

CHAPTER THREE

SPECIAL EDUCATION: LEGAL REQUIREMENTS

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I. INTRODUCTION

States are required to ensure a free and appropriate public education to children with disabilities. This chapter provides an overview of the federal and state laws that provide the basis for the rights of children with disabilities: The Individuals with Disabilities Education Act (IDEA),¹ N.Y. Education Law article 89,² Section 504 of the Rehabilitation Act of 1973 (Section 504),³ the Americans with Disabilities Act (ADA),⁴ and the New York State Human Rights Law.⁵ Chapters 4, 5, 6 and 7 of this publication discuss in greater detail the rights of individuals with disabilities to receive appropriate special education and vocational services. Chapter 4 addresses special education litigation including administrative hearings, appeals and mediation. Chapter 5 covers discipline of students attending public schools. Chapter 6 deals with assistive technology for students with disabilities and Chapter 7 covers vocational rehabilitation services..

II. HISTORY OF SPECIAL EDUCATION LEGISLATION

Federal and state special education legislation was founded on the basis of several constitutional concepts.⁶ Prior to passage of the IDEA, several cases challenged the failure to provide special education

1 20 U.S.C. §§ 1400–1482 (IDEA).

2 N.Y. Education Law §§ 4401–4410-b (Educ. Law).

3 29 U.S.C. §§ 794–794e (Section 504).

4 42 U.S.C. §§ 12101–12213 (ADA).

5 N.Y. Executive Law § 296.

6 Special education is premised on articles I and VI of the U.S. Constitution and in the Eleventh and Fourteenth amendments. For a general overview of the Eleventh Amendment, see *Hans v. Louisiana*, 134 U.S. 1 (1890); *Edelman v. Jordan*, 415 U.S. 651, 664 (1974), *rev'd on other grounds sub nom. Jordan v. Trainor*, 551 F.2d 152 (7th Cir. 1977), *aff'd sub nom. Quern v. Jordan*, 440 U.S. 332 (1979); *Will v. Mich. Dep't of State Police*, 491 U.S. 58 (1989); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984); *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 279–81 (1977); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). For an overview of the Fourteenth Amendment, see *Goss v. Lopez*, 419 U.S. 565 (1975) (students have a Fourteenth Amendment liberty and property interest in education); *Plyler v. Doe*, 457 U.S. 202 (1982) (violation of Fourteenth Amendment to deny a minimally adequate education to illegal aliens when the state provides a system of free public education); *San Antonio Indep. Sch. Dist. v. Rodriguez* 411 U.S. 1 (1973) (states must ensure only a minimally adequate education to all and do not violate the equal protection clause by allowing wealthy school districts to spend more money on education than poorer

services and the exclusion of special education students from schools on constitutional grounds. Two of these cases, *Pennsylvania Ass'n for Retarded Children (PARC) v. Pennsylvania*⁷ and *Mills v. Board of Education*⁸ were expressly referred to in the legislative histories of both Section 504 and the IDEA. In fact, the remedies in both *PARC* and *Mills* bear a striking resemblance to the basic provisions of the IDEA. Yet, an analysis reveals a tenuous at best constitutional claim to special education.⁹ Although *PARC*, *Mills*, and other courts examined the constitutional due process and equal protection claims to special education, it cannot be stated unequivocally that these cases *establish* an absolute constitutional right to special education; rather, they presume it.¹⁰

districts); *Tennessee v. Lane*, 541 U.S. 509 (2004) (Congress may declare acts violations of the Fourteenth Amendment provided the acts are congruent and proportional to the harm caused to the state).

7 343 F. Supp. 279 (E.D. Pa. 1972).

8 348 F. Supp. 886 (D.D.C. 1972).

9 *PARC*, 343 F. Supp. at 279 (the court did not reach the merits but determined that there was a *colorable* constitutional claim on due process and equal protection grounds for the exclusion of students with disabilities); *Mills* 348 F. Supp. at 866 (the court found a violation of equal protection and due process for failure to provide special education services, but constitutional analysis should not have been used because a District of Columbia statute would have authorized the same result).

10 *Harrison v. Michigan*, 350 F. Supp. 846 (E.D. Mich. 1972) (the court stated in *dicta* that it would be a violation of equal protection to provide education to only some students but granted motion to dismiss because a new state law was being implemented to address the claims); *Lebanks v. Spears*, 60 F.R.D. 135 (E.D. La. 1973) (the court approved a consent decree providing compensatory education for students over 21 who had been denied an education as school-age children); *Fialkowski v. Shapp*, 405 F. Supp. 946 (E.D. Pa. 1975) (the court denied motion to dismiss finding a colorable constitutional claim where the plaintiffs were challenging their complete exclusion from school); *Frederick L. v. Thomas*, 408 F. Supp. 832 (E.D. Pa. 1976) (the court denied a motion to dismiss for lack of constitutional basis, finding at least a colorable claim under the equal protection clause) *aff'd*, 557 F.2d 373 (3d Cir. 1977); *Cuyahoga County Ass'n for Retarded Children & Adults (ARC) v. Essex*, 411 F. Supp. 46 (N.D. Ohio 1976) (court found that a program for moderately retarded students, which was discretionary and based on an assessment of a student's ability to benefit from instruction, did not violate the equal protection clause); *Panitch v. Wisconsin*, 444 F. Supp. 320 (E.D. Wis. 1977) (court found that the state's failure to comply with state law, resulting in the exclusion of children with disabilities, violated the equal protection clause); *Lora v. Board of Education*, 456 F. Supp. 1211 (E.D.N.Y. 1978), (2d Cir. 1980) (Court held that isolation of *minority* students in special education settings with small hope of fruitful education or movement into less restrictive environments constitutes a denial of equal protection) *vacated*, 623 F.2d 248.

III. Individuals with Disabilities Education Act¹¹

The Education for All Handicapped Children Act of 1975¹² became effective in 1978. In 1990, the act's name was changed to the Individuals with Disabilities Education Act (IDEA).¹³ IDEA has been reauthorized several times,¹⁴ each resulting in significant changes to the legislation. The latest reauthorization, the Individuals with Disabilities Education Improvements Act (IDEIA) was enacted in December 2004.¹⁵

To receive its share of money under the IDEA, a school district must demonstrate to the state educational agency (in New York, the State Education Department, NYSED) that it will comply with the terms of the Act.¹⁶ Each state's educational agency is ultimately responsible for ensuring that the provisions of the IDEA are followed.¹⁷ The IDEA requires that *all* students with disabilities receive a free and appropriate public education, “regardless of the severity of their disabilities.”¹⁸ Thus, the statute incorporates into its requirements the educational concept of zero reject—the idea that no child is so severely disabled as to be excluded from an educational program.¹⁹

The federal regulations implementing the IDEA are set forth at 34 C.F.R. part 300. These regulations set the minimum level of service that a state must provide to students with disabilities. In most respects, the New York State regulations are comparable to those under the IDEA. However, New York

11 20 U.S.C. §§ 1400–1482.

12 Pub. L. No. 94-142, 89 Stat. 773.

13 20 U.S.C. § 1400(a).

14 Pub. L. 105-17, 111 Stat. 37 (IDEA '97).

15 Pub. L. 108-446, 118 Stat. 2647 (IDEA '04).

16 20 U.S.C. § 1413(a).

17 20 U.S.C. § 1412(a)(11).

18 20 U.S.C. § 1412(a)(3)(A).

19 20 U.S.C. § 1400(d). In the preamble to the IDEA, Congress found that at the time of the original enactment, “the educational needs of millions of children with disabilities were not being fully met” and that “children were excluded entirely from the public school system.” 20 U.S.C. § 1400(c)(2)(B). *See also Timothy W. v. Rochester School District*, 875

State, as permitted under federal law, has provided additional entitlements to special education that are not found in the federal law. The special education requirements for New York State are set forth in article 89 of the Education Law, sections 4401 through 4410-b, and in 8 NYCRR part 200 and part 201.

A. Free Appropriate Public Education

The IDEA requires all participating states to provide a free appropriate public education to children with disabilities.²⁰ The term *free appropriate public education* (FAPE) is statutorily defined to mean special education and related services provided at public expense and in conformity with an individualized education program (IEP)²¹ tailored to meet the unique needs of children with disabilities and “prepare them for further education, employment, and independent living.”²² All services provided under the IDEA are to be at no cost to the parents or student.²³ The right to a FAPE extends to all students in the state between the ages of 3 and 21²⁴ except for those individuals between the ages of 18 and 21 who are incarcerated in adult correctional facilities and who neither had been classified as having a disability nor had an IEP in the last educational placement prior to being incarcerated.²⁵

The right to a FAPE ends when a student graduates with a regular high school diploma.²⁶ This provision does not apply to students who have received a certificate of attendance or a certificate of

F.2d 954 (1st Cir.), *cert. denied*, 493 U.S. 983 (1989) (the court rejected a school district’s argument that the student was too severely disabled to benefit from instruction and thus was not entitled to services under the IDEA.)

20 20 U.S.C. § 1412(a)(1).

21 20 U.S.C. § 1401(9).

22 20 U.S.C. § 1400(d)(1)(A). In the preamble to the IDEA, Congress found that the education of students with disabilities can be made more effective by, “having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible, in order to—(i) meet developmental goals and, to the *maximum* extent possible, the challenging expectations that have been established for all children; and (ii) be prepared to lead productive and independent adult lives, to the *maximum* extent possible[.]” 20 U.S.C. § 1400(c)(5)(A)(emphasis added).

23 20 U.S.C. § 1401(9).

24 20 U.S.C. §§ 1401(9), 1412(a)(1)(A), (B), 1419(b)(2).

25 20 U.S.C. § 1412(a)(1)(B)(ii).

26 34 C.F.R. § 300.102(a)(3)(i).

graduation that is not a regular high school diploma.²⁷ Graduation with a high school diploma is considered a change of placement, requiring notice and the right to an impartial hearing.²⁸ It does not require a reevaluation of the student.²⁹

A FAPE is offered when the school district complies with the procedural requirements set forth in the IDEA, and when the IEP developed in compliance with those procedures is “reasonably calculated to enable the child to receive educational benefits.”³⁰ Although school districts are required to follow all of the procedures set forth in the IDEA, not all procedural violations render an IEP legally inadequate.³¹ Procedural violations will render an IEP invalid only if it impeded the child’s right to a free appropriate public education.³² Compliance with IDEA’s procedural protections is important, in large part, because of the effect it can have on the student’s and parent’s substantive rights. A procedural violation will only be found to constitute a denial of FAPE if it significantly impeded the parent’s right to participation in the decision-making process regarding the provision of FAPE or if it resulted in a loss of educational opportunity for the student.³³

Neither the IDEA nor the accompanying regulations set forth a standard for determining if a particular IEP or special education program is substantively appropriate. The United States Supreme Court directly confronted the question of what constitutes a free appropriate public education only once

27 34 C.F.R. § 300.102(a)(3)(ii), (iv).

28 34 C.F.R. § 300.102(a)(3)(iii).

29 34 C.F.R. § 300.305(e)(2).

30 *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 205 (1982); 20 U.S.C. § 1414(d). Many of the Act’s procedural protections geared toward giving parents rights of participation at every step of the administrative process. *See also Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007). *Rowley*, 458 at 206–207.

31 *A.C. v. Bd. of Educ.*, 553 F.3d 165, 172 (2d Cir. 2009) (quoting *Walczak v. Fla. Union Free Sch. Dist.*, 142 F.3d 119, 129 (2d Cir. 1998). In *A.C.*, the failure of the district to conduct a Functional Behavioral Analysis did not constitute a denial of FAPE. *A.C.*, 553 F.3d at 172).

32 *J.D. v. Pawlet Sch. Dist.*, 224 F.3d 60 (2d Cir. 2000); 20 U.S.C. § 1415(f)(3)(E)(i); 8 N.Y.C.R.R. § 200.5(j)(4)(ii).

33 *Davis v. Wappingers Cent. Sch. Dist.*, 772 F. Supp. 2d 500 (S.D.N.Y. 2010), *aff’d*, 431 F. App’x. 12 (2d Cir. 2011) (citing *Werner v. Clarkstown Cent. Sch. Dist.*, 363 F. Supp. 2d 656, 659 (S.D.N.Y. 2005); 20 U.S.C. § 1415(f)(3)(E)(i); 8 N.Y.C.R.R. § 200.5(j)(4)(ii).

since the enactment of the IDEA. To this day, the case most frequently cited to determine what constitutes a free and appropriate public education *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, evolved from a dispute with the Hendrick Hudson Central School District, a downstate New York school district.³⁴ Amy Rowley, a deaf student with minimal residual hearing and excellent lip reading skills whose academic progress exceeded that of the average student in her class.³⁵ Amy’s parents requested that the school district provide a qualified sign language interpreter in all of Amy’s academic classes; the district refused. After exhausting their administrative remedies, Amy’s parents brought suit in district court. Reversing the decision of the hearing officer and New York Commissioner of Education, the district court found that Amy had been denied a free appropriate public education.³⁶ The district court defined a free appropriate public education as “an opportunity [for Amy] to achieve her full potential commensurate with the opportunity provided to other children and the Second Circuit Court of Appeals affirmed.”³⁷

The specific question posed to the U.S. Supreme Court was whether IDEA’s promise of a FAPE required school districts to afford students with disabilities an education that maximized their opportunities. The Court concluded that the law required schools to “open the door of public education to handicapped children on appropriate terms [rather] than to guarantee any particular level of education once inside.”³⁸ Accordingly, students with disabilities are entitled to a “basic floor of opportunity”³⁹ that requires school districts to provide access to special education and related services individually designed to provide them with educational benefit. The FAPE requirement is satisfied when the state provides “personalized instruction with sufficient support services to permit the child to benefit educationally from

34 458 U.S. 176 (1982).

35 *Id.*

36 *Id.*

37 *Id.* at 185–186.

38 *Id.* at 192.

39 *Id.* at 200.

that instruction.”⁴⁰ However, the educational benefit provided to the student must be more than “trivial”.⁴¹ Most of the courts addressing this issue have found that the IDEA requires that the educational benefit be “meaningful”.⁴²

Since the Supreme Court issued its decision, little has changed. Without any departure from the Court’s basic principles, the United States Court of Appeals for the Second Circuit recognizes today that a “school district fulfills its substantive obligations under the IDEA if it provides an IEP that is likely to produce progress, not regression, and if the IEP affords the student with an opportunity greater than mere trivial advancement.”⁴³ Equally important, is its “strong preference for children with disabilities to be educated, to the maximum extent appropriate, together with their non-disabled peers.”⁴⁴ What constitutes an appropriate education for students with disabilities remains a central question presented in most IDEA litigation today.

Since the IDEA was first enacted, Congress has not expounded upon the meaning of an “appropriate” education. However, the Act’s stated goals for the education of children with disabilities have become loftier and more specific since 1975.⁴⁵ The IDEA currently directs that students with

40 *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 203 (1982). The Court found that if the child is being educated in a regular education classroom, the personalized instruction “should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” *Id.* at 204.

41 *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 181-182 (3d Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989); *Walczak v. Fla. Union Free Sch. Dist.*, 142 F.3d 119, 129 (2d Cir. 1998).

42 *See e.g.*, *Polk*, 853 F.2d at 184; *P. v. Newington Bd. of Educ.*, 546 F.3d 111 (2d Cir. 2008) (the IEP must provide for more than trivial advancement); *Weixel v. Bd. of Educ.*, 287 F.3d 138 (2d Cir. 2002) (IEP must be likely to produce progress, not regression); *D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 556 (3d Cir. 2010) (state must confer “significant learning” and “meaningful benefit”); *Deal v. Hamilton Cnty. Bd. of Educ.*, 392 F.3d 840, 864 (6th Cir. 2004) (at the very least, Congress intended that states provide meaningful educational benefit towards the goal of self-sufficiency); *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997) (IDEA requires “meaningful benefit” likely to produce progress and not mere trivial advancement).

43 *Cerra v Pawling Cent. Sch. Dist.*, 427 F.3d 186, 195 (2d Cir. 2005).

44 *Walczak*, 142 F.3d at 122.

45 The original purposes set forth in the Education for Handicapped Children Act included the protection of the child’s and parents’ rights; the availability of a FAPE; and methods to ensure that the education provided was effective. 34 C.F.R. § 300.1. When the IDEA was re-authorized and amended in 1997, the Act added goals of “high expectations” for children

disabilities must be prepared “for *further education*, employment and independent living.”⁴⁶ Students covered by the Act are expected to meet, to the “maximum extent possible,” “the challenging expectations that have been established for all children.”⁴⁷ This change reflects incorporation into the IDEA of some of the requirements of the No Child Left Behind Act of 2001.⁴⁸ For example, both Acts require that schools be held accountable for all students’ performance and require “highly qualified” special education teachers. Where the 1997 IDEA required that an IEP include a statement of the child’s present levels of “educational performance” and a statement of “measurable annual goals”, the 2004 IDEA requires that the IEP include a statement of the child’s “present levels of *academic* achievement and functional performance” and that the measurable annual goals include “*academic* and functional goals”.⁴⁹ This more specific, academic-based emphasis in the IDEA underscores the importance that the educational benefit a student receives must be “meaningful.”

Methodology or delivery of instruction has also been a widely debated issue as it relates to FAPE. Determining the appropriate method of instruction to educate a student with a disability is in the first instance the responsibility of the school district.⁵⁰ Nothing requires an IEP to include specific instructional methodology; however, “the [NYSED’s] longstanding position on including instructional methodologies in a child’s IEP is that it is an IEP Team’s [CSE] decision... if an IEP team determines that specific

with disabilities and the need to ensure access to the general curriculum to the “maximum extent possible.” Pub. L. No. 105-17, 111 Stat. 37 (20 U.S.C. 1400(c)(5)). One of the purposes of the 1997 IDEA was to prepare students with disabilities for “employment and independent living.” Pub. L. No. 105-17, 111 Stat. 37 (20 U.S.C. 1400(d)(1)(A)). At the time, this change from the original purpose of the act was considered a “significant shift” to an “outcome oriented approach” for students with disabilities as opposed to merely ensuring access to education. 62 Fed. Reg. 55029.

46 20 U.S.C. §1400(d)(1)(A) (emphasis added).

47 20 U.S.C. §1400(c)(5)(A).

48 The No Child Left Behind Act of 2001 (NCLB) (Pub. L. No. 107-110, 115 Stat. 1425 (2002)) was an amendment of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 6301 et seq. The IDEA requires higher levels of teacher qualification as well as programs and services based on peer-reviewed research. 20 U.S.C. §§ 1401(10); 1414(d)(1)(A)(IV).

49 20 U.S.C. §1414(d)(1)(A)(i)(I)(II). Given that the IDEA applies to all student with disabilities, regardless of the severity of the disability, (see footnote 4, *supra*), the requirement that every student’s IEP address academic goals is an indication of the quality of education that must be provided.

50 *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207 (1982).

instructional methods are necessary for the child to receive FAPE, the instructional methods may be addressed in the IEP.”⁵¹

B.. Least Restrictive Environment

The IDEA requires that students with disabilities be placed in the least restrictive environment (LRE) appropriate to their needs, which means that:

[t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and [that] special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability . . . is such that education in regular classes *with the use of supplementary aids and services* cannot be achieved satisfactorily.⁵²

Students with disabilities cannot be removed from “age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.”⁵³ “Public agencies, therefore, must not make placement decisions based on a public agency’s needs or available resources, including budgetary considerations and the ability of the public agency to hire and recruit qualified staff.”⁵⁴ Furthermore, “[P]lacement decisions must be individually determined on the basis of each child’s abilities and needs and each child’s IEP, and not solely on factors such as category of disability, severity of disability, availability of special education and related services, configuration of the service delivery

51 71 Fed. Reg. 46665.

52 20 U.S.C. § 1412(a)(5)(A) (emphasis added).

53 34 C.F.R. § 300.116(e).

54 71 Fed. Reg. 46587.

system, availability of space, or administrative convenience.”⁵⁵ Therefore, students must be “educated in the school [they] would attend if nondisabled,” unless the IEP “requires some other arrangement.”⁵⁶

To ensure that students with disabilities are educated in the least restrictive environment, “a continuum of alternative placements” must be made available to meet the needs of such students, including “instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions.”⁵⁷ Also, schools must ensure that supplementary services are available “to be provided in conjunction with regular class placement.”⁵⁸ The statute defines supplementary aids and services⁵⁹ and provides that such “aids, services, and other supports” are to be made available in regular education classes and “other education-related settings to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate.”⁶⁰ New York has authorized the use of consultant teachers, who may provide services either to a regular education teacher or to a student in a regular education classroom, to support the increased services needed by students with disabilities in the regular classroom.⁶¹

In *P. v. Newington Board of Education*, the Second Circuit adopted the two-pronged approach used by several other Circuit Courts, perhaps most notably the Third Circuit in *Oberti v. Board of Educ.*,⁶² when determining whether a student proposed placement meets the least restrictive environment requirement.⁶³ To determine whether a proposed placement was in the least restrictive environment appropriate to meet the student’s needs the Court analyzed (1) whether education in the general

55 71 Fed. Reg. 46588.

56 34 C.F.R. § 300.116(c).

57 34 C.F.R. § 300.115.

58 *Id.*

59 20 U.S.C. § 1401(33).

60 *Id.*

61 8 N.Y.C.R.R. §§ 200.1(m), 200.6(d).

62 *Oberti v. Bd. of Educ.*, 995 F.2d 1204 (Cir. 1993).

63 *P. v. Newington Bd. of Educ.*, 546 F.3d 111.

classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given student, and, if not, (2) whether the school has mainstreamed the student to the maximum extent appropriate.⁶⁴

In considering the first question, the inquiry requires consideration of

- (1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom;
- (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and
- (3) the possible negative effects of the inclusion of the child on the education of the other students in the class.⁶⁵

Recognizing the tensions between offering an education suited to a student's particular needs and educating a student with non-disabled peers, the Court opined that the inquiry must be individualized and take into account the nature of the student's condition and the school's particular efforts to accommodate it.⁶⁶ If, after considering these, removal of the child from regular education is deemed appropriate, then the analysis turns to the second prong of the test: whether the child is being included with nondisabled children to the maximum extent appropriate.⁶⁷

When a child is placed outside of the general education setting, a district is required to have available and to consider a continuum of alternative placements.⁶⁸ The continuum must include instruction in regular classes, special classes, special school, home instruction and instruction in hospitals and institutions.⁶⁹ A state's funding mechanism must not favor placements that result in a denial of the LRE requirement.⁷⁰

64 *Id.*

65 *P. v. Newington Bd. of Educ.*, 546 F.3d 111, 120 (2d Cir. 2008).

66 *Id.*

67 *Id.*

68 34 C.F.R. § 300.115(a).

69 34 C.F.R. § 300.115(b)(1); 8 N.Y.C.R.R. § 200.6.

C. Obtaining Special Education Services in New York State: New York Education Law

1. Referral Process

The process of obtaining special education services for a child not previously identified in need of special education services begins with a referral.⁷¹ IDEA specifically enumerates the individuals who are permitted to make a referral for special education services as opposed to a *request* for a referral to special education. For a student attending public school only a parent⁷² or a person designated by a school district is permitted to make an initial referral for special education.⁷³ The referral must be made in writing to the administrator in charge of the Committee on Special Education (CSE),⁷⁴ “or to the building administrator [the principal] of the school where the student attends.”⁷⁵

A *request* for a referral may be made in writing by (1) a professional staff member of the school district (e.g., a teacher); (2) a licensed physician; (3) a judicial officer; (4) a professional staff member of a public agency with responsibility for the welfare, health or education of a child; or (5) a student who is

70 34 C.F.R. § 300.114(b)(1)(i).

71 8 N.Y.C.R.R. § 200.4(a)

72 The term “parent” includes a biological or adoptive parent, a foster parent (unless prohibited by State law), a legally appointed guardian, a surrogate parent appointed under the provisions of IDEA and a relative acting in the place of a parent with whom the child lives or who is legally responsible for the child’s welfare. 20 U.S.C. § 1401(23); 34 C.F.R. § 300.30(a)(1); 8 N.Y.C.R.R. § 200.1(ii). The federal regulations further clarify that “[i]f a judicial decree or order identifies a specific person . . . to act as the ‘parent’ of a child or to make educational decisions on behalf of a child, then such person or persons shall be determined to be the ‘parent’ for purposes of this section.” 34 C.F.R. § 300.30(b)(2). However, if the child is a ward of the State, the State cannot be considered a parent for the purposes of the IDEA. In the case of parents who are separated or divorced, if there is a judicial decree or order identifying a specific person or persons to make educational decisions on behalf of a child, then only that person will be considered the “parent” for the purposes of the IDEA. *See* 20 U.S.C. § 1401(23)(B); 34 C.F.R. §§ 300.30(a)(3), (b)(2); 8 N.Y.C.R.R. §§ 200.1(ii)(1), (4).

73 8 N.Y.C.R.R. § 200.4(a)(1).

74 *See infra* III.E.3.d. for Committee on Special Education.

75 8 N.Y.C.R.R. 200.4(a)

18 years of age or older, or an emancipated minor.⁷⁶ A written *request* for a referral, if submitted by someone other than the student or a judicial officer (e.g., a teacher), must include the reason for the referral, any test results, records or report upon which the referral is based, a description in writing of any intervention services, programs or instructional methodologies used to remediate the students' performance prior to the referral; and a description of the parental contact or involvement prior to the referral.⁷⁷

2. Evaluation

Upon receipt of a referral, a comprehensive evaluation is required before a student may be identified as a student in need of special education supports and services. The IDEA requires that the evaluation process not be socially or culturally discriminatory, and that the student be evaluated “in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible” to do so.⁷⁸ Further, no single measure or assessment may be used as “the sole criterion for determining” an appropriate educational program for a child.⁷⁹ The purpose of the evaluation is to assess the relative contribution of cognitive, behavioral, physical and developmental factors and to obtain information about the student’s prospects for participating in the general curriculum.⁸⁰

76 8 N.Y.C.R.R. 200.4(a)(2)(i)(1)(a)-(e).

77 8 N.Y.C.R.R. 200.4(a)(2)(iii)(a)-(c).

78 20 U.S.C. § 1414(b)(3)(A). *See also* 8 N.Y.C.R.R. § 200.4(b)(6)(1) (the evaluation must be administered in the student’s dominant language or mode of communication, unless it is clearly infeasible to do so; must be conducted by a multidisciplinary team or group of people; and must be designed to assess specific areas of educational need, not merely to provide a general intelligence quotient). Two courts have reached conflicting results on the question of whether standardized IQ (intelligence) tests may be used to evaluate students, based on different findings as to whether such tests are racially discriminatory. *See Larry P. v. Riles*, 495 F. Supp. 926 (N.D. Cal. 1979), *aff’d in part and rev’d in part*, 793 F.2d 969 (9th Cir. 1984); *Parents in Action on Special Educ. (PASE) v. Hannon*, 506 F. Supp. 831 (N.D. Ill. 1980).

79 20 U.S.C. § 1414(b)(2)(B).

80 20 U.S.C. § 1414(b)(2). The federal regulations set forth specific requirements for evaluating students to determine whether they are students with disabilities under IDEA. *See* 34 C.F.R. §§ 300.301–300.311.

New York’s regulations mandate specific assessments be completed for the comprehensive evaluation.⁸¹ A district must complete a physical examination, an individual psychological evaluation (unless deemed unnecessary by a school psychologist), a social history, an observation of the student in the student’s learning environment, and such other evaluations needed to ascertain the factors contributing to the suspected disability.⁸² Whenever the school psychologist determines that an evaluation is not necessary, based on an assessment conducted by the psychologist, “the psychologist shall prepare a written report of [the] assessment, including a statement” of why an evaluation is not warranted.⁸³

The results of the evaluation are to be provided to the parents in their “native language or mode of communication.”⁸⁴ An initial evaluation must be completed within 60 calendar days of receiving a parent’s consent to the evaluation,⁸⁵ and procedures must be in place to expeditiously complete an evaluation for a student who moves into a school district.⁸⁶ Further, the CSE cannot delegate the evaluation to personnel at a proposed site after placement has been effected.⁸⁷

When a *request* for referral is made by a person other than the parent, parental notification is required *prior* to the comprehensive evaluation and *prior* to any subsequent reevaluation.⁸⁸ The notice has

81 The student must be “assessed in all areas related to the suspected disability, including, where appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, vocational skills, communicative status and motor abilities.” 8 N.Y.C.R.R. § 200.4(b)(6)(i)(d)(vii).

82 8 N.Y.C.R.R. § 200.4(b)(1). For students with impaired sensory, manual or speaking skills, the assessments must be selected and administered to ensure that each assessment accurately measures the pupil’s ability rather than the pupil’s impaired skills, unless that is what the assessment is designed to measure. 8 N.Y.C.R.R. § 200.4(b)(6)(iv).

83 8 N.Y.C.R.R. § 200.4(b)(2).

84 8 N.Y.C.R.R. § 200.4(b)(6)(i)(d)(xii).

85 8 N.Y.C.R.R. § 200.4(b)(7).

86 8 N.Y.C.R.R. § 200.4(b)(6)(i)(d)(xvii).

87 27 Educ. Dep’t Rep. 456 (1988); 22 Educ. Dep’t Rep. 1 (1982).

88 8 N.Y.C.R.R. § 200.5(a)(5)(i). This requirement does not apply to standardized testing, including diagnostic screening, that is given to all or most students. 8 N.Y.C.R.R. § 200.1(aa).

specific requirements.⁸⁹ Federal and New York State regulations provide that a parent’s consent is voluntary and may be revoked at any time.⁹⁰ However, if parents revoke consent, it is not retroactive, “i.e., it does not negate an action that has occurred after the consent was given and before the consent was revoked.”⁹¹ For a student previously identified, the district must seek parental consent prior to any reevaluation.⁹² The school may proceed with the reevaluation without the parents’ consent if it takes reasonable steps to obtain consent and the parents do not respond.⁹³

3. Parental Refusal to Consent

If a parent refuses permission to proceed with the proposed testing, the district must inform the parent of the right to request an informal conference to determine whether there is sufficient reason to test the student.⁹⁴ At the conference, the parent has the right to be represented by counsel or any other adviser, and may ask questions regarding the proposed evaluation.⁹⁵ If, at this meeting, the parent and the person initiating the referral agree in writing that the testing is not warranted, the referral may be withdrawn and the student will not be tested.⁹⁶ This written agreement must include any alternative methods suggested to address the learning problem and must provide an opportunity for a follow-up conference within an agreed-upon time “to review the student’s progress.”⁹⁷

89 The notice must include: (1) a description of the proposed evaluation or review and an indication of how such information will be used; (2) a statement of the parent’s right to submit information, which must be considered by the CSE, (3) a request for parental consent to the evaluation; and (4) a detailed description of the parent’s rights prepared by the Commissioner of Education. 8 N.Y.C.R.R. §§ 200.5(a), (f).

90 34 C.F.R. § 300.300(a)(1)(i); 8 N.Y.C.R.R. § 200.1(l)(3).

91 8 N.Y.C.R.R. § 200.1(l)(3); 34 C.F.R. § 300.300(c)(1)(i).

92 20 U.S.C. § 1414(c)(3); 8 N.Y.C.R.R. § 200.5(b)(1)(i).

93 34 C.F.R. § 300.300(c)(2); 8 N.Y.C.R.R. § 200.5(b)(1)(i)(b).

94 8 N.Y.C.R.R. § 200.5(b)(1)(i)(c).

95 *Id.*

96 *Id.*

97 8 N.Y.C.R.R. § 200.4(a)(7).

If a parent neither requests nor attends the informal conference, or if the referral is not withdrawn and the parent continues to withhold consent to do the evaluation for “30 days after the date of receipt of a referral,” the district *may* commence a formal hearing.⁹⁸ If the hearing officer determines that an evaluation is warranted, he or she may order the CSE to proceed with an evaluation even if the parent continues to withhold consent. In determining whether an evaluation is warranted, the Commissioner of the New York State Education Department (Commissioner) has held that chronic behavior problems without academic deficits do not justify evaluation over parental objections.⁹⁹ The district has the burden of either demonstrating “attempts to remediate the pupil’s performance prior to referral” or establishing an adequate basis for concluding that appropriate gains cannot be made in a regular classroom setting.¹⁰⁰

4. Committee on Special Education

The IDEA requires that decisions about special education services for a student, such as eligibility, be made by a group of persons, including the parent, knowledgeable about the student and about special education.¹⁰¹ In New York, the CSE fulfills this function for school-age students.¹⁰² Each school district must establish “committees and/or subcommittees¹⁰³ on special education as necessary to

98 8 N.Y.C.R.R. § 200.5(b)(1)(i)(c) (emphasis added). A school district does not have to pursue a due process hearing for consent to evaluate.

99 24 Educ. Dep’t Rep. 495 (1985).

100 30 Educ. Dep’t Rep. 140 (1990).

101 *See* 34 C.F.R. §§ 300.321, 300.322.

102 *See infra* III.F.2., “Preschool Special Education,” for children ages 3 to 5 and III.F.1. “Early Intervention Services” for children under the age of three.

103 In New York City, there must be a CSE for each of the community school districts. Additionally, in cities with 125,000 or more inhabitants (the so-called big five: New York, Buffalo, Rochester, Syracuse and Yonkers), the school districts must establish subcommittees on special education (sub-CSEs), although all other districts in the state may appoint sub-CSEs as well. These sub-CSEs shall include, but shall not be limited to, the child’s teacher, a teacher or administrator of special education and, where a new psychological evaluation is being reviewed or a change to a more restrictive program considered, a school psychologist. Sub-CSEs have jurisdiction over all referrals, except where a student is being considered for initial placement in a special education class, initial placement in a special class outside the student’s school of attendance, or placement in a school outside the student’s district or in a school primarily serving students with disabilities. If the parent objects in writing to a recommendation by a sub-CSE, the recommendation must be referred to the full CSE. Educ. Law § 4402(1)(b)(1)(d).

ensure timely evaluation and placement of students.”¹⁰⁴ The CSE is responsible for evaluating and recommending the classification and placement of children with disabilities residing within the district. A school district may not delegate its decision-making power to an outside party, such as a board of cooperative educational services (BOCES).¹⁰⁵

[Committees on Special Education] shall be composed of at least the following members:

- (i) the parent;¹⁰⁶
- (ii) one regular education teacher;¹⁰⁷
- (iii) one special education teacher;
- (iv) a school psychologist;
- (v) a school district representative knowledgeable of resources of the school district;
- (vi) an individual who can interpret the instructional implications of evaluation results;
- (vii) a school physician;¹⁰⁸

104 Educ. Law § 4402(1)(b)(1).

105 28 Educ. Dep’t Rep. 376 (1989).

106 See *supra* note 19 (defining parent).

107 A regular education teacher is required if the student is or may be participating in the regular education environment. The purpose of the regular teacher’s involvement in the IEP process is, at least in part, to help determine behavioral strategies, “supplement[al] aids and services, program modifications, and support for school personnel.” 20 U.S.C. § 1414(d)(3)(C). For students with more than one regular education teacher, the school can determine which teacher attends, taking into account the best interests of the student. The teacher should be one “who is, or may be, responsible for implementing a portion of the IEP, so that the teacher can participate in discussions about how *best* to teach the child.” 34 C.F.R. pt. 300 App’x A. The school is strongly encouraged to obtain input from any teachers who cannot attend the meeting. 34 C.F.R. pt. 300.

108 The school physician is required to attend CSE meetings only when requested to do so by the parent, the child or a CSE member. Parents must be advised of their right to request the physician’s attendance; their request for the physician’s attendance must be submitted, in writing, at least 72 hours before the CSE meeting. Educ. Law § 4402(1)(b)(1)(b).

- (viii) an additional parent member;¹⁰⁹
- (ix) other persons having knowledge or special expertise as the school district or the parents shall designate; and
- (x) if appropriate, the student.¹¹⁰

The child's parent(s) is a necessary member of the CSE and must be invited to attend, along with anyone else the parent wishes to bring to the meeting.¹¹¹ The parents of a child with a disability are expected to be *equal participants* along with school personnel, in developing, reviewing and revising the IEP for their child.¹¹² If the CSE is considering placing the child in a school operated by an agency (such as BOCES or a private school) or in a school district that is different from the one the student would attend if not disabled, the school district must ensure that a representative from that agency or school district participates in the CSE meeting.¹¹³ In addition to the required members, districts may designate social workers, nurses, teachers, psychologists and others as CSE members.

a. Excusal of Members of the CSE

The IDEA creates a process for a school district and a parent to consent to the excusal of necessary members of the CSE for the meeting. A CSE member [e.g. teacher] is not required to attend the meeting, in whole or in part, if the parent and the school district agree *in writing*, that the attendance of the member is not necessary.¹¹⁴ There are two types of excusals (1) excusals for members when the area of curriculum or related services is not being modified or discussed and (2) excusals for members where the

109 The parent member is required to attend CSE meetings only when requested to do so by the parent, the child or a CSE member. Parents must be advised of their right to request the parent members attendance; their request for the parent member must be submitted, in writing, at least 72 hours before the CSE meeting. Educ. Law § 4402(1)(b)(1)(b).

110 Educ. Law § 4402(1)(b)(1)(a).

111 *Id.*

112 The parent is a member of the CSE and in developing the IEP the school district must consider the concerns of the parents for enhancing their child's education. 20 U.S.C. § 1414(d)(3)(A).

113 8 N.Y.C.R.R. § 200.4(d)(4)(i)(a).

114 8 N.Y.C.R.R. § 200.3(f).

area of curriculum or related services will be modified or discussed.¹¹⁵ If the member’s area of curriculum or related service will be discussed or modified, the member must submit to the parent, *prior to the meeting*, written input into the development of the IEP pertaining to the member’s area of curriculum or related services.¹¹⁶ All excusals must be agreed to by both the parent and the school district and must be done in writing. The notice to excuse a member of the CSE must be provided no less than five days before the meeting in order to afford the parent a reasonable time to review and consider the request.¹¹⁷ However, the parent retains the right to waive this notice requirement and excuse necessary members of the CSE where the member is unable to attend because of an emergency or unavoidable scheduling conflict *and* the school district provides the parent written input within a reasonable time prior to the excusal.¹¹⁸

b. The CSE Meeting—Developing the IEP

Upon receiving the initial referral, the district must complete all the necessary evaluations, schedule a CSE meeting to determine eligibility for services and, if eligible, develop an IEP. A school district has 60 school days¹¹⁹ from the date that the parent signed the consent to evaluate the student to implement the placement on the IEP.¹²⁰

c. Notice of CSE Meeting

When the CSE meets to discuss the student, either as a result of an initial referral, a referral to review a child’s program or an annual review, the parent must receive a notice of the date, time and location of the committee meeting. To ensure parental participation, the federal regulations require that notice of the meeting be sent early enough so the parents have an opportunity to attend and that the

115 8 N.Y.C.R.R. § 200.3(f)(1)-(2).

116 8 N.Y.C.R.R. § 200.3(f)(2).

117 8 N.Y.C.R.R. § 200.3(f)(3).

118 8 N.Y.C.R.R. § 200.3(f)(3).

119 *Days* in this context is defined as “school days” from September through June; during “July and August, *school day* means every day except Saturday, Sunday and legal holidays.” 8 N.Y.C.R.R. § 200.1(n) (emphasis added).

120 8 N.Y.C.R.R. § 200.4(d).

meeting be “at a *mutually* agreed on time and place.”¹²¹ New York State regulations require that the parent receives notice at least five days prior to the meeting.¹²² The notice must list the people expected to attend the meeting, invite the parent “to participate as a member of the [CSE]” and inform the parent of his or her right to be accompanied by individuals with knowledge or special expertise about the child.¹²³ The CSE may conduct a meeting without the parents if it is unable to convince them to attend. The CSE must however, document its efforts to arrange a mutually agreed on time and place for the meeting.¹²⁴

D. Eligibility for Special Education

At the CSE meeting, the committee must first determine whether the student has a disability which necessitates special education services.¹²⁵ If the CSE determines that the student is eligible for special education services, it must identify the student’s disability classification from the following: autism, deafness, deaf-blindness, emotional disturbance,¹²⁶ hearing impairment, intellectual disability, learning disability, multiple disabilities, orthopedic impairment, other health impairment, speech or language impairment, traumatic brain injury or visual impairment including blindness. To be eligible under the IDEA, a student must have a disability *and* require a special education service. A CSE may not

121 34 C.F.R. § 300.322(a) (emphasis added); 8 N.Y.C.R.R. § 200.5(d)(1) (emphasis added).

122 8 N.Y.C.R.R. § 200.5(c)(1), (c)(2)(i).

123 8 N.Y.C.R.R. §§ 200.5(c)(2)(i)–(iii).

124 34 C.F.R. § 300.322(d); 8 N.Y.C.R.R. § 200.5(d)(3).

125 8 N.Y.C.R.R. § 200.4(c).

126 “The term does not apply to students who are socially maladjusted, unless it is determined that they have an emotional disturbance.” 8 N.Y.C.R.R. § 200.1(zz)(4). The distinction between “emotionally disturbed” and “socially maladjusted” is generally quite subtle. In one case, the commissioner found that a student who was “unable to control his attention-getting behavior . . . [who] intimidated younger students because of his size and manner . . . has been sent to the principal’s office by his classroom teachers for using inappropriate language . . . has been observed throwing food in the lunchroom, refusing to follow directions of teachers, punching other students, refusing to work and disturbing classroom activities of other students” was properly labeled emotionally disturbed. 21 Educ. Dep’t Rep. 620, 622 (1982). However, in another case, the commissioner found that “a childish rejection of school and a willful refusal to learn, hostility to school authorities and ‘wise’ answers to test questions” did not constitute an emotional disability where the student’s performance was generally age-appropriate, notwithstanding his excessive absences. 22 Educ. Dep’t Rep. 87 (1982); *see also* 27 Educ. Dep’t Rep. 439 (1988); 28 Educ. Dep’t Rep. 95 (1988); 23 Educ. Dep’t Rep. 114 (1983).

determine that a student needs special education services if the determinant factor is either a lack of appropriate instruction in reading;¹²⁷ lack of appropriate instruction in math; or limited English proficiency.¹²⁸ Under New York law, a student who requires only a related service still meets the IDEA's eligibility criteria and may, therefore, receive that service in conjunction with a regular education program.¹²⁹

If the child is not eligible for special education services, the CSE must indicate the reasons and send a copy of the appropriate evaluation material to the principal.¹³⁰ The parent must be given notice of this determination.¹³¹ When a pupil is determined ineligible for special education, the principal shall determine whether, and which, educationally related support services should be provided to the pupil pursuant to 8 N.Y.C.R.R. § 100.2(v).¹³²

1. IEP Requirements

If the pupil is entitled to receive special education, the CSE must develop the child's IEP. An IEP is a written statement for a student with a disability that is developed, reviewed, and revised by a CSE, Subcommittee CSE or Committee on Preschool Special Education (CPSE).¹³³ According to NYS Education Department, the IEP must be developed in a particular sequence:¹³⁴

- (1) Consider evaluation information;
- (2) Determine eligibility for special education services including classification;

127 Appropriate instruction in reading includes explicit and systematic instruction in phonemic awareness, phonics, vocabulary development, reading fluency (including oral reading skills) and reading comprehension strategies.

128 8 N.Y.C.R.R. § 200.4(c)(2).

129 Educ. Law § 4401(2)(k); 8 N.Y.C.R.R. § 200.6(e)(5).

130 8 N.Y.C.R.R. § 200.4(d)(1)(i).

131 8 N.Y.C.R.R. § 200.4(d)(1)(ii).

132 8 N.Y.C.R.R. § 200.4(d)(1)(i).

133 See CPSE.

134 The University of the State of New York, The State Education Department, *Guide to Quality Individualized Education Program (IEP) Development and Implementation* 2010 ed.).

- (3) Identify present levels of performance and needs in four areas;¹³⁵
- (4) Identify measurable postsecondary goals and transition needs;¹³⁶
- (5) Set measurable annual goals;¹³⁷
- (6) Report progress to parents;¹³⁸
- (7) Special education program and services;¹³⁹
- (8) Eligibility for twelve-month (July/August) services;¹⁴⁰
- (9) Testing accommodations;¹⁴¹
- (10) Transition activities;¹⁴²
- (11) Participation in state and district-wide assessments;¹⁴³

135 The CSE must discuss the student’s present performance, strengths and needs in four key areas: academic achievement, functional performance, and learning characteristics; social development; physical development; and management needs. In assessing these four areas the CSE must consider the students need for assistive technology or service (including an intervention, accommodation, or other program modification) to allow the student to receive FAPE. *Guide to Quality Individualized Education Program (IEP) Development and Implementation supra* note 160, at 10. *See also* III.F.3., “Placement Based on Similarity of Needs.”

136 *See infra* III.G.6., “Transition Services.”

137 The CSE must set yearly measurable annual goals that relate to the needs identified in the present levels of performance section of the IEP. Each annual goal must indicate the evaluative criteria (the measure used to determine if the goal has been achieved), evaluation procedure (how progress will be measured), and the schedule (when progress will be measured) to be used to assess progress towards the annual goal. For students taking the New York State Alternative Assessment and for preschool students (see *infra* preschool special education) the IEP must also include short-term instructional objectives.

138 The CSE must determine when progress reports will be given to the student’s parents.

139 The CSE must decide the special education program and services, including related services, accommodations, modifications and other supports the student needs to achieve his/her annual goals, progress in the general education curriculum, and participate in extracurricular and other nonacademic activities with other students with/without disabilities.

140 *See infra* Part III.G.1., “Twelve-Month Educational Services.”

141 For guidance on Testing Accommodations, see *Test Access & Accommodations for Students with Disabilities –Policy and Tools to Guide Decision-Making and Implementation* found at <http://www.p12.nysed.gov/specialed/publications/policy/testaccess/policyguide.htm>

142 *See infra* III.G.6., “Transition Services.”

143 The CSE must recommend whether a student will participate in state and district-wide assessments or alternatively be assessed by alternative state and district-wide assessments.

- (12) Participation in general education;¹⁴⁴
- (13) Special transportation needs;¹⁴⁵
- (14) Determine placement;¹⁴⁶
- (15) Implement the IEP;¹⁴⁷
- (16) Review and if appropriate revise IEP;¹⁴⁸
- (17) Conduct Reevaluation.¹⁴⁹

Starting in 2012, all public schools must use a model IEP form created by the New York State Department of Education.¹⁵⁰ A copy of the IEP must be accessible to each regular or special education teacher, as well as any others who are responsible for implementing the IEP.¹⁵¹ Additionally, everyone providing services must be informed of their specific responsibilities as well as the specific accommodations, modifications and supports to be provided to the student.¹⁵² The parents must also be given a copy of the IEP at no charge.¹⁵³

144 See *infra* III.E.2., “Least Restrictive Environment.”

145 The CSE must identify any special transportation needs, including door-to-door transportation, of the student. See U.S. Department of Education Office of Special Education and Rehabilitative Services (OSERS) question and answer document on the subject of Transportation found at <http://idea.ed.gov/explore/view/pl/%2Croot%2Cdynamic%2CQaCorner%2C12%2C>

146 See *infra* III.F., “Placement Requirements.”

147 The IEP of a school-age student must be implemented within 60 school days of: (1) the parent’s consent to evaluate the student not yet classified, or (2) the referral to review a student already classified with an IEP. For students recommended for placement in in-state or out-of-state private schools the program must be implemented within 30 school days of the recommendation for placement by the CSE.

148 See *infra* III.E.3.e.3. and 4.

149 8 N.Y.C.R.R. § 200.4(d)(2)(i)–(xii). See also *infra* III.a.3., “Reevaluation.”

150 www.p12.nysed.gov/specialed/formsnotices/IEP/memo-Jan10.htm.

151 34 C.F.R. § 300.323(d)(1).

152 34 C.F.R. § 300.323(d)(2).

153 34 C.F.R. § 300.322(f).

2. Annual Review

Federal and state regulations require that the IEP be reviewed at least annually.¹⁵⁴ The parents or the school staff may also refer the student back to the CSE for a program review at any other time during the year.¹⁵⁵ When this occurs, the CSE must meet to review the IEP and implement any changes to the student's program within 60 school days.¹⁵⁶

3. Reevaluation

Once a student has been classified, the district is required to reevaluate the child every three years, or more frequently “[i]f the . . . needs . . . of the child warrant a reevaluation,” or “[i]f the child's *parent* or teacher *requests*” it.¹⁵⁷ The student must also be reevaluated before being declassified.¹⁵⁸

New York requires that a student with a disability be reevaluated *at least* every three years by a multidisciplinary team, “including at least one teacher or other specialist with knowledge in the area of the student's disability.”¹⁵⁹ This evaluation must be sufficient to determine the pupil's “individual needs, educational progress and achievement, the student's ability to participate in instructional programs in regular education and the student's continuing eligibility for special education.”¹⁶⁰ The Commissioner has noted that earning passing grades in a self-contained special education classroom “is not conclusive evidence that [a student] does not exhibit an ‘inability to learn.’”¹⁶¹

154 34 C.F.R. § 300.343(c)(1); 8 N.Y.C.R.R. § 200.4(f).

155 8 N.Y.C.R.R. § 200.4(e)(4).

156 8 N.Y.C.R.R. § 200.4(d).

157 34 C.F.R. § 300.303 (emphasis added); *see* 20 U.S.C. § 1414(a)(2).

158 20 U.S.C. § 1414(c)(5)(A). However, 34 C.F.R. § 104.35(d) and notes 33-34 and accompanying text noting that the regulations under Section 504, which also cover all students identified under the IDEA, require a reevaluation before any significant change in placement.

159 8 N.Y.C.R.R. § 200.4(b)(4).

160 *Id.*

161 29 Educ. Dep't Rep. 163, 167 (1989).

4. Notice of CSE Recommendation and Board of Education Implementation

The IDEA and New York regulations require prior written notice to the parents whenever the SED, the district or an intermediate educational agency (such as BOCES in New York) proposes or refuses to initiate or change “the identification, evaluation or educational placement” of a student or “the provision of a free appropriate public education” to the student.¹⁶² This notice must fully inform the parents of all their procedural rights.¹⁶³ The notice must include a “description of the action proposed or *refused* . . . [a]n explanation of why the agency proposes or refuses to take the action,” and a “description of other options that the IEP Team considered and the *reasons* why those options were rejected.”¹⁶⁴ When the parent’s primary language is not English, the notice must be in the dominant language spoken in the home.¹⁶⁵

Upon receipt of the CSE’s recommendation as to a particular child, the board of education must select the most reasonable and appropriate special service or program for the child.¹⁶⁶ If the board of education disagrees with a CSE recommendation, it must refer the student back to the CSE. The board must notify the parents of its decision, and it must ensure that there is a final decision and that the student is placed in an appropriate education program within 60 school days of the initial consent for an evaluation.¹⁶⁷

5. Independent Evaluation at District Expense

The IDEA gives parents the right to an independent educational evaluation of the child.¹⁶⁸ The regulations specify that if the parent disagrees with the district’s evaluation and requests an independent evaluation at public expense, the district is allowed to ask the parents why they disagree with the school’s

162 20 U.S.C. § 1415(b)(3); 8 N.Y.C.R.R. § 200.5(a)(1).

163 20 U.S.C. § 1415(d)(2).

164 20 U.S.C. § 1415(c)(1) (emphasis added); 34 C.F.R. § 300.503(b)(1)–(3); *see* 8 N.Y.C.R.R. § 200.5(a)(3).

165 8 N.Y.C.R.R. § 200.5(a)(4).

166 Educ. Law § 4402(2)(b)(2).

167 8 N.Y.C.R.R. § 200.4(e).

168 20 U.S.C. § 1415(b)(1); 8 N.Y.C.R.R. § 200.5(g)(1).

evaluation, but it cannot require the parents to respond to the inquiry.¹⁶⁹ In any case, the school must, without unreasonable delay, either agree to pay for the independent evaluation or initiate a hearing to show its evaluation is appropriate.¹⁷⁰ If the hearing officer rules that the district's evaluation is appropriate, the parent may still obtain an independent evaluation, but not at public expense.¹⁷¹ The Commissioner has ruled that a parent's right to an independent evaluation at public expense must be based on a disagreement with the evaluation of the district, not the recommended placement.¹⁷² Therefore, the parent or the legal representative should be careful in phrasing a request for an independent evaluation.

The Commissioner has also ruled that parents must notify the district prior to obtaining an independent evaluation, to enable the district to initiate a hearing to establish that its evaluation is appropriate.¹⁷³ By contrast, the U.S. Department of Education has indicated that parents cannot be required to notify the district prior to obtaining an independent evaluation, and need not specify the areas or bases of disagreement. Parents are entitled to only one independent evaluation for each district evaluation with which they disagree. The district may establish maximum prices for specific tests, so long as it “only eliminates unreasonably excessive fees” and provides for exceptions for unique circumstances. Districts may also establish a list of qualified experts from which the parents must select their evaluator provided the list is exhaustive and is subject to exceptions in unique circumstances.¹⁷⁴

E. Placement Requirements

1. General Guidelines

Children with disabilities are entitled to an education which appropriately meets their unique educational needs. Special education program options include “[s]pecial classes, transitional support

169 34 C.F.R. § 300.502(b)(4); 8 N.Y.C.R.R. § 200.5(g)(1)(iii)(a).

170 34 C.F.R. § 300.502(b)(2); 8 N.Y.C.R.R. § 200.5(g)(1)(iv).

171 34 C.F.R. § 300.502(b)(3); 8 N.Y.C.R.R. § 200.5(g)(1)(v).

172 21 Educ. Dep't Rep. 213 (1981).

173 21 Educ. Dep't Rep. 353 (1981). *But see In re Child with a Handicapping Condition*, Appeal No. 90-1 (1990).

services, resource rooms, direct and indirect consultant teacher services, transition services . . . , home instruction, and . . . itinerant teachers.”¹⁷⁵ Districts may provide these services directly or may contract with other school districts, BOCES or with private schools, either residential or nonresidential and in- or out-of-state, which are on a state-approved list.¹⁷⁶ In addition, districts must provide students with disabilities with free transportation to and from special classes or programs.¹⁷⁷

A school district is responsible for securing an appropriate placement and may not delegate this responsibility to the parents or BOCES.¹⁷⁸ The parent has “the right [prior to placement] to see the actual class, if one is in existence, and the right to question concrete elements of the placement such as class size, location, qualification of teachers, teaching aids, and the many other factors that relate to a particular program.”¹⁷⁹

The proposed placement listed in the IEP must be specific, including a specific proposed site, and parents must be given adequate notice of the location of such site.¹⁸⁰ The IEP or notice letter must also provide specific information concerning pupil/teacher ratio, the degree of mainstreaming and related services, as well as information and assurances regarding the similarity of needs among the children in the proposed class.¹⁸¹

2. Specific Requirements

New York Regulations establish guidelines for placement of children in special education programs, including criteria for grouping students and requirements for class sizes, age range within the

174 *Fields*, 2 EHLR 213:259 (EHA 1989).

175 Educ. Law § 4401(2)(a).

176 Educ. Law § 4401(2)(a)–(n).

177 Educ. Law § 4402(2)(d)(4)(a).

178 *In re David & Patricia B.*, 17 Educ. Dep’t Rep. 469 (1978); State Review Officer Decision No. 95-61 (1995).

179 *In re Harry & Roberta L.*, 18 Educ. Dep’t Rep. 78 (1978); *see also* 18 Educ. Dep’t Rep. 525 (1979); 19 Educ. Dep’t Rep. 142 (1979).

180 20 Educ. Dep’t Rep. 488 (1981).

181 18 Educ. Dep’t Rep. 118 (1978); 20 Educ. Dep’t Rep. 488 (1981); 22 Educ. Dep’t Rep. 520 (1983).

classes, minimum hours of instruction and teacher certification.¹⁸² All teachers and supervisors in such programs must be certified in appropriate areas of special education.¹⁸³ In general, all students must be offered a minimum of five hours of instruction per day on the elementary school level and five-and-one-half hours on the secondary level, exclusive of any lunch period.¹⁸⁴

The recommended special education programs and services must enable the student to achieve his or her annual goals and to participate and progress in the general education curriculum in the least restrictive environment. In determining the appropriate program and services the CSE must consider the results of any evaluation, the student's strengths, "concerns of the parent for enhancing the education of their child, results of any general State or district-wide assessment programs, and any special considerations unique to the student. [R]ecommendations of the programs and services . . . *cannot* be based solely on factors such as the category of the student's disability, the availability of special education programs or related services or personnel, the current availability of space, administrative convenience, or how the district/agency has configured its special education service delivery system."¹⁸⁵

3. Placement Based on Similarity of Needs

To achieve the goal of placing children with similar individual needs in resource rooms and self-contained classes, such needs are determined on the basis of "(1) levels of academic or educational achievement and learning characteristics; (2) levels of social development; (3) levels of physical development; and (4) the management needs of the students in the classroom."¹⁸⁶ The pupil's functioning

182 8 N.Y.C.R.R. § 200.6(b).

183 8 N.Y.C.R.R. § 200.6(b)(1)–(6). The regulations also authorize the provision of individual or group remedial reading instruction for students whose reading difficulties cannot be addressed through the general reading program. 8 N.Y.C.R.R. § 200.6(b)(6).

184 8 N.Y.C.R.R. § 175.5.

185 *Recommended Special Education Programs and Services, available at* <http://www.p12.nysed.gov/specialed/publications/iepguidance/programs.html> (2010) (emphasis added). *See also Continuum of Special Education Services for School-Age Students with Disabilities, available at* <http://www.p12.nysed.gov/specialed/publications/policy/schoolagecontinuum.html>.

186 8 N.Y.C.R.R. § 200.6(f)(4), (h)(2).

level, individual needs and annual goals in each of these four areas must be included on the IEP.¹⁸⁷ These terms are defined as follows:

(a) *academic [or educational] achievement and learning characteristics* .

. . . shall mean the levels of knowledge and development in subject and skill areas, including activities of daily living, level of intellectual functioning, adaptive behavior, expected rate of progress in acquiring skills and information, and learning style;

(b) *social development* . . . shall mean the degree and quality of the student's relationships with peers and adults, feelings about self, and social adjustment to school and community environments;

(c) *physical development* . . . shall mean the degree or quality of the student's motor and sensory development, health, vitality, and physical skills or limitations which pertain to the learning process; and

(d) *management needs* . . . shall mean the nature of and degree to which environmental modifications and human or material resources are required to enable the student to benefit from instruction. Management needs shall be determined in accordance with the factors identified in each of the three areas [described above].¹⁸⁸

The criteria for making placement decisions using these four categories are as follows:

(i) The range of academic or educational achievement of such students shall be limited to assure that instruction provides each student appropriate opportunities to achieve his or her annual goals. The learning characteristics of students in the group shall be sufficiently similar to

187 8 N.Y.C.R.R. § 200.4(d)(2)(i), (iii).

188 8 N.Y.C.R.R. § 200.1(w)(3)(i) (emphasis added).

assure that this range of academic or educational achievement is at least maintained.

(ii) The social development of each student shall be considered prior to placement in any instructional group to assure that the social interaction within the group is beneficial to each student, contributes to each student's social growth and maturity, and does not consistently interfere with the instruction being provided. The social needs of a student shall not be the sole determinant of such placement.

(iii) The levels of physical development of such students may vary, provided that each student is provided appropriate opportunities to benefit from such instruction. Physical needs shall be considered prior to determining placement to assure access to appropriate programs. The physical needs of the student shall not be the sole basis for determining placement.

(iv) The management needs of such students may vary, provided that environmental modifications, adaptations, or human or material resources required to meet the needs of any one student in the group are provided and do not consistently detract from the opportunities of other students in the group to benefit from instruction.¹⁸⁹

These requirements will be considered when determining whether the school district has recommended an appropriate placement. The hearing officer and the state review officer will look at whether the record establishes that the proposed class provides a grouping of children with similar educational needs.¹⁹⁰ The district must provide evidence regarding the nature of the disability and

189 8 N.Y.C.R.R. § 200.6(a)(3).

190 22 Educ. Dep't Rep. 520 (1983).

functioning levels of the other children in the proposed class.¹⁹¹ However, the privacy rights of these other children have often been held to outweigh the *right* to detailed documentary evidence regarding such other children, and districts have satisfied their burden of proof with summary profiles.¹⁹²

4. Resource Room and Consultant Teacher

New York authorizes a student’s placement in a regular education classroom with the assistance of a consultant teacher for the regular education teacher and/or the student.¹⁹³

The next more restrictive option is placement in a special education resource room program in conjunction with placement in regular classes. Students must receive at least three hours in the resource room per week and may be placed in a resource room for up to 50 percent of the day.¹⁹⁴ There can be no more than five students in a resource room at a time, except in New York City, where the maximum is eight.¹⁹⁵ “The composition of the instructional groups . . . [must] be based on the similarity of the individual needs of the students” in the resource room.¹⁹⁶ Students may also receive both consultant teacher and resource room services.¹⁹⁷

The total number of special education students assigned to a resource room teacher cannot exceed 20, except that in grades 7 through 12 and in multilevel middle schools¹⁹⁸ operating on a period basis, the

191 *Id.*; 22 Educ. Dep’t Rep. 463 (1983).

192 26 Educ. Dep’t Rep. 183 (1986); 26 Educ. Dep’t Rep. 269 (1987).

193 8 N.Y.C.R.R. §§ 200.1(m), 200.6(d).

194 8 N.Y.C.R.R. § 200.6(f)(1), (2).

195 8 N.Y.C.R.R. § 200.6(f)(3).

196 8 N.Y.C.R.R. § 200.6(f)(4).

197 8 N.Y.C.R.R. § 200.6(d)(2).

198 A *multi-level middle school* is defined as a “middle school . . . of one or more grades below grade 7 and one or more grades [from] 7 through 9.” 8 N.Y.C.R.R. § 175.11(b)(3). In New York City, the maximum cannot exceed 30 and 38 students, respectively. 8 N.Y.C.R.R. § 200.6(f)(5).

maximum cannot exceed 25.¹⁹⁹ A district may apply to the commissioner for a variance from the maximum sizes of the instructional groups.²⁰⁰

5. Self-Contained Classes

A self-contained special class is a small class taught by a certified special education teacher in which students with similar educational needs typically remain together for most of the school day. Where appropriate, students may leave these classes for part of the day to be mainstreamed.

The class size and student/teacher ratio in self-contained classes depend upon the management needs of the students. The maximum class size is 15 students with one special education teacher (15:1).²⁰¹ For students whose management needs interfere with the instructional process and therefore require an extra adult in the classroom, the maximum is 12 students with one teacher and at least one aide (12:1+1).²⁰² “The maximum class size for . . . students whose management needs are . . . intensive, and requiring a significant degree of individualized attention and intervention” is eight students with one teacher and at least one aide (8:1+1).²⁰³ For pupils with highly intensive management needs, “requiring a high degree of individualized attention and intervention,” the maximum class size cannot exceed six pupils with one special education teacher and at least one aide (6:1+1).²⁰⁴ For pupils with severe multiple disabilities whose programs consist primarily of rehabilitation and treatment, the maximum class size is 12. In addition to the teacher, the staff/pupil ratio must be one staff person to three pupils (12:1+(3:1)). The staff may consist of teachers, aides or related service providers.²⁰⁵

199 8 N.Y.C.R.R. § 200.6(f)(5).

200 8 N.Y.C.R.R. § 200.6(f)(6).

201 8 N.Y.C.R.R. § 200.6(h)(4).

202 8 N.Y.C.R.R. § 200.6(h)(4)(i).

203 8 N.Y.C.R.R. § 200.6(h)(4)(ii)(b).

204 8 N.Y.C.R.R. § 200.6(h)(4)(ii)(a).

205 8 N.Y.C.R.R. § 200.6(h)(4)(iii).

The chronological age range in self-contained classes for students under 16 years of age cannot exceed 36 months.²⁰⁶ There are no age restrictions for classes of students who are 16 or older, nor are there age limits for students with severe multiple disabilities (those in the 12:1+(3:1) classes).²⁰⁷ A district may receive a variance from the commissioner of education for both the class size and age limitations upon “documented educational justification.”²⁰⁸

Children in self-contained special classes must be placed on the basis of similar individual needs.²⁰⁹ Where the achievement levels in reading and math in a given class (except for 8:1+1, 6:1+1 and 12:1+(3:1) classes) exceed a range of three years, the district must provide parents and teachers, by November 1 of each year, with a description of the reading and math levels, the general levels of social and physical development and the management needs of all the pupils in the class.²¹⁰

To foster integration of students with disabilities with students who do not have disabilities, a new option has been established—“integrated co-teaching services.” This option allows for the instruction of students with disabilities and nondisabled students in a combined classroom with both a regular and special education teacher.²¹¹

6. Private School Placement Procedures

Although article 89 of the Education Law establishes a preference for public rather than private placements, if the district cannot provide an appropriate public school placement, it must contract with a private school. A school district, however, is not required to “match or surpass a program offered by a private school.”²¹² The New York State Department of Education maintains a register (an “approved list”)

206 8 N.Y.C.R.R. § 200.6(h)(5).

207 *Id.*

208 8 N.Y.C.R.R. § 200.6(h)(6).

209 8 N.Y.C.R.R. § 200.6(h)(2).

210 8 N.Y.C.R.R. § 200.6(h)(7).

211 8 N.Y.C.R.R. § 200.6(g).

212 22 Educ. Dep’t Rep. 87 (1982).

of private in-state and out-of-state schools qualified to contract for the education of New York’s students with disabilities.²¹³

When a CSE recommends a private or residential program for a pupil, it must forward to the SED (so that it is received within six business days²¹⁴) current evaluations (completed within the prior six months) and detailed documentation of the need for the placement.²¹⁵ The SED will approve the application if the required documentation is submitted, the proposed placement is an approved school and “the proposed placement offers the instruction and services recommended in the student’s IEP.”²¹⁶ The SED must notify the board of education of its decision within 15 business days,²¹⁷ and the district then has the opportunity to correct any deficiencies in the application; it also has the right to an administrative review of the decision.²¹⁸ However, the district is responsible for implementing a board-approved CSE recommendation within 60 school days of the consent to evaluate, regardless of whether it receives SED approval for reimbursement.²¹⁹

If the SED determines that a district has unnecessarily relied on private or residential placements or has failed to make timely placements, it will advise the district to take corrective action. If the district does not comply, the SED may require prior approval for the district’s future private and residential placements. In such cases, if the SED does not approve a pupil for placement, the parents have a right to a hearing against the SED.²²⁰

213 See 8 N.Y.C.R.R. § 200.7(a). Private schools that wish to be included on the approved list must apply to the State Education Department, pursuant to 8 N.Y.C.R.R. § 200.7(a).

214 8 N.Y.C.R.R. § 200.6(j)(3)(i).

215 8 N.Y.C.R.R. § 200.6(j)(1)(i)–(iv).

216 8 N.Y.C.R.R. § 200.6(j)(2)(i)–(iii).

217 8 N.Y.C.R.R. § 200.6(j)(3)(ii).

218 8 N.Y.C.R.R. § 200.6(j)(3)(iii), (iv).

219 8 N.Y.C.R.R. § 200.6(j)(4).

220 8 N.Y.C.R.R. § 200.6(j)(5).

7. Placement in State-Operated or State-Supported Schools

Appointments to state-operated or state-supported schools for students who are “deaf, blind, severely physically disabled or severely emotionally disturbed” are made by the Commissioner of Education.²²¹ The student is first evaluated at a school designated by the Commissioner.²²² For state-operated schools, the results of the evaluation are forwarded to the parents and the Commissioner, and the school makes a recommendation as to whether appointment is appropriate.²²³ For state-supported schools, the results are forwarded to the CSE in the district in which the parents reside, which makes the recommendation as to whether the student should be appointed.²²⁴ The parents may appeal the recommendations of the school²²⁵ or CSE²²⁶ or the decision of the Commissioner.²²⁷

8. Home or Hospital Instruction

When a student with a disability requires home or hospital instruction, the regulations require “a minimum of five hours per week [for] elementary level [students] . . . or . . . 10 hours per week [for] secondary level students.”²²⁸ Home/hospital instruction is only a temporary measure and not a “long-range solution to the question of meeting the educational needs of a handicapped child,” since it is clearly the most restrictive setting.²²⁹

221 8 N.Y.C.R.R. § 200.7(d)(1).

222 *Id.*

223 8 N.Y.C.R.R. § 200.7(d)(1)(i).

224 8 N.Y.C.R.R. § 200.7(d)(1)(ii).

225 8 N.Y.C.R.R. § 200.7(d)(1)(i)(f).

226 8 N.Y.C.R.R. § 200.7(d)(1)(iii).

227 8 N.Y.C.R.R. § 200.7(d)(4).

228 8 N.Y.C.R.R. § 200.6(i).

229 *In re Funk*, 14 Educ. Dep’t Rep. 143 (1974); 22 Educ. Dep’t Rep. 520 (1983).

F. Specific Elements of the IEP

1. Twelve-Month Educational Programs²³⁰

School districts are required to provide special services or programs for those students who are determined by the CSE to require an extended-school-year program. The program must be for at least 30 days during July and August.²³¹ A single special education service may be provided during the summer as the sole component of a summer program.²³²

Eligibility for 12-month programming hinges upon whether extended-school-year services are necessary to “prevent substantial regression.”²³³ “*Substantial regression*” is defined as a “student’s inability to maintain developmental levels due to a loss of skill or knowledge” during the summer, which is “of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain [previously mastered] IEP goals and objectives.”²³⁴

2. Related Services

The IDEA defines *related services* as

transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a [FAPE] as described in the [IEP] of the child, counseling services, including rehabilitation counseling, orientation and

230 For more information on the provision of special education programs/services during the months of July and August, see *Extended School Year Programs and Services Questions and Answers* found at <http://www.p12.nysed.gov/specialed/finance/2010QA.htm>.

231 Educ. Law § 4408.

232 See OSEP Policy Letter to Libous dated Nov. 15, 1990, 17 EHRLR 419 (1990).

233 8 N.Y.C.R.R. § 200.6(k)(1).

234 8 N.Y.C.R.R. § 200.1(aaa); see *Holmes v. Sobol*, 690 F. Supp. 154 (W.D.N.Y. 1988); 28 Educ. Dep’t Rep. 293 (1989).

mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.²³⁵

The definition excludes a medical device that is surgically implanted, as well as the replacement of such a device.²³⁶ The federal regulations add *orientation and mobility training*, *school health services* and *parent counseling and training*.²³⁷ The comments to the regulations note that the list is not exhaustive and add “artistic and cultural programs, art, music and dance therapy” as additional examples of related services.²³⁸ Therefore, any of the examples in the federal law, regulations or comments should also, in appropriate circumstances, be considered for a child with a disability. New York’s definition of related services includes “other appropriate services.”²³⁹

As noted above, in New York State related services may be the only special services offered to a student with a disability.²⁴⁰ These related services, as well as their frequency and duration, must be listed in a pupil’s IEP.²⁴¹ A group receiving such services cannot exceed five pupils per teacher or specialist, except in New York City, where the group cannot exceed eight.²⁴² Additionally, students receiving speech and language services must be given “a minimum of two 30-minute sessions per week,” and the teacher’s caseload “cannot exceed 65 students.”²⁴³

235 20 U.S.C. § 1401(26)(A).

236 20 U.S.C. § 1401(26)(B).

237 34 C.F.R. § 300.34(a).

238 64 Fed. Reg. 12548.

239 8 N.Y.C.R.R. § 200.1(qq); see 1999 N.Y. Laws ch. 311, § 7, *amending* Educ. Law § 4401(2)(k).

240 8 N.Y.C.R.R. § 200.6(e)(5); see *supra* III.A.1.d.

241 8 N.Y.C.R.R. § 200.6(e)(1).

242 8 N.Y.C.R.R. § 200.6(e)(3).

243 8 N.Y.C.R.R. § 200.6(e)(2).

3. School Health Services

Under the IDEA, related medical services are limited to diagnosis and evaluation.²⁴⁴ The regulations define *medical services* as those “provided by a licensed physician to determine a child’s medically related disability.”²⁴⁵ However, the regulations also include “school health services,” which are to be “provided by either a qualified school nurse or other qualified person.”²⁴⁶

In determining whether a health-related service is permissible as a “school health service” or is an excluded “medical service,” the service must be required during the school day and must be able to be performed by someone other than a physician.²⁴⁷ The Supreme Court in *Garret F.* noted that schools “cannot limit educational access simply by pointing to the limitations of existing staff. . . . [T]he IDEA requires school districts to hire specially trained personnel to meet disabled student needs.”²⁴⁸

The IDEA requires that states have what is referred to as a comprehensive system of personnel development to ensure there are sufficient qualified personnel to meet the needs of its students with disabilities.²⁴⁹ “[E]ach State must have a mechanism for serving children with disabilities if instructional needs exceed available (qualified) personnel, including addressing those shortages in its comprehensive system of personnel development if the shortages continue.”²⁵⁰

244 20 U.S.C. § 1401(26).

245 34 C.F.R. § 300.34(b)(5).

246 34 C.F.R. § 300.34(b)(13).

247 *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66 (1999) (The Court adopted a bright line test for determining whether health services are required under IDEA and ordered the school district to provide a ventilator-dependent student with one-to-one school health services). *See also Irving Independent School District v. Tatro*, 468 U.S. 883, 894 (1984) (the Court ruled that clean intermittent catheterization (CIC) is a permissible related service for students with disabilities because it “enables a handicapped child to remain at school during the day,” similar to services that enable the “child to reach, enter or exit the school.”).

248 *Cedar Rapids Cmty. Sch. Dist.*, 526 U.S. at 76 n.8 (citations omitted).

249 34 C.F.R. § 361.18.

250 64 Fed. Reg. 12408 (regarding 34 C.F.R. § 300.136(g)(3)).

4. Psychiatric Services

In *T.G. v. Board of Education*,²⁵¹ the court upheld the provision by a social worker of what was referred to as “psychotherapy” under the supervision of a psychiatrist who was on the child’s treatment team. The court reasoned that this was within the scope of counseling or psychological services authorized by the IDEA, and not an unauthorized medical service.²⁵²

5. Assistive Technology²⁵³

The IDEA includes definitions for *assistive technology (AT) device*²⁵⁴ and *assistive technology service*.²⁵⁵ In the legislative history, Congress noted the importance of AT: Advances in assistive technology have provided new opportunities for students with disabilities to participate in educational programs. For many, the provision of assistive technology will redefine an “appropriate placement in the least restrictive environment.”²⁵⁶

The U.S. Department of Education has determined that both AT devices and services may qualify as special education, related services, or supplementary aids and services. If a child requires assistive technology to receive a FAPE, the IEP must indicate the nature and amount of such services.²⁵⁷ If a student requires an AT item for home use in order to receive an appropriate education, it must be provided.²⁵⁸

251 576 F. Supp. 420 (D.N.J. 1983), *aff’d*, 738 F.2d 421 (3d Cir.) (mem.), *cert. denied*, 469 U.S. 1086 (1984).

252 *See Vander Malle v. Ambach*, 673 F.2d 49 (2d Cir. 1982).

253 *See* Chapter 6, “Work, Assistive Technology and Transition-Aged Youth.”

254 Assistive Technology device means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified or customized, that is used to increase, maintain or improve the functional capabilities of a student with a disability. Assistive technology devices can range from “low technology” items like pencil grips, markers, or paper stabilizers to “high technology” items such as voice synthesizers, Braille readers or voice activated computers.

255 Assistive Technology services means any service that directly assists a student with a disability in the selection, acquisition or use of an assistive technology device. *See* 20 U.S.C. § 1401(1), (2); 34 C.F.R. §§ 300.5, 300.6.

256 H.R. Rep. No. 101-544, *as reprinted in* 1990 U.S.C.C.A.N. 1730.

257 *Goodman*, 16 EHLR 1317 (OSEP 1990).

258 34 C.F.R. § 300.105(b); *Shrag*, 18 IDELR 627 (OSEP 1991).

The need for AT must be considered for all students when developing the IEP.²⁵⁹ AT encompasses the individual student’s personal needs for AT, such as electronic note takers, cassette recorders as well as access to AT devices used by all students. If a student needs accommodations to use an AT device used by all students, the school “must ensure that the necessary accommodation is provided.”²⁶⁰ The CSE must also consider what instruction the student and teacher might need to use the AT device.

All states must have interagency agreements to ensure that all public agencies (including those that provide Medicaid) responsible for providing services which are also considered special education services (including AT) fulfill their responsibilities. The financial responsibility of these public agencies must precede that of the school district. If an agency does not fulfill its obligation, the school district must provide the needed services, but it has the right to seek reimbursement from the public agency. The interagency agreement must also specify how the various agencies will cooperate to ensure the timely and appropriate delivery of services to the students.²⁶¹

6. Transition Services

The IDEA requires that school districts plan for students’ transition from school to adulthood.²⁶² In New York, the process begins with what is called a level I assessment. Commencing at age 12, students must be assessed to determine their vocational skills, aptitudes and interests. The assessment must “include[] a review of [the student’s] records[,] . . . teacher assessments, and parent and student interviews.”²⁶³ Under the IDEA reauthorization, the definition of *transition services* was amended to add “related services” to the types of services to be provided, thereby removing any doubt that transition services may include AT.²⁶⁴

259 20 U.S.C. § 1414(d)(3)(B)(v).

260 64 Fed. Reg. 12540.

261 20 U.S.C. § 1412(a)(12).

262 The federal requirements are set forth at 20 U.S.C. §§ 1401(34), 1414(d)(1)(A)(i)(VIII), (d)(6); 34 C.F.R. §§ 300.43, 300.324(c), 300.320(b), 300.321(b).

263 8 N.Y.C.R.R. § 200.4(b)(6)(viii).

264 20 U.S.C. § 1401(34).

In New York, commencing when a student is age 15 (or younger, if appropriate), the district must conduct comprehensive transition planning.²⁶⁵ *Transition services* are defined as a coordinated set of activities, designed within an outcome-oriented process, to promote movement from school to post-school activities, based on the *student's* needs, preferences and interests. The post-school activities to be considered include post-secondary education, vocational training, employment, continuing and adult education, adult services, independent living and community participation. Transition services “shall include instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, if appropriate, acquisition of daily living skills and functional vocational adult evaluation.”²⁶⁶

Districts are authorized to enter into agreements with other agencies to actually provide the transition services. In such cases, however, these agencies are still required to pay for the services they would normally provide for students with disabilities.²⁶⁷

The IEP for students eligible for transition services must specify the services needed in the areas of instruction, community experiences, employment and other post-school adult living objectives. If it is determined that services are not needed in any of these areas, the IEP must specify the basis for this determination. The IEP must also indicate the responsibilities of the district and any participating agency to provide these services.²⁶⁸

The student and a representative of a participating agency must be invited to attend the CSE meeting when transition services are being considered. If the student does not attend, the district must take steps to ensure that the student's interests are considered. Likewise, if the agency does not attend, the district should take other steps to involve the agency in the planning process.²⁶⁹ Finally, if the participating

265 8 N.Y.C.R.R. § 200.4(d)(2)(ix).

266 Educ. Law § 4401(9); 8 N.Y.C.R.R. § 200.1(fff).

267 Educ. Law § 4401(2)(n).

268 8 N.Y.C.R.R. § 200.4(d)(2)(ix)(e).

269 8 N.Y.C.R.R. § 200.4(d)(4)(i)(c).

agency does not provide the agreed-upon services, the CSE must hold another transition planning meeting as soon as possible “to identify alternative strategies to meet the transition objectives” or to revise the IEP.²⁷⁰

7. Annual Goals

Annual goals are observable and measurable statements that identify the knowledge, skills, and/or behaviors a student is expected to achieve within one year. The IEP must list measurable annual goals consistent with the student’s needs and abilities, as identified in the present levels of performance. “Goals should not be restatements of the general education curriculum (i.e., the same curriculum as for students without disabilities), or a list of everything the student is expected to learning in every curricular content area during the course of the school year or other areas not affected by the student’s disability.”²⁷¹ “The annual goals will guide instruction, serve as the basis to measure progress and report to parents, and serve as the guideposts to determine if the supports and services being provided to the student are appropriate and effective.”²⁷²

The IEP must identify when periodic reports on the progress of the student will be given to the student’s parent. “Regular reports to parents provide a mechanism to monitor a student’s progress toward the annual goal and to evaluate the effectiveness of the student’s special education services.”²⁷³ If the student is not progressing sufficiently towards the annual goal or is not expected to achieve an annual goal, the CSE “must review and revise the student’s IEP to ensure that the student is being provided the appropriate supports and services.”²⁷⁴ According to NYSED “[t]he information included in reports to parents [must be] sufficient to identify a student’s lack of progress early enough that the [CSE] could, if

270 8 N.Y.C.R.R. § 200.4(e)(6).

271 In developing an IEP the CSE must design goals that, “answer the question: ‘What skills does the student require to master the content of the curriculum?’ *rather than* ‘What curriculum content does the student need to master.’ *NYSED Guide to Quality Individualized Education Program (IEP) Developmental and Implementation*, at 31, available at <http://www.p12.nysed.gov/specialed/publications/iepguidance.htm>.

²⁷² *Id.*

²⁷³ *Id.* at 36.

²⁷⁴ *Id.*

necessary, reconvene to review and, if appropriate, revise the student's IEP to ensure the student is provided the appropriate supports to reach the annual goals."²⁷⁵ Therefore, if a student is not on track to meet annual goals the CSE must first consider whether adding supports and services to the student's IEP would allow the student to achieve goals *before* it recommends reducing or eliminating the annual goals.

G. Other Major Special Education Provisions

1. Confidentiality of Records

The IDEA requires compliance with the requirements pertaining to the confidentiality of and access to records, as set forth in the Family Educational Rights and Privacy Act of 1974 (FERPA) (also known as the Buckley Amendment).²⁷⁶ Generally speaking, FERPA prohibits, with certain exceptions, third-party access to a student's educational records without written parental (or student, when eligible) consent. Further, it guarantees parental access to records and the right to request amendment or removal of any record that is "inaccurate or misleading or that violates the privacy or other rights of the child."²⁷⁷

Neither the FERPA nor the IDEA access to records regulations require, in all cases, that parents be given copies of student records.²⁷⁸ However, because parents are now full members of the Committee on Special Education, they have the same right to access their child's records as any other member of the Committee.

2. Dual Enrollment for Students with Disabilities Parentally Placed in Nonpublic Schools Where FAPE Is Not at Issue

Under New York State law, students enrolled in nonpublic schools, including parochial schools, *are* entitled to special education programs and services provided by the public schools.²⁷⁹ Chapter 378 of the Laws of 2007 amended New York law to conform with the 2004 changes in the IDEA. N.Y. Education Law § 3602-c (dual enrollment) formerly required the district of the student's residence to

²⁷⁵ *Id.* at 37.

²⁷⁶ 20 U.S.C. § 1232g. The FERPA regulations are located at 34 C.F.R. pt. 99.

²⁷⁷ 34 C.F.R. § 300.618(a).

²⁷⁸ *See* 34 C.F.R. §§ 99.12, 300.613(a).

²⁷⁹ Educ. Law § 3602-c.

evaluate students with disabilities placed by their parents in nonpublic schools and to offer special education services and supports recommended on the student’s IEP. Under the amended law, those responsibilities shifted to the school district of location where the student is placed and required the development of an Individualized Education Services Plan (IESP) for students identified as disabled. To obtain an IESP, parents must make a written request to the district where the school is located prior to June 1 of the school year preceding or within 30 days of the date the student was initially found eligible for services. With parental consent, the district of location bills the district of residence directly for the cost of evaluation, meetings and services provided to nonresidents through the dual enrollment process.²⁸⁰ Despite state and federal guidance that advises against having parents seek evaluations and program recommendations from both their district of residence and district of location, the shift in responsibility and procedures has resulted in duplication of efforts and over testing in some cases.

Under the IDEA, special education and related services may be provided on-site at a parochial school “to the extent consistent with law.”²⁸¹ The constitutionality of providing services on the premises of a sectarian school was affirmed by the U.S. Supreme Court in *Zobrest v. Catalina Foothills School District*²⁸² *Zobrest* concerned a profoundly deaf student whose parents requested that the school district provide him with a sign language interpreter at a parochial high school. The Court held that the establishment clause does not bar a public school district from furnishing a sign language interpreter to a child with a disability who is unilaterally enrolled at a parochial school, because general government programs are for the benefit of the child, not the school, and an interpreter is a “neutral service” that does not add to or subtract from the parochial school’s program. In *Russman v. Bd. Of Education*, the Second Circuit reiterated that the establishment clause does not bar the on-site provision of other special education services such as an aide, consultant teacher or related services.²⁸³

280 N.Y. Educ. Law § 3602-c.

281 20 U.S.C. § 1412(a)(10)(A)(i)(III).

282 509 U.S. 1 (1993).

283 150 F.3d 219, 221 (2d Cir. 1998). In 2001, the the Second Circuit, reversed its earlier decision and held that the IDEA no longer requires the provision of special education services on-site at a parochial school. *Russman v. Bd of Educ.* 260 F2d.

The New York State Court of Appeals has ruled that New York Education Law does not *require* the provision of related services for parochial school students at a neutral site or at the public school; but the services must be provided consistent with each student’s individual needs.²⁸⁴ Certain related services (e.g., sign language interpretation services, facilitated communication, toileting assistance) must, by their very nature, be provided to a child *in the classroom* or school being attended.²⁸⁵ Following the *Russman* decision, the SED Office of Counsel issued a memorandum setting forth its interpretation of Education Law § 3602-c.²⁸⁶ The SED memo indicates that special education services *must* be provided to private/parochial students and that services may be provided at the public school, a neutral site or the private/parochial school, *as appropriate*. If services are not provided on-site, the school district must provide transportation to and from the site, if needed, for the student to benefit from or participate in the service.²⁸⁷

4. Surrogate Parents

In certain circumstances, surrogate parents may act in the place of a child’s parents or guardian and represent the child’s interests during the identification, evaluation, placement and review process. Following a request for the assignment of a surrogate parent to the CSE,²⁸⁸ the district must appoint a surrogate whenever it has been determined that (a) the pupil’s natural parents, legal guardian or persons acting as a parent, such as a grandmother or stepparent with whom the pupil lives, are unknown or are unavailable to represent the pupil, or (b) the pupil is a ward of the state.²⁸⁹

114 (2d Cir. 2001). The Court remanded the case to determine whether the services are required under New York State law or the free-exercise clause of the First Amendment. On remand, the district court found no right to on-site services under New York State law or the First Amendment. On appeal, the Second Circuit dismissed the case as moot and vacated the judgment below.

284 *Bd. of Educ. v. Wieder*, 72 N.Y.2d 174, 531 N.Y.S.2d 889 (1988).

285 *New*, EHLR 211:372 (EHA 1985); *In re Board of Educ. of New York City*, 24 Educ. Dep’t Rep. 155, 159 (1984).

286 Ahearn, NYSED Counsel and Deputy Commissioner of Legal Affairs (Sept. 1998).

287 34 C.F.R. § 300.139(b).

288 8 N.Y.C.R.R. § 200.5(n)(3).

289 *Id.*; see 34 C.F.R. § 300.519(a)(1)–(3); 8 N.Y.C.R.R. § 200.5(n)(1).

Each school district must maintain a list of eligible individuals willing to serve as surrogate parents; to be eligible, a person must have the “knowledge and skills [to] ensure [the pupil’s] adequate representation.”²⁹⁰ The surrogate parent’s interests must not conflict with those of the pupil.²⁹¹ The surrogate may not be an officer, employee or agent of the school district or public agency involved in the education or care of the pupil.²⁹²

Unless a surrogate parent has already been assigned, an impartial hearing officer may appoint a guardian *ad litem* when it is determined that the interests of the student conflict with those of his or her parents or when, for any other reason, the interests of the student would best be protected by the appointment of a guardian *ad litem*.²⁹³ A guardian *ad litem* may be a person on the district’s list of surrogate parents or a pro bono attorney familiar with the regulations of the commissioner.²⁹⁴ The guardian *ad litem* has the right to participate fully in the hearing and to join in an appeal to the state review officer.²⁹⁵ When a guardian *ad litem* is appointed, the hearing officer must ensure that the parent’s due process rights “are preserved throughout the hearing.”²⁹⁶

H. Special Education Services for Children From Birth Through five years²⁹⁷

1. Early Intervention Services

All Infants and toddlers with disabilities,²⁹⁸ from birth age through two years, are eligible for early intervention services under part C of IDEA.²⁹⁹ Disabled toddlers and infants are entitled to a wide range of

290 34 C.F.R. § 300.519(d)(2)(iii).

291 *Id.*; 8 N.Y.C.R.R. § 200.5(n)(2)(ii).

292 8 N.Y.C.R.R. § 200.5(n)(2)(i).

293 8 N.Y.C.R.R. § 200.5(j)(3)(ix).

294 8 N.Y.C.R.R. § 200.1(s).

295 *Id.*

296 8 N.Y.C.R.R. § 200.5(j)(3)(ix).

297 The author would like to thank Joshua Cotter for the contribution of this section.

298 20 U.S.C. § 1432(5).

299 20 U.S.C. § 1434(1).

services³⁰⁰ from qualified personnel³⁰¹ to best meet their individual needs. These services are provided pursuant to an “individualized family service plan,” which is created by a multidisciplinary team, including the parent, after assessments of the child’s developmental needs.³⁰² The individualized family service plan is required to have specific content³⁰³ such as the child’s current levels of development,³⁰⁴ and a statement of goals the child is expected to achieve.³⁰⁵ The plan is evaluated once per year, and the family is provided with a review at least every six months.³⁰⁶ Parental consent is needed before the implementation of any early intervention service.³⁰⁷ To the greatest extent possible, the services outlined in the plan should be provided in natural settings, such as the home, or community settings in which children without disabilities also receive services.³⁰⁸

The minimum procedural safeguards required include the right to prior written notice of any proposed changes to the plan, timely administrative resolution of complaints, and a review of any administrative decision in state or federal court.³⁰⁹ During any proceedings, or action involving a complaint by the parents, the infant or toddler will continue to receive early intervention services if they were being provided before the initiation of the complaint.³¹⁰

300 20 U.S.C. § 1432(E).

301 20 U.S.C. § 1432(F).

302 20 U.S.C. § 1436(a).

303 20 U.S.C. § 1436(d).

304 20 U.S.C. § 1436(d)(1).

305 20 U.S.C. § 1436(d)(3).

306 20 U.S.C. § 1436(b).

307 20 U.S.C. § 1436(e).

308 20 U.S.C. § 1432(g).

309 20 U.S.C. § 1439(A).

310 20 U.S.C. § 1439(B).

In New York, early intervention services for infants and toddlers with disabilities, from birth through two years, are administered by the Department of Health.³¹¹

2. Preschool Special Education

The process for obtaining special education services for preschool children mirrors the same requirements set forth above for school-age children. In New York all children with disabilities aged three through five are entitled to a FAPE.³¹² A child is eligible to receive preschool special education services on or before his or her third birthday.³¹³ The process begins with a written referral to the administrator in charge of special education services.³¹⁴ Upon receipt of the referral, the school district must contact the parent³¹⁵ to obtain consent to evaluate the student.³¹⁶ After receiving consent, the school district is required to provide the parent with a list of approved evaluators within their geographic region.³¹⁷ Following the parents' selection, the district has to arrange for the evaluation to take place.³¹⁸ Within 60 calendar days of receiving parental consent to evaluate the student, the evaluation is required to be completed, and the Committee on Pre-school Special Education (CPSE) must make a recommendation of eligibility for special education services to the board of education.³¹⁹ Parents are entitled to receive a copy of the

311 N.Y. Public Health Law tit.II-A, §§ 2540–2559-b.

312 Educ. Law § 4410 and 8 N.Y.C.R.R. § 200.16.

313 8 N.Y.C.R.R. § 200.1(mm)(2).

314 8 N.Y.C.R.R. § 200.16(b)(1)(i).

315 *See supra* note 99.

316 8 N.Y.C.R.R. § 200.16(b)(1)(iv).

317 Educ. Law § 4410(4)(b).

318 8 N.Y.C.R.R. § 200.16(b)(1)(iv).

319 8 N.Y.C.R.R. § 200.16(e)(1).

evaluation³²⁰ and the recommendation.³²¹ If the parents disagree with the evaluation, they may seek an independent educational evaluation (IEE) at the public's expense.³²²

The IEP is developed at a meeting of the CPSE,³²³ and any services provided to the child in the IEP have to be administered in the LRE.³²⁴ In developing the IEP the CPSE should first examine the appropriateness of the child receiving only related services, then move on to the suitability of more restrictive services or half- and full-day programs.³²⁵ The board of education must implement a student's special education program no later than thirty school days of receipt of the CPSE recommended IEP or 60 school days from the consent to evaluate, whichever occurs first.³²⁶ The IEP has to be reviewed no less than once a year.³²⁷

The due process rights of parents of preschool students are the same as outlined for parents of school-age children in Chapter 4.³²⁸ If a due process hearing request is pending when the child ages out of preschool services (at age 5) the student is entitled to remain in the preschool program ("stay-put") until the hearing is concluded.³²⁹

320 8 N.Y.C.R.R. § 200.16(d)(2).

321 8 N.Y.C.R.R. § 200.16(e)(2).

322 8 N.Y.C.R.R. § 200.16(d)(3) *see supra* III.E.3.e.7., "Independent Evaluation at District Expense."

323 8 N.Y.C.R.R. § 200.16(e)(4).

324 8 N.Y.C.R.R. § 200.16(e)(3)(i).

325 8 N.Y.C.R.R. § 200.16(f)(1). II.E.2., "Least Restrictive Environment."

326 8 N.Y.C.R.R. § 200.16(f).

327 8 N.Y.C.R.R. § 200.16(g).

328 *See supra* Chapter 4, "Challenging Special Education Decisions."

329 *In re Child with a Handicapping Condition*, Appeal No. 01-023. *See also supra* Chapter 4, Section V. "Pendency/Status Quo" for further discussion of "stay put."

IV. Section 504 of the Rehabilitation Act

A. Basic Statutory and Regulatory Provisions

Section 504 provides in pertinent part: “No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . .”³³⁰ Section 504 is not limited to educational programs. Since virtually all public schools receive various sources of federal funding, however, the statute applies to schools.

The main thrust of Section 504 is to prevent discrimination. However, the regulations under Section 504 require school districts to provide a free and appropriate public education (FAPE)³³¹ to students with disabilities. This dichotomy was addressed by the Supreme Court in *Southeastern Community College v. Davis*,³³² where the Supreme Court ruled that the prohibition on discrimination did not mandate the recipient to take affirmative action nor to undertake *substantial* revision of its program. Instead, the Court directed recipients only to take affirmative steps to avoid discriminatory treatment, particularly when those steps would not impose undue financial and administrative burdens.³³³ The Second Circuit has held that Section 504 requires some affirmative action to accommodate people with disabilities.³³⁴

In the special education context, the U.S. Department of Education Office for Civil Rights (OCR), which enforces Section 504, has refused to adopt the Supreme Court’s analysis in *Davis* as not directly applicable. In response to a question about a school district’s obligation to provide FAPE under Section 504, OCR states that there are no cost conscious limitations to a school district’s obligation.

330 29 U.S.C. § 794(a).

331 See Section 504.

332 442 U.S. 397 (1979).

333 *Id.* at 412; see also *N.M. Ass’n for Retarded Citizens (ARC) v. New Mexico*, 678 F.2d 847 (10th Cir. 1982).

334 *Dopico v. Goldschmidt*, 687 F.2d 644, 652 (2d Cir. 1982); see also *Rothschild v. Grottenthaler*, 907 F.2d 286 (2d Cir. 1990) (awarding judgment to parents under Section 504 and ordering the district to provide a sign language interpreter to enable hearing-impaired parents to participate in school-initiated conferences relating to their non-hearing-impaired children).

The key question . . . is whether OCR reads into Section 504 regulatory requirement for a free appropriate public education (FAPE) a “reasonable accommodation” standard, or other similar limitation. The clear and unequivocal answer to that is *no*.

[T]here have been no actions by the Congress, the Federal courts, or the agencies and administrative tribunals of the executive branch that would require OCR to modify § 104.33, or its interpretation thereof, to allow for some limitation of the FAPE guarantee.³³⁵

OCR distinguished other sections of the regulations under Section 504 from those governing elementary and secondary education and concluded Congress, “intended to create a different standard for elementary and secondary students than from employees or postsecondary/vocational students.”³³⁶

Section 504 also places an affirmative obligation on public elementary or secondary programs to locate and identify students with disabilities.³³⁷ This “child find” obligation must be conducted annually and must notify the person with a disability or their parent/guardian of their right to FAPE.³³⁸

B. Otherwise Qualified Individual with a Disability

The statute defines *individual with a disability* as “any person who (i) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.”³³⁹ On January 1, 2009, the ADA Amendments Act of 2008 became effective impacting the definition of *individual with a disability*

335 OCR Policy Letter to Zirkel, 20 IDELR 134, 136 (Aug. 23, 1993) (emphasis added).

336 *Id.* OCR reviewed the employment, higher education and vocational education regulations which include reasonable accommodation limitation.

337 34 C.F.R. § 104.32.

338 *Id.*

339 29 U.S.C. § 705(20)(B).

under Section 504.³⁴⁰ The Amendments to the ADA reversed prior Supreme Court rulings which limited who would be considered an *individual with a disability* under the ADA.³⁴¹ Congress’s intent was clear; the ADA must now be “construed in favor of broad coverage of individuals.”³⁴² A person’s impairment must be assessed without regard to the availability of mitigating measures such as reasonable modifications, auxiliary aids, services and devices of a personal nature, or medication. Furthermore, an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.³⁴³

C. Program or Activity

The Civil Rights Restoration Act of 1987³⁴⁴ mandates that all programs and activities of a recipient of federal funding be administered in a non-discriminatory manner. This legislation reversed a prior Supreme Court ruling limiting the scope of Section 504 to the specific program or activity receiving federal money.³⁴⁵

D. Special Education Eligibility

Although Section 504 and the IDEA are conceptually quite different, there is a large overlap between the special education coverage of both statutes. There are, however, circumstances where a pupil may be considered to have a qualifying disability under Section 504 even though he or she is not eligible for services under the IDEA. For example, a student with a disability would be protected by Section 504 even if the student does not require any special education or related services—a circumstance that would

340 The amendments to the ADA affect eligibility under Section 504 because the definition of *individual with a disability* is the same under the ADA and Section 504. See note 56 for greater discussion.

341 In essence, the Court ruled that to be considered disabled, an individual must be currently impaired, and if his or her condition can be mitigated, the person is not disabled. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Albertsons, Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999).

342 42 U.S.C. § 12102(4)(A).

343 For greater discussion of the import of the ADA Amendments Act of 2008, see Chapters _____.

344 Pub. L. No. 100-259, 102 Stat. 28.

345 *Grove City College v. Bell*, 465 U.S. 555 (1984) (citing *U.S. Dep’t of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597 (1986)).

preclude coverage under the IDEA. Furthermore, if a district determines that a student with a disability is ineligible for services under the IDEA, it must have a process in place to determine whether the student is covered by Section 504.³⁴⁶

Prior to receiving services under Section 504, a student must be given a comprehensive, individualized evaluation.³⁴⁷ The tests and evaluation materials that are used must be chosen to assess specific areas of the student's needs.³⁴⁸ Only trained people may administer the tests or evaluation materials.³⁴⁹ The student's needs and the services to be provided must be specifically identified in writing, but this does not require the development of an individualized education program (IEP),³⁵⁰ as required by IDEA.³⁵¹ However, the OCR has ruled that an IEP that meets the requirements of the IDEA also fulfills the requirements of Section 504 and Title II of the ADA for an appropriate education for a student with disabilities.³⁵² Parents have due process rights if they disagree with a district's recommendations under Section 504, including the right to an impartial hearing³⁵³ and maintenance of the current program pending resolution of the hearing.³⁵⁴

346 See U.S. Dep't of Educ. Joint Policy Memorandum, 18 IDELR 116 (1991).

347 34 C.F.R. § 104.35(a), (b).

348 See U.S. Dep't of Educ., Office for Civil Rights, Student Placement in Elementary and Secondary Schools and Section 504 of the Rehabilitation Act and Title II of the Americans With Disabilities Act (2010), available at <http://www.2.ed.gov/about/offices/list/ocr/docs/placpub.html> ("For example, a student may not be assigned to special education classes only on the basis of intelligence tests. When a student with impaired sensory, manual, or speaking skills is evaluated, the test results must accurately reflect what the test is supposed to measure and not the student's impaired skills except where those skills are what is being measured.").

349 *Id.*

350 See III.G.

351 OCR Senior Staff Memorandum dated Oct. 24, 1988, EHLR 307:01 (1988).

352 U.S. Dep't of Educ., Office for Civil Rights, note 29.

353 34 C.F.R. § 104.36.

354 OCR Policy Letter to P. Zirkel dated May 15, 1995, 22 IDELR 667 (1995).

E. Regulations

The special education regulations implementing Section 504 are found at 34 C.F.R. part 104. While these regulations are quite similar to those implementing the IDEA, one major difference is that under Section 504, the regulations expressly require a new evaluation prior to any significant change in an individual's placement.³⁵⁵ The regulations under the IDEA do not require such evaluation. The OCR, in interpreting this regulation, has ruled that a significant change in placement without a prior reevaluation would be inappropriate.³⁵⁶

F. Available Services

Under Section 504, schools must take reasonable steps to ensure that students with disabilities have access to the full range of programs and activities offered by the school.³⁵⁷ A school district is not required to make every part of every building it owns fully accessible. However, it is responsible for ensuring that all its programs are accessible to students with disabilities.³⁵⁸ In meeting this program accessibility mandate, a school does not need to make structural changes to existing facilities if other effective methods are available. However, the school must give priority to those methods that enable students with disabilities to participate "in the most integrated setting appropriate."³⁵⁹

Section 504 also requires the provision of a free appropriate public education (FAPE) to eligible students. The regulations define a FAPE as "regular or special education and related aids and services that . . . are designed to meet individual educational needs of [students with disabilities] as adequately as the

355 34 C.F.R. § 104.35(a).

356 *See, e.g., Special Sch. Dist. of St. Louis Co. (Mo.)*, EHLR 352:156 (OCR 1986).

357 *See* 34 C.F.R. §§ 104.4, 104.22, 104.34, 104.37; *Eldon (MO) R-I Sch. Dist.*, EHLR 352:145 (OCR 1986); *Beaver Dam (Wis.) Unified Sch. Dist.*, 26 IDELR 761 (OCR 1997) (access to chorus room and auditorium); *Saddleback Valley (Cal.) Unified Sch. Dist.*, 27 IDELR 376 (OCR 1997).

358 34 C.F.R. § 104.21.

359 34 C.F.R. § 104.22(b).

needs of [nondisabled] persons are met.”³⁶⁰ Services must be provided without cost to the student or to his or her parents, except where “fees . . . are imposed on [nondisabled students] or their parents.”³⁶¹

Services must be provided in the least restrictive environment (LRE). LRE means that each student with a disability is to be educated with students who are not disabled to the maximum extent appropriate. Students are to be placed in “the regular educational environment . . . unless it is demonstrated by the [school] that the education of the person in the regular environment *with the use of supplementary aids and services* cannot be achieved satisfactorily.”³⁶² This means that the school must first look at whether adding supplemental aids and services will allow the child to progress in the regular educational environment before removing the child to a more restrictive setting. For students placed in a “setting other than the regular educational environment,” the school shall take into account the “proximity of the alternate setting to the person’s home.”³⁶³ Schools that do not offer the special educational programs or facilities that may be required by a student with disabilities may refer that student to another school or educational institution.³⁶⁴ Transportation must be provided at no greater cost than would be incurred if the student were placed in the home district.³⁶⁵

The U.S. Department of Education, in a policy memorandum about attention deficit disorder (ADD), set forth a broad range of services that are available under Section 504 (note that all students with disabilities being educated under the IDEA are also covered by Section 504).³⁶⁶ That memorandum states, in pertinent part:

State educational agencies and local education agencies should take the necessary steps to promote coordination between special and regular

360 34 C.F.R. § 104.33(b)(1).

361 34 C.F.R. § 104.33(c)(1).

362 34 C.F.R. § 104.34(a) (emphasis added).

363 *Id.*

364 U.S. Dep’t of Educ., Office for Civil Rights, *supra* note 26.

365 *Id.*

366 U.S. Dep’t of Educ. Joint Policy Memorandum dated Sept. 16, 1991, 18 IDELR 116, 118 (1991).

education programs. Steps also should be taken to train regular education teachers and other personnel [in] ... the adaptations that can be implemented in regular education programs to address the instructional needs of...children. Examples of adaptations in regular education programs could include the following:

- a. Providing a structured learning environment,
- b. Repeating and simplifying instructions about in class and homework assignments,
- c. Supplementing verbal instructions with visual instructions,
- d. Using behavioral management techniques,
- e. Adjusting class schedules and modifying test delivery,
- f. Using tape recorders, computer-aided instruction and other audio-visual equipment,
- g. Selecting modified textbooks and workbooks, or
- h. Tailoring homework assignments.

Other provisions range from consultation to special resources and may include reducing class size, use of one-on-one tutorials, classroom aides and note takers, involvement of a “services coordinator” to oversee implementation of special programs and services, and possible modification of nonacademic times such as lunchroom, recess and physical education.

Section 504 also may require that the school provide an assistive technology (AT)³⁶⁷ device to enable a student with a disability to fully participate in school activities, as well as any training needed to effectively use the device.³⁶⁸ OCR has issued a number of rulings concerning the use of AT.³⁶⁹

V. Americans with Disabilities Act³⁷⁰

The ADA, which was passed in 1990 and became effective January 26, 1992, basically extends the provisions of Section 504 to other entities that do not receive federal funds. On September 15, 2010, the U.S. Department of Justice published a final rule revising the regulations implementing Titles II and III of the Americans with Disabilities Act (ADA). The amendments became effective as of March 15, 2011.³⁷¹

The ADA has five titles, two of which specifically apply to the rights of children with disabilities who are in school:

1. Title II prohibits discrimination on the basis of disability by any public entity, which includes public schools.³⁷²

³⁶⁷ See III.G.5.

³⁶⁸ U.S. Dep't of Educ. Joint Policy Memorandum dated Sept. 16, 1991, 18 IDELR 116, 118 (1991). See also *Colton Joint (CA) Unified Sch. Dist.*, 22 IDELR 895 (OCR, 1995).

³⁶⁹ *Glendale (AZ) High Sch. Dist.*, 30 IDELR 62 (OCR 1998) (Modification and adaption of a computer to enable a student with quadriplegia to use a computer without assistance); *Cobb County (GA) Sch. Dist.*, 27 IDELR 229 (OCR 1997) (use of a classroom hearing assistance device and reduction of noise levels for a student with a hearing impairment); *Newton (MA) Pub. Schs.*, 27 IDELR 233 (OCR 1997) (use of a computer for a student with mobility impairment to access the library prevented a district from having to install an elevator to make the library accessible); *Chapel Hill-Carrboro (NC) City Schs.*, 27 IDELR 606 (OCR 1997)(use of a closed-caption decoder with videotapes for students with a hearing impairment); *Bacon County (GA) Sch. Dist.*, 29 IDELR 78 (OCR 1998) (use of tutorial software and a laptop computer for a student with narcolepsy); *Alabama Dep't of Educ.*, 29 IDELR 249 (OCR 1998)(use of Arkenstone scanner to scan and read text for a student with a learning disability).

³⁷⁰ The ADA is discussed in greater detail in chapters 13, 14, 17 and 18.

³⁷¹ See ADA Handbook, p. II-10 (Equal Employment Opportunity Comm'n, U.S. Dep't of Justice, Oct. 1992). The regulations governing title II are found at 28 C.F.R. pt. 35. The regulations implementing title III are found at 28 C.F.R. pt. 36.

³⁷² 42 U.S.C. §§ 12131–12165.

2. Title III prohibits discrimination on the basis of disability by places of public accommodation.³⁷³ Private schools are specifically covered by title III;³⁷⁴ however, private schools run by religious organizations are exempt.³⁷⁵

The ADA does not distinguish in any significant way the obligations of public and private schools that receive federal funds under Section 504. In fact, OCR has determined that its investigations under Title II of the ADA would be governed by the same standard as that of Section 504.³⁷⁶

VI. New York State Law

A. New York State Human Rights Law³⁷⁷

The New York Stat Human Rights states that it is, “an unlawful discriminatory practice for an education corporation or association which holds itself out to the public to be non-sectarian and exempt from taxation pursuant to the provisions of article four of the real property tax law to . . . permit the harassment of any student or applicant, by reason of his [or her] . . . disability.”³⁷⁸

What constitutes an "education corporation or association" is not defined in the Human Rights Law. In *Matter of North Syracuse v. New York State Div. of Human Rights*, the Court of Appeals recently ruled, however, that education corporation or association “refers to only private, non-

³⁷³ 42 U.S.C. §§ 12181–12189.

³⁷⁴ 42 U.S.C. § 12181(7)(J).

³⁷⁵ 42 U.S.C. § 12187.

³⁷⁶ Title II’s relationship to Section 504 is covered by 28 C.F.R. § 35.103 of the regulation. That section of the regulation states that Title II shall not be construed to apply a lesser standard than the standards applied under Title V of the Rehabilitation Act of 1973 (which includes Section 504) or other regulations issued by Federal agencies pursuant to Title V. “[C]ongress did not intend to displace any of the rights or remedies provided by the other Federal laws (including Section 504) . . . that provide greater or equal protection to individuals with disabilities.” 28 C.F.R. § 35.103(b); 28 C.F.R. ch. 1, pt. 35, app. A., at 430 (1992). Since the Department has developed the specific FAPE standard for compliance for elementary and secondary schools under Section 504, the Title II regulation in this instance is not intended to be applied to weaken the existing Section 504 standards. OCR Policy Letter to Zirkel, 20 IDELR 134 (1993).

³⁷⁷ Executive Law § 296.

³⁷⁸ Executive Law § 296(4).

sectarian entities that are exempt from taxation under RPTL article 4.”³⁷⁹ The court concluded that the Human Rights Law grants the Division of Human Rights jurisdiction to investigate complaints only against private, non-sectarian education corporations or associations.³⁸⁰

B. New York Anti-Discrimination Regulations

Title 8, section 100.2(k) of the N.Y. Comp. Codes R. & Regs. (hereinafter “N.Y.C.R.R.”) is an anti-discrimination provision for schools in New York State. This regulation prohibits the denial of membership or participation on the basis of disability (as well as on the basis of race, sex, marital status, color, religion or national origin) in school curricular or extracurricular programs or activities. The participation of students with disabilities must be consistent with their special education needs, as determined by the committee on special education.³⁸¹

³⁷⁹ --- N.E.2d ----, 2012 WL 2092954 June 12, 2012

³⁸⁰ *Id.*

³⁸¹ The committee on special education is discussed at III.E.3.d.