OVERVIEW OF GOVERNING STATUTES AND SEMINAL CASE LAW

NYSBA Special Education Law Update – 2013

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November 2013

Pre- 1970

- US Supreme Court
  - ***Brown v. Board of Education,*** 347 US 483 (1954)
    - "…in these days it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the State has undertaken to provide it, is a right which must be made available to all on equal terms…"

1965
ESEA

- The primary means for federal support of public schools today
- renamed and passed as “No Child Left Behind” in January 2002
- 20 USC 6301 *et seq*, 34 CFR Part 200

Lawsuits of the Early 1970s

- Constitutional protections of due process and equal protection
  - “nor shall any state deprive any person of life, liberty or property without due process of law.”
  - “nor deny to any person within its jurisdiction the equal protection of the law.”

- ***Pennsylvania Association for Retarded Children v. PA*, 334 FSupp 1257 (ED Pa 1971)**
  - Parents challenged state's refusal to educate students seen as "uneducable"
  - Federal Court consent decree
    - Full access to free public education to children with mental retardation up to age 21
    - Each child is to be afforded education appropriate to his/her learning capacity
    - Established preference for least restrictive placement

- ***Mills v. Board of Education of the District of Columbia*, 348 FSupp 866(DDC 1972)**
  - Parents of students with disabilities challenged district's exclusion of their children
  - Equal right to public education
  - In form meaningful to the student
  - When school considered change in status SWD entitled to full procedural protections

Section 504 of the Rehabilitation Act of 1973

- 29 USC 794; 34 CFR 104
- No otherwise qualified individual with a disability…shall, solely be reason of his or her disability,
  - Be excluded from participation in
  - Be denied the benefits of, or
  - Be subjected to discrimination under
    - Any program or activity receiving Federal financial assistance

- Subpart D applies to
  - Preschool, Elementary, Secondary & Adult Education Programs
  - Receiving or Benefiting from Federal financial assistance for operation of program/activities
  - 34 CFR 104.31

- Prohibits intentional & unintentional discrimination
- Applies to
  - Qualified persons with disabilities
  - Persons believed to be disabled
  - Family members of persons with disabilities

- Qualified individual with disability
  - Has a physical or mental impairment which substantially limits one or more of such person's major life activities,
  - Has a record of such an impairment, or
  - Is regarded as having such an impairment

- Students with disabilities must have access to full range of the school's programs and activities
- Anti-discrimination statute, no separate funding to promote access
- Enforcement by Office for Civil Rights

- §504 compliance requirements
  - Child find
  - Free Appropriate Public Education (FAPE)
  - Least Restrictive Environment (LRE)
  - Procedural Safeguards
  - Includes nonacademic and extracurricular activities and services

1975
Family Educational Rights & Privacy Act

- 20 USC §1232g; 34 CFR Part 99
- Governs educational institutions and agencies that receive Federal DOE funding – public schools, colleges and universities
- Ensures the privacy and confidentiality of a student's educational records containing "personally identifiable information"

- Parent and eligible students have right to access to education records
- Establishes procedures for school's disclosure of a student's education records
- Parents can request amendment of student's records believed to be inaccurate, misleading or in violation of a student's privacy rights; and hearing process to challenge amendment request denial

The Americans with Disabilities Act of 1990

- 42 U.S.C. §§ 12101-12213
- Sweeping federal civil rights legislation
- Prohibiting discrimination on the basis of disability in employment, State and local government, public accommodations, commercial facilities, transportation and telecommunication
- Extends Section 504 mandates to private institutions
- Office for Civil Rights enforcement

Title II of the ADA

- applies to public elementary, secondary and postsecondary schools, regardless whether they receive Federal financial assistance
- Qualified individuals with disabilities are not excluded from or denied benefits of services, programs or activities of a public entity, or subjected to discrimination by the public entity, by reason of their disability

1975
PL 94-142
Education for All Handicapped Children Act

- Cornerstone of special education
- Guaranteed a free appropriate public education to every child with a disability across the US
- Congressional response to children with disabilities who were either excluded entirely or provided only limited access to the education system

- Free appropriate public education for every child between 3 – 21 regardless of disability
- Required parent participation
- Mandated IEP with short and long term goals and objectives
- LRE
- Nondiscriminatory testing
- Due process procedures

1997
Individuals with Disabilities Education Act Reauthorization

- “the implementation of this Act has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities..”

IDEA 1997
4 main themes

- Strengthening parental participation in the educational process
- Accountability for students' participation and success in the general education curriculum and mastery of IEP goals and objectives
- Remediation and disciplinary actions addressing behavior problems at school and in the classroom
- Responsiveness to growing needs of an increasingly more diverse society

1997 reauthorization shifts thinking from access to improving results

- High expectations, ensuring access to gen ed to maximum extent possible
- Parents to have meaningful opportunities for participation
- Special ed is a service not a place where children with disabilities are sent
- Supporting high quality professional development
- Providing pre referral interventions to reduce “labels”
- Focusing resources on teaching and learning while reducing paperwork

No Child Left Behind Act of 2001

- Accountability for the outcomes of education
- Highly qualified teachers
- Highly qualified teachers will use evidence based instruction
- Local flexibility
- Safe schools
- Parent participation and choice
- 20 USC 6301 *et seq*, 34 CFR Part 200

2004
IDEA reauthorization

- Intended to help CWD achieve high standards
- Promoting accountability for results
- Enhancing parental involvement
- Using proven practices and materials
- Providing more flexibility and reducing paperwork for teachers
- High quality FAPE
- Aligned with No Child Left Behind (NCLB)

New York Law and Regulations

- http://www.p12.nysed.gov/specialed/lawsregs/
- NYS Education Law Article 89
- 8 NYCRR Part 200 and 201

Cases

Bd. Of Educ. Of the Hendrick Hudson Cent. S.D. v Rowley, 458 US 176 (1982)

- First decision by US Supreme Court in special education case
- Comprehensive analysis of development of special education law
- Defined Free Appropriate Public Education
- Basic floor of opportunity as “benefits test”
- Access required but not strict equality of opportunity

Irving Independent School District v. Tatro, 486 US 883 (1984)

- Defined scope of related services
- Created medical exception rule
- Related services to a student with a disability include school health services

***Burlington Sch. Comm. v Massachusetts Dept. of Educ.*, 471 US 359 (1985)**

- Determination of reimbursement for unilateral placement is based on three factors
  - Did services offered by the school district provide FAPE
  - If not, were services obtained by the parents appropriate?
  - If so, are there equitable considerations to support the parents' claim for reimbursement?

Honig v. Doe, 484 US 305 (1988)

- Removed school's unilateral authority to change placement of SWD
- Temporary suspension up to ten school days
  - Cooling down period to initiate IEP review and interim placements
  - Opportunity for schools to invoke court assistance under 20 USC 1415(e)(2)
- Suspension from instruction is a change in placement and child is therefore entitled to due process
- SWD cannot be disciplined for conduct caused by disability

Daniel RR v. State Bd. of Educ., 874 F2d 1036 (5th Cir., 1989)

- First circuit court case that examined LRE
  - Whether SWD can be satisfactorily educated in the regular classroom with supplementary aids and services
  - If not, and SWD removed, has school included the SWD in school programs with nondisabled children to the maximum extent appropriate?

Zobrest v. Catalina Foothills Sch. Dist.,509 US 1 (1993)

- The First Amendment's Establishment Clause does not prohibit services of interpreter under IDEA to students in a Catholic high school

***Florence County Sch. Dist. v Shannon Carter, et al.*, 510 US 7 (1993)**

- Parent entitled to reimbursement for unilateral placement in an unapproved private school if Burlington test met.

Oberti v. BOE of the Borough of Clementon School Dist., 995 F2d 1204 *(1993)*

- Whether students with disabilities have right to be educated in general education classroom with age appropriate peers with supplemental aids and services
- Discussed term “inclusion” as concept of placing SWD in the regular education environment with supplementary aids and services to alter the educational environment and meet the child’s special needs due to his disability

***Cedar Rapids Community Sch. Dist. V. Garret F. by Charlene F.*, 526 US 66 (1999)**

- Specialized health care services that do not require a physician and are necessary for student with a disability are related, not medical services
- IDEA focuses on access to the school setting and education by SWD, rather than the cost of that education.

Schaffer ex rel. Schaffer v. Weast, 546 US 49 (2005)

- Burden of proof (includes the burden of production and the burden of persuasion) in case challenging appropriateness of an IEP is on the party seeking relief
- Shifting burden of proof to parent if parent bringing due process request
- **In 2007 NYS adopted legislation placing burden of proof on the school district, except where parent is seeking reimbursement through due process hearing.**

Oberti v. BOE of the Borough of Clementon School Dist., 995 F2d 1204 *(1993)*

- Whether students with disabilities have right to be educated in general education classroom with age appropriate peers with supplemental aids and services
- Discussed term “inclusion” as concept of placing SWD in the regular education environment with supplementary aids and services to alter the educational environment and meet the child’s special needs due to his disability

Fuentes v. Board of Education, 12 NY3d 309(2009)

- A non custodial parent lacks standing to bring a complaint on behalf of his disabled child when the custody order is silent as to educational decision making rights

New York State Bar Association

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November 6, 2013
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TABLE OF CONTENTS

I. OVERVIEW: IDEA / § 504 / ADA

a. The Individuals with Disabilities Education Act (IDEA)

i. **Overview:** Federal Legislation that guarantees children with disabilities are provided a free appropriate public education (FAPE).

ii. **Purpose:** To protect the rights of children with disabilities and their parents and ensure that all children with disabilities have available to them a FAPE that is designed to meet their unique needs and prepare them for further education, employment, and independent living, provided in conformity with a comprehensive written individualized education plan (IEP). 20 USCS § 1400.

iii. **Eligibility for IDEA services:** All students ages 3 to 21 must be provided a FAPE. Therefore, students with disabilities must have an IEP in effect by their third birthday. 34 CFR § 300.101(b). Students who receive a regular high school diploma are no longer eligible to receive FAPE; students who receive only an IEP diploma are eligible for a FAPE until the end of the school year in which they turn 21.

iv. **Qualifying Disabilities:**

1. Autism - 38 CFR § 300.8(c)(1)
2. Deaf-blindness - 38 CFR § 300.8(c)(2)
3. Deafness - 38 CFR § 300.8(c)(3)
4. Emotional disturbance - 38 CFR § 300.8(c)(4)
5. Hearing impairments - 38 CFR § 300.8(c)(5)
6. Mental retardation - 38 CFR § 300.8(c)(6)
7. Multiple disabilities - 38 CFR § 300.8(c)(7)
8. Orthopedic impairments - 38 CFR § 300.8(c)(8)
9. Other health impairment - 38 CFR § 300.8(c)(9)
10. Specific learning disability - 38 CFR § 300.8(c)(10)
11. Speech or language impairments - 38 CFR § 300.8(c)(11)
12. Traumatic brain injury - 38 CFR § 300.8(c)(12)

13. Visual impairment including blindness - 38 CFR § 300.8(c)(13)

v. **Exceptions:** A student is not deemed a child with a disability if the "determinant factor" in their disability is a "lack of appropriate instruction in reading, including in the essential components of reading instruction" (34 CFR 300.306(b)(1)(i)) or limited English proficiency or lack of math instruction (34 CFR 200.206(b)(1)(ii)-(iii)).

vi. **Uneducable students:** There is no exclusion in the law for a student who is so severely disabled that they are uneducable. All students, no matter how disabled, are entitled to a FAPE. *See* Timothy v. Rochester, NH Sch. Dist., 493 U.S. 983 (1989).

b. **§ 504 of the Rehabilitation Act (§ 504)**

i. **Overview:** § 504 of the Rehabilitation Act makes it illegal to discriminate against "handicapped" persons, including students, who are "otherwise qualified" to participate in school activities but, because of their disability, are unable to participate in the same manner as non-disabled individuals.

ii. **"Handicapped Persons":** 34 CFR § 104.3(j) defines "handicapped persons" to mean any person who:

1. has a physical or mental impairment which substantially limits one or more major life activities;

2. has a record of such an impairment; or

3. is regarded as having such an impairment.

iii. **"Major Life Activities":** 34 CFR § 104.3(j)(ii) defines "major life activities" as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." (emphasis added).

iv. **"Otherwise qualified":** 34 CFR § 104.3(l)(2)(ii) states that students who are "of school age" are "otherwise qualified" for the purposes of § 504.

v. **Important Decision – Lamkin v. Lone Jack S.D. 58 IDELR 197 (W.D. Mo. 2012):** The Court found that "a parent may not bypass the IDEA's administrative procedures by voluntarily revoking consent under the IDEA and then recasting their grievances under § 504 and the ADA." The court also noted that, in its Letter to McKethan, 25 IDELR 295 (Dec. 31, 1996), the Office of Civil Rights explained that "by rejecting the services developed under the IDEA, [a] parent would essentially be rejecting what

would be offered under Section 504. The parent could not [thereafter] compel the district to develop an IEP under Section 504 as that effectively happened when the school followed the IDEA requirements."

c. **The Americans with Disabilities Act (ADA)**

i. **Overview:** The ADA protects individuals with "disabilities" from discrimination and ensures that they have the same opportunities as individuals without disabilities to employment opportunities, to purchase goods and services, and to participate in State and local government programs and services.

ii. **"Disability":** The ADA eligibility definitions are closely aligned with § 504. However, the ADA's definition of "major life activity" is more expansive. "Major life activities" under the ADA "include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." 42 USC § 12102(2)(A). Major life activities also include the operation of "major bodily functions," which include, but are not limited to, "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." 42 USC § 12102(2)(B).

II. ELIGIBILITY FOR SPECIAL EDUCATION SERVICES

a. **"Child Find" Obligations:**

i. **IDEA:** The IDEA imposes "Child Find" obligations on school districts to put in place procedures and policies to identify, locate and evaluate children of school age (including homeless children) who require special education and related services. 34 CFR § 300.111. A failure to identify, locate and evaluate a student with a disability may result in a denial of a FAPE to that student.

ii. **§ 504:** School districts are required to "identify and locate every qualified handicapped person residing in the recipient's jurisdiction who is not receiving a public education; and (b) take appropriate steps to notify handicapped persons and their parents or guardians of the [school's duty]." 34 CFR § 104.32.

b. **Initial Evaluation:** Prior to determining whether a student is eligible for special education, a "full and individual initial" evaluation of the student must be conducted. 34 CFR § 300.301(a).

c. **Initiating Evaluation Procedures:** An evaluation may be initiated at the request of a parent or the child's school. 34 CFR § 300.301(b).

d. **Evaluation Refusals:** If a district has no reasonable basis to believe that a student has a disability, it may refuse to conduct an evaluation of that student, but must provide the parent written notice of the refusal. 34 CFR § 300.503(a)(2).

e. **Conduct of Evaluations:** The initial evaluation of a child suspected of having a disability must be conducted within 60 days of receiving parental consent for the evaluation; or, within an applicable state timeframe, if one exists. The evaluation procedures must determine whether the child is a child with a disability, as defined by 34 CFR § 300.8, and the child's educational needs. 34 CFR § 300.301(c).

f. **Independent Educational Evaluation:** The IDEA provides that if the parents of a child with a disability disagree with the results of a district's evaluation of their child, they have the right to obtain an independent educational evaluation (IEE) "conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child." 34 CFR 300.502(a). Then, the public agency must, without unnecessary delay, either:

   i. File a due process complaint to request a hearing to show that its evaluation is appropriate; or

   ii. Ensure that an IEE is provided at public expense, unless the agency demonstrates in a hearing pursuant to 34 CFR §§ 300.507 - 300.513 that the evaluation obtained by the parent did not meet agency criteria. 34 CFR § 300.502(b)(2).

III. FREE APPROPRIATE PUBLIC EDUCATION (FAPE)

a. **FAPE: IDEA / § 504 / ADA**

   i. **FAPE Under the IDEA**: The most recent IDEA provisions define a FAPE to mean: "special education and related services that (a) Are provided at public expense, under public supervision and direction, and without charge; (b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of 34 CFR §§ 300.320 - 300.324."

ii. **FAPE Under § 504 and the ADA:** § 504 states that a FAPE is the "provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the [educational setting, evaluation and placement, and procedural safeguard] requirements" of §§ 104.34 - 104.36, and are provided at no cost to the handicapped person. 34 CFR § 104.33(b). The ADA's FAPE requirement is effectively the same as that of § 504.

b. **Seminal Cases:**

i. **Bd. of Educ. of Hendrick Hudson Cent. S.D. v. Rowley, 485 U.S. 176, 203 (U.S. 1982):** In *Rowley*, SCOTUS clarified that a FAPE requires only access to educational opportunities, it makes no guarantee regarding educational results. Therefore, a school district offers a child a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." As such, a Board of Education is deemed to have provided a child a FAPE when: (1) it complies with the IDEA's procedural requirements; and (2) the student's IEP is "reasonably calculated" to enable the student to receive "some educational benefit." *See also* Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 (2nd Cir. 2005).

ii. **Polk v. Central Susquehanna Intermediate Unit, 853 F.2d 171 (3rd Cir. 1998):** The "some educational benefit" standard requires more than a *de minimis* educational benefit.

IV. INDIVIDUALIZED EDUCATION PLANS

a. **Individualized Education Program:** The IDEA requires that a student who is eligible for special education services must have an IEP created for them by a local Committee on Special Education (CSE).

b. **Committee on Special Education:** The CSE must include: the student's parent(s); regular education teacher; special education teacher; school psychologist; district representative; individual to interpret evaluation results; school physician; and, in some circumstances, an additional parent or the student. NY Educ. Law § 4402(b)(1)(a); 20 USC § 1414(d)(1)(A)-(B); 34 CFR §§ 300.20, 300.321; 8 NYCRR §§ 200.3, 200.4(d)(2).

i. If a CSE team does not contain the proper participants, the IEP it creates may be declared invalid. *See* W.G. v. Bd. of Trustees, 960 F.2d 1479 (9th Cir. 1992).

c. **Required IEP Components:** 34 CFR § 300.320(a) provides that an IEP must contain:

i. A statement of the child's present levels of academic achievement and functional performance;

ii. A statement of measurable annual goals, including academic and functional goals;

iii. A description of how the child's progress toward meeting the annual goals will be measured; and when periodic reports on the progress the child is making toward meeting the annual goals will be provided;

iv. A statement of the special education and related services and supplementary aids and services to be provided and a statement of the program modifications or supports for school personnel that will be provided;

v. An explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and nonacademic activities;

vi. A statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments; and

vii. The projected date for the beginning of the services and modifications and the anticipated frequency, location, and duration of those services and modifications.

d. **Required IEP Components - Transition Services:** 34 CFR § 300.320(b) further provides that, beginning not later than the first IEP to be in effect when a child with a disability turns 16, or younger if determined appropriate by the IEP Team, and updated annually, thereafter, the child's IEP must include:

i. Appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and

ii. The transition services (including courses of study) needed to assist the child in reaching those goals.

iii. **Transfer of rights at age of majority:** Beginning not later than one year before the child reaches the age of majority under State law, the IEP must contain a statement that the child has been informed of his/her rights, if any, that will transfer to him/her upon reaching the age of majority.

e. **Procedural Errors:** Not all IDEA procedural errors render an IEP inadequate. To deny a student a FAPE, a procedural inadequacy must have:

i. impeded the student's right to a FAPE;

ii. significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student; or

iii. caused a deprivation of educational benefits.

20 U.S.C. § 1415(f)(3)(E)(ii); 34 CFR § 300.513(a)(2); 8 NYCRR § 200.5(j)(4)(ii); *see also* Winkelman v. Parma Cty. Sch. Dist., 550 U.S. 516, 525-26 (2007).

f. **"Appropriate" vs. "Maximizing":** The IDEA "does not require states to develop IEPs that 'maximize the potential of handicapped children.' What the statute guarantees is an 'appropriate' education, 'not one that provides everything that might be thought desirable by loving parents.'" Walczak v. Florida UFSD, 142 F.3d 119, 133 (2nd Cir. 1998) (*citing* Bd. of Educ. v. Rowley, 485 U.S. 176 (1982); Tucker v. Bay Shore UFSD, 873 F.2d 563 (2nd Cir. 1989)).

g. **"Likely to produce progress":** "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.'" Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 195 (2nd Cir. 2005) (*citing* Walczak v. Florida UFSD, 142 F.3d 119 (2nd Cir. 1998)).

V. PLACEMENT DECISIONS

a. **Placement Decisions:**

i. **IDEA:** The IDEA requires that the decision regarding where a student's IEP will be implemented must be "made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options" and the placement must be in the "Least Restrictive Environment" (LRE). 34 CFR §§ 300.114-120.

ii. **§ 504:** § 504's placement requirements mirror the IDEA's placement and LRE requirements. It applies to academic settings, nonacademic settings, and extracurricular activities. 34 CFR § 104.34.

b. **"Least Restrictive Environment":** Pursuant to 34 CFR § 300.116, the placement of an individual student in the LRE must:

i. "provide the special education needed by the student;

ii. provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and

iii. be as close as possible to the student's home."

iv. ("[c]onsideration is also given to any potential harmful effect on students or on the quality of services that they need.") 34 CFR § 300.116(d).

c. **2nd Circuit LRE Test:** The Second Circuit has adopted a two-pronged test for determining whether an IEP places a student in the LRE. It considers: "[1] whether education in the general 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."

i. The first prong determination is made through an examination of factors, including, but not limited to:

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."

P. v. Newington, 546 F.3d 111, 119-20 (2nd Cir. 2008).

d. **Continuum of Alternative Placements:** Federal and New York State regulations require school districts to ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. 34 CFR § 300.115; 8 NYCRR § 200.6. The continuum of alternative placements means all of the placements where a student's special education program may be implemented.

i. **Requirements:** The continuum of alternative placements includes "instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions." It also "make[s] provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement." 34 CFR § 300.115(b).

VI. PLACEMENT DECISIONS – Functional Grouping

a. **Similarity of Individual Need:** The IDEA does not require special education students to be grouped in any particular manner. However, New York State regulations require that, for instructional purposes in special classes, students with disabilities must be "grouped by similarity of individual needs." 8 NYCRR §§ 200.1(ww)(3)(ii); 200.6(a)(3), (h)(3).

b. **Class Size & Composition:** New York State regulations further provide that "[i]n all cases the size and composition of a class shall be based on the similarity of the individual needs of the students according to:

i. levels of academic or educational achievement and learning characteristics;

ii. levels of social development;

iii. levels of physical development; and

iv. the management needs of the students in the classroom."

8 NYCRR § 200.6(h)(2); *see* 8 NYCRR § 200.1(ww)(3)(i)(a)-(d).

c. **Social & Physical Development:** The "social development" and "levels of physical development" of students with disabilities shall be considered prior to their placement in an instructional group, however these shall not be the *sole* determinants of their placement. 8 NYCRR § 200.6(a)(3)(ii), (iii).

d. **Management Needs:** Further, "the management needs of [students with disabilities] 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." 8 NYCRR § 200.6(a)(3)(iv).

e. **Nov. 1 Deadline:** New York State regulations also require that a "district operating a special class wherein the range of achievement levels in reading and mathematics exceeds three years shall . . . provide the [CSE] and the parents and teacher of students in such class a description of the range of achievement in reading and mathematics . . . in the class, by November 1st of each year." 8 NYCRR § 200.6(h)(7).

f. **NY Grouping Regs:** However, New York State regulations do not preclude a grouping of students in a classroom when the range of achievement levels in reading and math would exceed three years. *See* Application of the Dep't of Educ., SRO Appeal No. 08-018; Application of the Bd. of Educ., SRO Appeal No. 06-010; Application of a Child with a Disability, SRO Appeal No. 01-073.

VII. RELATED SERVICES

a. **Definitions:**

i. **IDEA "Related Services":** "Related services means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility

services, and medical services for diagnostic or evaluation purposes. Related services also include school health services and school nurse services, social work services in schools, and parent counseling and training." 34 CFR § 300.34.

ii. **§ 504 / ADA "Related Aids and Services":** Providing an appropriate education requires providing "regular or special education and related aids and services that are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met." 34 CFR 104.33(b)(1).

b. **OSERS Letter to Anonymous, 11/28/07 - IDEA vs. § 504:** A student with a disability who needs related services but does not require special education is not eligible to receive related services under the IDEA. However, the student may receive related services under § 504 whether or not he needs special education. 34 CFR 104.33(b). A student's eligibility for special education will be identified in his or her evaluations.

VIII. DUE PROCESS HEARINGS - Procedure

a. **Dispute Resolution:** The IDEA entitles a parent or public agency to file a due process complaint alleging a violation of the Act relating to the "identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child." The complaint must be filed within two years of the date when the parent or public agency knew or should have known of the violation. 34 CFR § 300.507(a).

b. **"Parent":** For the purposes of the IDEA, a "parent" may be:

i. "A biological or adoptive parent of a child";

ii. "A foster parent, unless State law, regulations, or contractual obligations with a State or local entity prohibit a foster parent from acting as a parent";

iii. "A guardian generally authorized to act as the child's parent, or authorized to make educational decisions for the child (but not the State if the child is a ward of the State)";

iv. "An individual acting in the place of a biological or adoptive parent (including a grandparent, stepparent, or other relative) with whom the

child lives, or an individual who is legally responsible for the child's welfare"; or

v. A properly appointed surrogate parent.

34 CFR § 300.30.

c. **"Resolution Meeting"**: Within 15 days of receiving notice of a parent's due process complaint, the district must convene a resolution meeting in order to give the parent an opportunity to discuss the reason for the complaint and give the district an opportunity to resolve it. The meeting must include a representative from the district who has decision-making authority; however the district's attorney may not participate unless the parent is also accompanied by an attorney. If, after reasonable efforts, the district is unable to obtain the parent's participation in the resolution meeting within 30 days of receiving the complaint, it may request that the hearing officer dismiss the complaint. 34 CFR §§ 300.510(a)-(b).

d. **Waiver of the Resolution Meeting:** The resolution meeting need not be held if the district and the parent waive it in writing or agree to mediation. 34 CFR § 300.510(a)(3)(i)-(ii).

e. **Due Process Hearing**: The due process hearing may occur if the district is unable to resolve the complaint within 30 days of receipt. A decision on the complaint must be reached within 45 days of the expiration of the 30-day timeframe. 34 CFR §§ 300.510(b); 300.515(a).

IX. DUE PROCESS HEARINGS – Tuition Reimbursement

a. **Seminal Case - Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 (1985):** A court may order tuition reimbursement for parents who unilaterally withdraw their child from a public school that provides an inappropriate education under the IDEA and put the child in a private school that provides an education that is otherwise proper under the IDEA, but does not necessarily meet all of the IDEA's procedural requirements. *See also* Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 (1993). A board of education may be required to pay for such educational services obtained for a student by his or her parent, if three criteria are met: (1) the services offered by the board of education were inadequate or inappropriate; (2) the services selected by the parent were appropriate; and (3) equitable considerations support the parent's claim. *See* 20 U.S.C. § 1412(a)(10)(C)(ii), (iii), (iv); 34 CFR § 300.403(c), (d), (e).

b. **Burden of Proof:** Under New York state law, "[t]he board of education or trustees of the school district or the state agency responsible for providing education to students with disabilities shall have the burden of proof, including the burden of persuasion and burden of production, in any such impartial hearing, except that a parent or person in parental relation seeking tuition reimbursement for a unilateral parental placement shall have the burden of persuasion and burden of production on the appropriateness of such placement." Educ. Law § 4404(1)(c).

c. **2nd Cir. Standard:** The Second Circuit applies the following standard to determine whether parents have met their burden of establishing the appropriateness of their unilateral placement:

    i. "No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction." Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 (2nd Cir. 2007).

d. **Equitable Considerations:** With respect to equitable considerations, the IDEA provides that reimbursement may be reduced or denied:

    i. when parents fail to raise the appropriateness of an IEP in a timely manner;

    ii. when parents fail to make their child available for evaluation by the district; or

    iii. upon a finding of unreasonableness with respect to the actions taken by the parents.

    20 U.S.C. § 1412(a)(10)(C)(iii).

X. DUE PROCESS HEARINGS - Pendency

a. **Seminal Case - Honig v. Doe, 484 U.S. 305, 323 (1988):** The pendency provision "prohibits state or local school authorities from unilaterally excluding disabled children from the classroom for dangerous or disruptive conduct growing out of their disabilities during the pendency of review proceedings . . . [and] strip[s] schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school."

b. **Then-Current Placement:** The IDEA and the New York State Education Law require that, unless otherwise agreed by a student's parents and the board of education, during the pendency of proceedings relating to the identification, evaluation or placement of a student, the student shall remain in his or her then-current educational placement.

Educ. Law §§ 4404(4), 4410(7)(c); 34 CFR § 300.518(a); 8 NYCRR § 200.5(m).

c. **Change in "Educational Placement":** The term "'educational placement' refers only to the general type of educational program in which the child is placed." As such, a change in placement "encompass[es] only decisions to transfer a child from one type of program to another." The pendency provision does not require a student to remain at a particular location or a grade level. Concerned Parents and Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. NYC Bd. of Educ., 629 F.2d 751, 753-754 (2nd Cir. 1980).

d. **2nd Circuit Definitions:** The IDEA does not define "then-current educational placement," but the Second Circuit has described three definitions of the term:

   i. "the placement described in the child's most recently implemented IEP";

   ii. "the operative placement actually functioning at the time . . . when the stay put provision of the IDEA was invoked"; and

   iii. "the placement at the time of the previously implemented IEP."

   Mackey v. Bd. of Educ., 386 F.3d 158, 163 (2nd Cir. 2004) (citing cases).

e. **Suspensions:**

   i. **Parental Notice:** "No later than the date on which . . . a decision is made to impose a suspension or removal [of a student with a disability] . . . the parent shall be notified of such decision and shall be provided [a]

procedural safeguards notice in accordance with [8 NYCRR § 200.5(f)]." 8 NYCRR § 201.7(a).

ii. **5-Day Suspension/Removal:** The board of education, a superintendent, or a building principal with authority to suspend students under Educ. Law § 3214(3)(b),(g) is authorized to order the placement in an appropriate interim alternative educational setting or suspension or of a student with a disability "for a period not to exceed five school days, and not to exceed the amount of time that a nondisabled student would be subject to suspension for the same conduct." 8 NYCRR § 201.7(b).

iii. **10-Day Suspension/Removal:** A superintendent designated to conduct a superintendent's hearing pursuant to Educ. Law § 3214(3)(c),(g) is authorized to order the placement into an interim alternative educational setting [IAES] or suspension of a student with a disability "for up to 10 consecutive school days, inclusive of any period in which the student has been suspended or removed pursuant to [§ 201.7(b)] for the same behavior . . . provided that the duration of any such suspension . . . shall not exceed the amount of time that a nondisabled student would be subject to suspension for the same behavior." 8 NYCRR § 201.7(c).

iv. **Pattern of suspensions exception:** "A student with a disability may not be removed pursuant to [§ 201.7(b),(c)] if imposition of the 5 school day or 10 school day suspension or removal . . . would result in a disciplinary change in placement based on a pattern of suspensions . . . except where the manifestation team pursuant to [§ 201.4] has determined that the behavior was not a manifestation of such student's disability." 8 NYCRR § 201.7(d).

v. **Behavior involving serious bodily injury, weapons, illegal drugs or controlled substances:** A superintendent designated to conduct a superintendent's hearing "may order the change in placement of a student with a disability to an appropriate IAES . . . for up to 45 school days, but not to exceed the period of suspension ordered by the superintendent . . . where the student:

1. has inflicted serious bodily injury . . . upon another person while at school, on school premises or at a school function; . . .

2. carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of the educational agency; or

3. knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school, on school premises or at a school function under the jurisdiction of the educational agency."

   8 NYCRR § 201.7(e)(1)(i)-(iii).

4. However, "[t]he period of suspension or removal ordered by the superintendent may not exceed the amount of time that a nondisabled student would be suspended for the same behavior." *Id.* § (e)(2).

XI. DISABILITY-BASED DISCRIMINATION/HARASSMENT/BULLYING

a. **ADA "Discrimination":** The Americans with Disabilities Act (ADA) includes under the definition of "discrimination":

   i. The use of criteria that screen out or tend to screen out an individual with a disability from fully and equally enjoying services, facilities, privileges, advantages, or accommodations;

   ii. A failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such services, facilities, privileges, advantages, or accommodations to individuals with disabilities;

   iii. A failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services;

   iv. A failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities, where such removal is readily achievable; and

   v. Where the removal of a barrier is not readily achievable, a failure to make such goods, services, facilities, privileges, advantages, or

accommodations available through alternative methods if such methods are readily achievable.

42 USC 12181(b)(2)(A).

b. **§ 504 "Discrimination":** § 504 states that it is unlawful discriminatory practice to, *inter alia*, deny a qualified handicapped person the opportunity to benefit from an aid or participate in a service; or provide them an opportunity that is different, unequal to or not as effective as one provided to others. 34 CFR § 104.4.

c. **OSEP Dear Colleague Letter:** In its Dear Colleague letter issued on Aug. 20, 2013, OSEP issued the following regarding bullying:

   i. **"Quickly and Consistently" Addressing Bullying:** When bullying of a student with a disability results in the student being denied a meaningful educational benefit, it constitutes a denial of a free appropriate public education (FAPE) which the school must remedy; however, bullying which does not rise to that level may nonetheless undermine a student's academic performance. Therefore, schools are responsible for preventing all instances of bullying "quickly and consistently."

   ii. **Disproportionate Impact:** Students with disabilities are more likely to be affected by bullying. Some students with intellectual, communication, processing, or emotional disabilities may not understand the impact of bullying behavior or may not know to inform an adult. In some circumstances, bullying of a student who has not previously been identified as a student with a disability may trigger a school's child find obligations.

   iii. **IEP Review:** When a student with a disability has been the target of bullying, the student's IEP team should convene to determine whether the student's needs have changed such that the IEP is no longer designed to provide him/her an educational benefit. If they have, the IEP team should revise their IEP accordingly. The school should also generally grant a parent's request for an IEP team meeting when the student's needs may have changed due to bullying.

   iv. **Change of Placement:** IDEA placement teams should strive to keep students who have been bullied in their original placement. A change to

the student's placement, such as placement in a more restrictive "protected" setting, may be a denial of the IDEA's requirement that the student be placed in the least restrictive environment (LRE). "Moreover, schools may not attempt to resolve the bullying situation by unilaterally changing the frequency, duration, intensity, placement, or location of the student's special education and related services."

v. **Students with disabilities who bully:** When a student with a disability engages in bullying behavior, the IEP team should determine whether additional supports or services are required to address their behavior, and should examine the environment in which the bullying occurred to determine if changes in the environment are necessary.

d. OCR Dear Colleague Letter, Oct. 26, 2010 – OCR's Harassment Standard

i. **"Harassment":** "Harassment" constitutes discrimination when it is so "severe, pervasive, or persistent [that it] interferes with or limit[s] a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school."

ii. **Harassing Conduct:** Conduct that OCR has found to be harassing includes "verbal acts and name-calling; graphic and written statements, which may include use of cell phones or the Internet; or other conduct that may be physically threatening, harmful, or humiliating. Harassment does not have to include intent to harm, be directed at a specific target, or involve repeated incidents."

iii. **Known Conduct:** Schools are responsible for addressing incidents of harassment that it knows "or reasonably should have known" about.

iv. **Responding to Harassment:** "When responding to harassment, a school must take immediate and appropriate action to investigate or otherwise determine what occurred. The specific steps in a school's investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the school, and other factors. In all cases, however, the inquiry should be prompt, thorough, and impartial."

v. **Reasonably Calculated Steps:** "If an investigation reveals that discriminatory harassment has occurred, a school must take prompt and

effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring. These duties are a school's responsibility even if the misconduct also is covered by an anti-bullying policy, and regardless of whether a student has complained, asked the school to take action, or identified the harassment as a form of discrimination."

e. **Federal Harassment Standard - Five-Part Test:** The Federal standard for liability for peer-on-peer disability harassment is:

   i. The plaintiff is an individual with a disability;

   ii. He or she was harassed based on that disability;

   iii. The harassment was sufficiently severe or pervasive that it altered the condition of his or her education and created an abusive educational environment;

   iv. The defendant knew about the harassment; and

   v. The defendant was deliberately indifferent to the harassment.

   See, e.g., T.K. v. New York City Dep't of Educ., 779 F. Supp. 2d 289 (E.D.N.Y. 2011).

f. **T.K. v. New York City Dep't of Educ., 779 F. Supp. 2d 289 (E.D.N.Y. 2011).**

   i. Plaintiffs, parents of a student with a disability, alleged that their child had been denied a FAPE because "her assigned public school did nothing to prevent her from being so bullied by other students as to seriously reduce the opportunity for an appropriate education." The court considered the then-unresolved issue in the Second Circuit of "the extent to which bullying by other students inhibits a disabled child from being educated appropriately, and what [the child's] school must do about it," and applied the following test:

   "When responding to bullying incidents, which may affect the opportunities of a special education student to obtain an appropriate education, a school must take prompt and appropriate action. It must investigate if the harassment is reported to have occurred. If harassment is found to have occurred, the school must take appropriate steps to

prevent it in the future. These duties of a school exist even if the misconduct is covered by its anti-bullying policy, and regardless of whether the student has complained, asked the school to take action, or identified the harassment as a form of discrimination."

The court held that the plaintiff provided evidence of each element of the test: (1) witnesses testified that the disabled student was isolated and the victim of harassment from her peers, therefore a factfinder could conclude that the child was the victim of bullying; (2) there was conflicting evidence of whether the principal had notice of the issue. [The IHO did not make a determination about the school personnel's notice.]; (3) the school did not provide evidence that it either investigated claims of bullying or took steps to remedy the conduct; and (4) the parents stated that the child withdrew emotionally, did not want to go to school, and suffered social scars as a result of the bullying (The school district attempted to refute this by pointing to her academic progress, however, the court noted, a student is not required to prove that she was denied all educational benefit, only that she suffered adverse educational effects as a result of bullying.).

g. **The Dignity for All Students Act (DASA):**

i. **Prohibited Discrimination/Harassment:** "No student shall be subjected to harassment or bullying by employees or students on school property or at a school function; nor shall any student be subjected to discrimination based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender, or sex by school employees or students on school property or at a school function." Educ. Law § 12(1).

XII. EXTRACURRICULAR ACTIVITIES

a. **Board's Responsibility:** Boards of Education have the responsibility to ensure that students with disabilities have the opportunity to participate in nonacademic and extracurricular activities to the maximum extent appropriate for the student's needs, including, but not limited to, "counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the school district, referrals to agencies that provide assistance to individuals with disabilities and employment of students,

including both employment by the school district and assistance in making outside employment available." 8 NYCRR § 200.2(b)(1).

b. U.S. Dep't. of Educ. "Dear Colleague" Letter 1/25/13

i. § 504 Requirements

1. Section 504 requires that qualified students with disabilities be provided an equal opportunity to benefit from a school district's educational program.

2. However, as long as they do not act discriminatorily, districts may require that a student possess a certain level or degree of skill/ability in order to participate in a selective or competitive program or activity.

3. "In general, OCR would view a school district's failure to address participation or requests for participation in extracurricular athletics for a qualified student with a disability with an IEP in a manner consistent with IDEA requirements as a failure to ensure Section 504 FAPE and an equal opportunity for participation."

ii. Generalizations and Stereotypes

1. "A school district may not operate its program or activity on the basis of generalizations, assumptions, prejudices, or stereotypes about disability generally, or specific disabilities in particular."

2. "A school district also may not rely on generalizations about what students with a type of disability are capable of—one student with a certain type of disability may not be able to play a certain type of sport, but another student with the same disability may be able to play that sport."

iii. Equal Opportunity

1. School districts that offer extracurricular athletics must afford qualified students with disabilities an equal opportunity for participation.

2. Districts may adopt bona fide safety standards but must consider whether safe participation by a student with a disability may be achieved through reasonable modifications of aids and services.

3. Schools may require a level of skill/ability for participation in athletic events but must make reasonable modifications to ensure students with disabilities have an equal opportunity to participate in an integrated manner to the maximum extent appropriate.

4. Reasonable modifications are legally required if they are necessary and would not result in a fundamental alteration of the nature of the extracurricular athletic activity or would give a player with a disability an unfair advantage over others. "Even if a specific modification would constitute a fundamental alteration, the school district would still be required to determine if other modifications might be available that would permit the student's participation."

5. Districts must also provide needed aids and services if the failure to do so would deny a disabled student an equal opportunity for participation.

iv. <u>Offering Separate or Different Athletic Opportunities</u>

1. It is discriminatory to provide separate or different services that are *unnecessary*.

2. If reasonable modifications or aids and services will not permit students with disabilities to "fully and effectively" participate in a district's existing extracurricular athletics program, the district should create additional opportunities for them (e.g. wheelchair sports).

3. If there are a sufficient number of students with disabilities to form a team, the district should consider: (1) creating a district-wide/regional team; (2) creating co-ed teams; or (3) offering "allied" or "unified" teams consisting of students with and without disabilities.

v. **NSBA 5/21/13 Request for Clarification re: "Dear Colleague" Memo Regarding Extracurricular Activities:**

1. NSBA expressed concern that, in its Dear Colleague Letter (DCL), the Office of Civil Rights (OCR) "appears to be taking a more expansive view of its authority under Section 504 to regulate the conduct of school districts."

c. **Notable Case - S.S. v. Whitesboro Cent. Sch. Dist., 2012 U.S. Dist. LEXIS 11727 (N.D.N.Y. Jan. 31, 2012):** Plaintiffs, parents of a child with a mental disability "which caused her to experience severe unannounced anxiety attacks in public places" sued a School District, Principal and Swim Coach for alleged violations of the student's rights under the ADA and § 504, alleging that the Defendants failed to make proper accommodations for her disability during high school swim practices. The claim was dismissed by the Court for several reasons, explained below. The Plaintiffs' Amended Complaint alleged that during swim practice, athletes were required "to stay in the swimming pool for 'extended periods of time,' . . . [yet] severe onsets of anxiety would trigger in [the student] thoughts of drowning, which prevented her from being able to stay in the pool for such periods of time. As a result, she would need to exit the pool during practice to ease her anxiety." It further alleged that when the student exited, she was "verbally attacked" by her coach, who threatened to kick her off the team if she did not stay in the pool. The student suffered similar anxiety attacks during swim meets, causing her to "get out of the pool and run to the restroom to ease her anxiety"; she was also told she was in jeopardy of being cut from the team on these occasions.

The Court noted that an essential requirement of swim team participation is that the swimmer must be able to swim when called upon to do so, and dismissed the Plaintiffs' claims because they "failed to allege facts plausibly suggesting that, regardless of [the student's] disability, she was otherwise qualified to meet all of the swim team's requirements." Second, "there is no reasonable accommodation that a swim team coach could make for an athlete who is suddenly and sporadically afraid of the water and thus has to exit the pool during practices and competitions," therefore the Plaintiffs had "failed to allege facts plausibly suggesting that Defendants could have made reasonable accommodations for [the student's] disability." Third, because the Plaintiffs did not allege facts plausibly suggesting that there was any occasion when [the student] was not allowed to get out of the pool [or was] kicked off the swim

team," the Defendant had provided the Plaintiffs' requested accommodation. Further, the Court held that student "does not have a right to participate in school sports teams as part of her federally protected right to education."

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NEW YORK STATE BAR ASSOCIATION
Special Education Law Update - 2013

November 6, 2013
Mt. Kisco, New York

I. Governing Statutes - Group A

- **Individuals with Disabilities Education Act (IDEA)** - affords all eligible children with disabilities the right to a free appropriate public education in the least restrictive environment. 20 U.S.C. § 1400-1482; 34 C.F.R. Part 300.

- **New York State Education Law**

  - Article 89 - vehicle for implementing IDEA requirements in New York State.

    • But note: *New York State Laws and Regulations that Differ from Federal Requirements* (OSE June 2013).[1]

    Examples:

    - CSE Membership (Additional Parent Member) - Chapter 276 of the Laws of 2012 provides that the additional parent member of the committee on special education (CSE) would be a required member of the CSE meeting if requested by the parent, the student or the district in writing at least 72 hours prior to the meeting.

    - IEP Dissemination - Chapter 279 of the Laws of 2012 allows school districts the option of giving teachers, related service providers and other service providers access to a student's individualized education program (IEP) electronically

[1]Available at: http://www.p12.nysed.gov/specialed/publications/partb-analysis-cover.htm. The New York State Education Department's Office of Special Education (OSE) was formerly referred to as the Office of Vocational and Educational Services for Individuals with Disabilities (VESID).

◦ Burden of Proof at Impartial Hearings - Chapter 583 of the Laws of 2007 was enacted to provide that the burden of proof in an impartial due process hearing is generally placed on the school district providing special education to the student. *See* N.Y. Educ. Law § 4404(1)(c).

◦ CSE Membership (Additional Parent Member) - Chapter 194 of the Laws of 2004 amended section 4402 of the Education Law to expand the pool of parents eligible to serve as the additional parent member on a CSE by authorizing persons whose disabled child is no longer eligible to receive special education services to serve on a CSE for a period of five (5) years subsequent to the declassification of their child, or the graduation of the child.

◦ IEP Dissemination - Chapter 408 of the Law of 2002 requires each public school to adopt a policy that:

✓ ensures that each regular education teacher, special education teacher and related service provider and other service providers who are responsible for the implementation of a student's IEP be given a copy of the student's IEP prior to the implementation of the student's special education program;

✓ requires that any copy of the student's IEP remain confidential and can not be redisclosed to any other person; and

✓ requires the chairperson of the CSE to designate a professional employee of the school district with knowledge of the student's disability and education program to, prior to the implementation of the IEP, inform each teacher, assistant and support staff person of his or her responsibility relating to the implementation of the IEP and the specific accommodations, modifications and supports that must be provided for the student in accordance with the IEP.

◦ Students with Disabilities at Risk of or in Residential School Placements - Chapter 600 of the Laws of 1994 requires that CSEs:

✓ provide written notification to parents/guardians of

students who are at risk of a residential school placement that the students are not entitled to receive a FAPE or to remain in a residential educational program after the age of 21 or the receipt of a high school diploma;

✓provide parents/guardians of students at risk of residential school placements with available information about community supports services for children and families;

✓ notify the local social services district when the CSE determines that a child who is receiving foster care is at risk of a future placement in residential school;

✓ request in writing that a designee of the appropriate county or State agency participate in any proceedings of the CSE when a student is at risk of a residential school placement.

○ Section 3602-c (a/k/a dual enrollment statute) - Chapter 378 of the Laws of 2007 amended section 3602-c of Education Law relating to the education of students with disabilities who are parentally placed in nonpublic elementary and secondary schools. Section 3602-c of Education Law requires the ***public school district where the nonpublic school is located*** to provide special education services to students with disabilities enrolled by their parents in nonpublic elementary and secondary schools.

• *Bay Shore Union Free Sch. Dist. v. Thomas K.*, 14 N.Y.3d 289 (2010).

In 2004, the child was attending a private school when he was referred to the district CSE. The CSE recommended that the child be classified as OHI and that he receive resource room and a 1:1 aide, but only if he were to attend the public school. The parents requested a hearing, asserting that he should be able to receive the services of the aide in the private school.

The IHO and SRO found for the parent. The school district appealed to federal court. The federal district court affirmed prompting an appeal by the school district to the 2nd Circuit. The 2nd Circuit vacated and dismissed the district court decision for lack of subject matter jurisdiction finding that the issue was one of purely state law. The school district then commenced a state court action to vacate the SRO decision.

The Court of Appeals reasoned that while the language of Education Law §3602-c does not compel on site provision of services, it allows for the provision of services on site at a private school. Here, the child could not have benefitted from the recommended 1:1 aide services unless they were delivered on site.

- **Part 200 of the Regulations of the Commissioner of Education of the State of New York** - vehicle for implementing IDEA requirements in New York State (last updated January, 2013).

- Basic Definitions

    - **Free Appropriate Public Education (FAPE)** - consists of special education and related services provided to an eligible child with a disability at public expense under public supervision or direction, and in conformity with an individualized education program that is tailored to meet the unique needs of the student. *See* 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.

        • **Special Education** - means specially designed individualized or group instruction or special services or programs provided at no cost to the parent to meet the unique needs of an eligible student with a disability. It may include instruction conducted in the classroom, homes, hospital and other settings, special classes and resource rooms, consultant teacher serves, related services, and special transportation. *See* 20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; N.Y. Educ. Law § 4401(2); 8 NYCRR § 200.1(ww).

        • **Related Services** - consist of *transportation* and such developmental, corrective and other supportive services as may be required to assist a child with a disability, including the early identification and assessment of disabling conditions in students, speech/language pathology, and audiology services; interpreting services; psychological services; physical and occupational therapy; school social work services; counseling services (including rehabilitation counseling, orientation, and mobility services); medical services for diagnostic and evaluation purposes only; parent counseling and training; school health services and school nurse services; assistive technology services, other appropriate developmental or corrective support services; appropriate access to recreation (including therapeutic recreation), and other appropriate support services. *See* 20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; N.Y. Educ. Law § 4401(2)(k); 8 NYCRR § 200.1(qq), 200.1(ss).

○ **Individualized Education Program (IEP)** - a written statement outlining the plan for providing an educational program for a disabled student based on the unique needs of that student. It must include:

• the classification of the student's disability;

• the student's present levels of academic achievement and functional performance;

• measurable annual goals consistent with the student's needs and abilities;

• how the student's progress toward meeting the annual goals will be measured and when the student's parents will be informed of that progress;

• short-term instructional objectives and benchmarks for students who take a New York State alternate assessment and for preschool students with a disability;

• recommended special education program and services;

• any testing accommodations;

• for a student participating in an alternate assessment, the reasons why the student cannot participate in a regular assessment;

• the extant to which the student will or will not participate in the regular education program or appropriate services with age-appropriate non-disabled peers;

• transition services to facilitate the student's movement from school to post-school activities, beginning no later than the first IEP to be in effect when the student is age 15;

• information necessary for the provision of services during the months of July and August to a student eligible for a 12-month service and/or program;

• the projected date for an annual review of the student's IEP;

• the student's recommended placement.

See 20 U.S.C. §§ 1401(14), 1414(d)(1)(A); 34 C.F.R. §§ 300.22, 300.320-324;

8 NYCRR §§ 200.1(y), 200.4(d)(2).

○ **Least Restrictive Environment (LRE)** - refers to the setting in which students with disabilities are educated and the obligation to ensure that, to the maximum extent appropriate, they are not placed in special classes, separate schools, or otherwise removed from the regular educational environment unless the nature and severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. *See* 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114-120; 8 NYCRR § 200.1(cc).

The placement of an individual student in the LRE shall:

(1) provide the special education needed by the student;

(2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and

(3) be as close as possible to the student's home. *See* 8 NYCRR §§ 200.1(cc), 200.4(d)(4)(ii)(b); *see also* 34 C.F.R. § 300.116.

• *P. v. Newington Bd. of Educ.*, 546 F.3d 111 (2d Cir. 2008). To apply the principles described above, the Second Circuit has adopted a two-pronged test for determining whether an IEP places a student in the LRE, considering:

(1) whether education in the general education classroom, with use of supplemental aids and services, can be achieved satisfactorily for a given student and, if not;

Factors:

✓ whether the school district has made reasonable efforts to accommodate the child in a regular classroom;

✓ 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

✓ the possible negative effects of the inclusion of

the child on the education of other students in the class.

(2) whether the school has mainstreamed the student to the maximum extent appropriate.

• *Briggs v. Board of Educ.*, 882 F.2d 688, 692 (2d Cir. 1989) - LRE must be balanced against the requirement that each student receive an appropriate education.

- School District Responsibilities
  - Provide eligible students with a FAPE in the LRE appropriate to meet their individual needs in conformity with their IEP. *See* 20 U.S.C. §§ 1401(3), 1412(a)(1)(A), (3), (4), (5)(A); 34 C.F.R. §§ 300.101-02; *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982).
  - Identify, locate and/or evaluate, and maintain information about all children with disabilities who reside, or attend private school, within their districts. *See* 20 U.S.C. §§ 1412(a)(3)(A), (10)(A)(ii); 34 C.F.R. §§ 300.111, 300.131; N.Y. Educ. Law §§ 3602-c(2-a), 4402(1)(a); 8 NYCRR § 200.2(a)(1).
  - Establish a CSE/CPSE to assure timely identification, evaluation and placement of eligible students. *See* 20 U.S.C. §§ 1414(b)(4)(A), (d)(1)(B); 34 C.F.R. § 300.321; N.Y. Educ. Law §§ 4402(1)(b), 4410(3), 8 NYCRR §§ 200.3(a), (c).
  - Ensure that testing and evaluation materials and procedures for identifying and placing children with disabilities meet the requirements of federal and state law and regulations and are neither racially nor culturally discriminatory. *See* 20 U.S.C. §§ 1412(a)(7), 1414(a), (b), (c); 34 C.F.R. §§ 300.304-305; 8 NYCRR § 200.4(b)(6).
  - Arrange for special education programs and services based upon completion of a student's IEP and the recommendation of the CSE or CPSE. *See* 8 NYCRR §§ 200.2(d), 200.16(f).
  - Provide procedural safeguards for children with disabilities and their parents. *See* 20 U.S.C. § 1415; 34 C.F.R. §§ 300.500-520; 8 NYCRR § 200.5.
- Procedural Safeguards
  - Prior written notice a reasonable time before the district proposes or refuses to

initiate or change the identification, evaluation, or educational placement of the student, or the provision of a FAPE.

- ○ Notice of procedural safeguards

- ○ Consent to evaluations and reevaluations, the initial provision of services, and the release of the student's personally identifiable information.

- ○ Access to examine the student's educational records.

    - • Note - IHOs lack subject matter jurisdiction over FERPA disputes. *See, e.g., Application of a Student with a Disability* (New York City Dep't of Educ.), Appeal No. 08-106 at 2-3 (SRO Nov. 19, 2008).

- ○ Meaningfully participate in CSE/CPSE meetings, accompanied by such individuals as the parent may desire.

- ○ Receive at least five (5) days notice of committee meetings.

- ○ Obtain an independent educational evaluation (IEE)

- ○ An opportunity to present and resolve complaints, participate in mediation, and initiate due process hearings, appeal to the State Review Officer, and initiate civil actions in state or federal courts related to the identification, evaluation or placement of the student, or the provision of FAPE.

- ○ Have the student "stay-put" in his or her current educational placement during the pendency of due process proceedings.

- ○ Attorneys' fees.

See 20 U.S.C. §§ 1414(b), (d)(2), 1415; 34 C.F.R. §§ 300.500-520; 8 NYCRR § 200.5.

☞ **Practice Point - Application of Governing Statute (IDEA):**

A FAPE is offered to a student when: (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits.[2]

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[2]*See Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206-207 (1982); *R.E. v. New York City Dep't of Educ.*, 694 F.3d 167, 189-190 (2d Cir. 2012); *M.H. v. New York City Dep't of Educ.*, 685 F.3d 217, 245 (2d Cir. 2012); *Cerra v. Pawling Cent. Sch. Dist.*, 427 F.3d 186, 192 (2d Cir. 2005).

Not all procedural errors render an IEP legally inadequate under the IDEA.[3]

Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies: (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits.[4]

II. Governing Statutes - Group B

- **Section 504 of the Rehabilitation Act of 1973** - prohibits discrimination on the basis of disability. 29 U.S.C. 706, 794-794(a); 34 C.F.R. Part 104.

  - "No otherwise qualified individual with a disability in the United States, as defined in Section 706(8) of this title, 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"

  - Qualified individual with a disability

    • Eligibility Test - a person who has a ***physical or mental impairment*** that ***substantially limits*** one or more of his or her ***major life activities***; has a record of such an impairment; or is regarded as having such an impairment. This test is functionally the same as that of the ADA.

    • This test was modified by the ADA Amendments Act of 2008 (see below).

  - Distinguish from IDEA

    • All educationally disabled students under IDEA are also disabled within the definitions of Section 504/Title II of the ADA.

    • All Section 504/ADA student are not educationally disabled within in

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[3]*See M.H.*, 685 F.3d 245; *A.C. v. Board of Educ. of the Chappaqua Cent. Sch. Dist.*, 553 F.3d 165, 172 (2d Cir. 2009); *Grim v. Rhinebeck Cent. Sch. Dist.*, 346 F.3d 377, 381 (2d Cir. 2003).

[4]*See* 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. 300.513(a)(2); 8 NYCRR § 200.5(j)(4)(ii); *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 525-526 (2007); *R.E.*, 694 F.3d at 190, *M.H.*, 685 F.3d at 245; *A.H. v. Dep't of Educ.*, 2010 WL 3242234, at *2 (2d Cir. Aug. 16, 2010); *E.H. v. Board of Educ.*, 2008 WL 3930028, at *7 (N.D.N.Y. Aug. 21, 2008), *aff'd*, 2009 WL 3326627 (2d Cir. Oct. 16, 2009); *Matrejek v. Brewster Cent. Sch. Dist.*, 471 F. Supp. 2d 415, 419 (S.D.N.Y. 2007), *aff'd*, 2008 WL 3852180 (2d Cir. Aug. 19, 2008).

the meaning of IDEA.

○ School District Regulatory Duties

• Duty to identify and locate Section 504 eligible students. 34 C.F.R. § 104.32.

• Duty to notify eligible students and their parents or guardians of the school's duty towards them. 34 C.F.R. § 104.32.

• Duty to evaluate students prior to placement decisions regarding school district programs. 34 C.F.R. §§ 104.35(a), (b).

○ Evaluation Procedures:

✓ tests and other evaluation materials must be validated for the specific purpose for which they are used and are administered by trained personnel in conformance with the instructions provided by their producer, 34 C.F.R. § 104.35(b)(1);

✓ tests and other evaluation materials must include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient, 34 C.F.R. § 104.35(b)(2);

✓ tests must be selected and administered so as to best ensure that, when a test is administered to a student with impaired sensory, manual or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the student's impaired sensory, manual or speaking skills (except where those skills are the factors that the tests purports to measure), 34 C.F.R. §104.35(b)(3).

○ Revaluation - a school district shall establish procedures for periodic reevaluation of students who have been provided special education and related services. A reevaluation procedure consistent with IDEA is one means of meeting this requirement. 34 C.F.R. § 104.35(d).

○ Consent to evaluate - parental consent is required prior to the conduct of initial student evaluation procedures for the identification, diagnosis and prescription of special education services. Subsequent student evaluations, however, are not subject

to parental consent. *See Letter to Durheim*, 27 IDELR 380 (OCR 1997).

○ Interpreting evaluative data - a school district shall, in making placement decisions:

✓ draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, 34 C.F.R. § 104.35(c)(1);

✓ establish procedures to ensure that information obtained from all sources is documented and carefully considered, 34 C.F.R. § 104.35(c)(2);

✓ ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, 34 C.F.R. § 104.35(c)(3).

✓ ensure that the placement decision is made in conformity with Section 104.34 - educational setting, 34 C.F.R. § 104.35(c)(4).

• Duty to provide eligible students with a free appropriate public education ("FAPE"). 34 C.F.R. § 104.33(a).

☞ FAPE is defined under these regulations as the provision of regular or special education and related aids and services that are designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met. Implementation of an IEP developed in accordance with IDEA is one means of meeting the FAPE standard under Section 504. 34 C.F.R. § 104.33(b)(2).

• Duty to provision eligible students with a residential placement as appropriate. 34 C.F.R. § 104.33(c)(3).

○ Rights of Eligible Students

• Right to program access with no fee charges greater than charged regular students. 34 C.F.R. § 104.33(c)(1).

• Right of equal access to school transportation. 34 C.F.R. § 104.33(c)(2).

- Right to be placed in the least restrictive environment. 34 C.F.R. § 104.34(a).

- Right to maximum extent appropriate to be integrated with regular students. 34 C.F.R. § 104.34(b).

- Right to non-discriminatory testing procedures. 34 C.F.R. § 104.35(b)

- Right of equal access to extra-curricular activities. 34 C.F.R. § 104.37(a).

- Right of equal access to counseling services. 34 C.F.R. § 104.37(b).

- Right of equal access to physical education and sports. 34 C.F.R. § 104.37(c).

- Right of equal access to preschool and adult education services. 34 C.F.R. § 104.38.

☞ Section 504 rights are distinguishable from IDEA FAPE rights in that the duty to give even-handed treatment for program access purposes under Section 504 does not mandate substantial changes to the programs. *See J.D. v. Pawlet Sch. Dist.*, 224 F.3d 60, 70-71 (2d Cir. 2000); *but see Letter to Zirkel*, 20 IDELR 134 (OCR 1993) (qualified students shall always be considered qualified for programs regardless of cost and the necessity of making substantial programmatic changes).

○ Procedural Safeguards - a school district must establish and implement for the identification, evaluation, and educational placement of disabled students a system of procedural safeguards that includes notice, and opportunity for the parents or guardian of the student to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel and a review procedure. Compliance with the procedural safeguards of IDEA is one means of meeting this requirement (for educationally disabled students). 34 C.F.R. § 104.36.

● **Title II of the Americans with Disabilities Education Act (ADA)** - prohibits discrimination on the basis of disability. 42 U.S.C. § 12101-12213.

○ On September 25, 2008, the Americans with Disabilities Amendments Act of 2008 (ADAA) was signed into law. The amendments became effective January 1, 2009.

○ The ADAA was passed to overturn the United States Supreme Court rulings in *Sutton v. United Air Lines* and *Toyota Motor Mfg. v. Williams*, as well as EEOC regulations which, in Congress' view, were inconsistent with the congressional intent of the ADA and which set too high a standard for eligibility.

○ Qualified individual with a disability

• Eligibility Test - a person who has a ***physical or mental impairment*** that ***substantially limits*** one or more of his or her ***major life activities***; has a record of such an impairment; or is regarded as having such an impairment.

• ***Physical or Mental Impairment*** - any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs cardiovascular; reproductive, digestive, genitourinary; hemic and lymphatic; skill and endocrine; or any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

○ ADA regulations further specify: such contagious and noncontagious diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addition and alcoholism.

• ***Substantially Limits***

○ An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

○ An impairment that is *episodic* or in *remission* is a disability if it would substantially limit a major life activity when active.

○ The determination of whether an impairment substantially limits a major life activity shall be made *without regard to the ameliorative effects of mitigating measures* such as:

✓ medication, medical supplies, equipment, or appliances,

low vision devices (not including ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;

✓ use of assistive technology;

✓ reasonable accommodations or auxiliary aids or services[5]; or

✓ learned behavioral or adaptive neurological modifications.

✓ The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.[6]

• ***Major Life Activity*** - the ADAA sets forth a nonexclusive list of major life activities, including: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, *learning, reading, concentrating, thinking, communicating*, and working.

  ○ The ADAA also provided that major life activities include *major bodily functions*, including but not limited to: functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

• ***Record of Impairment*** - an individual has a record of such impairment if he/she has a history of, or has been misclassified as having a mental or physical impairment that substantially limits one or more major life activities.

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[5]The term "auxiliary aids and serves" includes: (1) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments; (2) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments; (3) acquisition or modification of equipment or devices; and (4) other similar services and actions.

[6]The term "ordinary eyeglasses or contact lenses" means lenses that are intended to fully correct visual acuity or eliminate refractive error. The term "low vision devices" means devices that magnify, enhance, or otherwise augment a visual image.

• ***Regarded as Having Impairment*** - defined by the ADAA as being subjected to an action prohibited by this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

III. Governing Statutes - Group C

- **Section 1983 liability** - arises under section 1983 of the Civil Rights Act of 1876 (42 U.S.C. § 1983). Liability can attach to a school district itself or to school officials who: (1) **acting under color of state law**, (2) **deprive a person of his or her federal constitutional and/or statutory rights**. *See Monnell v. Department of Social Servs.*, 436 U.S. 658 (1978).

  ○ A parent's ability to use Section 1983 to seek relief under IDEA depends on the Circuit Court of Appeals in which the school district is located.

  • The First, Third, Fourth, Ninth and Tenth U.S. Circuit Courts of Appeals have all held that Section 1983 is ***not*** available to remedy violations of the IDEA, regardless of the type of relief sought.

  • Only the Second and Seventh U.S. Circuit Courts of Appeals have consistently held that parents can bring Section 1983 actions for IDEA violations. *See Mrs. W. v. Tirozzi*, 559 IDELR 184 (2d Cir. 1987).

  ○ Parents seeking to use Section 1983 to enforce IDEA rights must first exhaust IDEA administrative remedies. *See* 20 U.S.C. § 1415(f); *J.S. v. Attica Cent. Schools*, 386 F.3d 107, 112 (2d Cir. 2004).

  ○Basis of Liability - School District

  • School officials who allegedly deprived the plaintiff of a federal constitutional or statutory right acted pursuant to an official district policy or custom. *See Jeffes v. Barnes*, 208 F.3d 49 (2d Cir. 2000).

  [OR]

  • The conduct underlying the alleged unlawful deprivation was undertaken or caused by an official whose actions represent official policy. *See Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989).

  ○Basis of Liability - School Official - may be liable as individuals under section 1983 if they acted under color of state law and their actions caused the deprivation of a federal constitutional or statutory right. *See Monroe v.*

Pape, 365 U.S. 167 (1961).

• Absolute Immunity - school board members have absolute immunity in connection with lawsuits arising out of their performance of legislative activities. *See Bogan v. Scott-Harris*, 523 U.S. 44 (1998).

• Qualified Immunity - school board members and district employees enjoy qualified immunity that protects them from liability when their actions or their performance of discretionary functions do not violate a clearly established constitutional or statutory right of which a reasonable person would have known. *See Davis v. Scherer*, 768 U.S. 183 (1984); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

◦ Second Circuit's three-step inquiry:

✓ Has the plaintiff alleged a violation of a constitutional right?

✓ If yes, was that right "clearly established" at the time of the alleged violation of that right?

✓ If a clearly established, constitutionally protected right was violated, were the defendant's actions "objectively reasonable?"

This inquiry should be followed in sequential order, since a plaintiff's failure to establish any one part typically will result in a grant of qualified immunity to the defendant. *See Harhay v. Town of Ellington Bd. of Educ.*, 323 F.3d 206 (2d Cir. 2003).

○Theories of Liability

• Deliberate Indifference - will be found both when governmental response to known discrimination is unreasonable in light of the known circumstances and when remedial action only follows after a lengthy and unjustified delay. *See Hayut v. State Univ. of New York*, 352 F.3d 733 (2d Cir. 2003).

• Special Relationship - limited to cases where the government has deprived individuals of their liberty and ability to defend themselves as in the case of prisoners and involuntary institutionalized patients. *See DeShaney v. Winnebago County*

Dep't of Social Serv., 489 U.S. 189 (1989).

- Generally, state compulsory education laws do ***not*** give rise to a special relationship. *See Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246 (2d Cir. 2001).

- Violation of Substantive Due Process Rights - requires a showing of egregious conduct which goes beyond merely offending some fastidious squeamishness or private sentimentalism and can fairly be viewed as so brutal and offensive to human dignity as to shock the conscience. *See Smith v. Half Hollow Hills Cent. Sch. Dist.*, 298 F.3d 168 (2d Cir. 2002).

- State Created Danger - applies in cases where state actors:

  - created a substantially dangerous environment;

  - knew of the danger; and

  - used state authority to create an opportunity that would not have otherwise existed for the injury to occur. *See Dwares v. New York*, 985 F.2d 94 (2d Cir. 1993).

- Remedies

Non-monetary

- Parents ***cannot*** utilize a Section 1983 claim in order to challenge the contents of an IEP. *Luo v. Baldwin Union Free Sch. Dist.*, 60 IDELR 281 (E.D.N.Y. 2013).

Monetary

- The U.S. Supreme Court has ***not*** explicitly decided whether parents can seek monetary damages for FAPE violations.

- A majority of Circuit Courts agree that awards of compensatory or punitive (monetary) damages are ***not*** available under the *IDEA. See, e.g., Cave v. East Meadow Union Free Sch. Dist.*, 49 IDELR 92 (2d Cir. 2008).

- A number of Circuit Courts have held that monetary damages ***are*** available under *Section 504. See, e.g., Mark H. v. Lemahieu*, 49

IDELR 91 (9th Cir. 2008). Parents, however, cannot simply plead a violation of the IDEA. Instead, they must allege that the school district failed to provide "regular or special education and related aids and services" designed to meet the needs of student with disabilities as adequately as the need of their non-disabled peers – the FAPE standard under Section 504.

- A handful of district courts have held that parents ***can*** recover monetary damages under *Section 1983* for IDEA violations. *See, e.g., Zahran v. Board of Educ. of the Niskayuna Cent. Sch. Dist.*, 41 IDELR 122 (N.D.N.Y. 2004); *R.B. v. Board of Educ. of the City of New York*, 32 IDELR 226 (S.D.N.Y. 2000).

Appendix B

DOCUMENTATION OF THE DETERMINATION OF ELIGIBILITY FOR A STUDENT SUSPECTED OF HAVING A LEARNING DISABILITY

Section 200.4(j)(5) of the Regulations of the Commissioner of Education requires that the committee on special education (CSE) prepare a written report of the determination of eligibility of a student suspected of having a learning disability that contains a statement of the following information:

1. The CSE has reviewed the individual evaluation results for _____, which indicate that the student:
   - ❑ has a learning disability requiring special education services.
   - ❑ does not have a learning disability.

2. This decision was based on the following sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the student's physical condition, social or cultural background, and adaptive behavior in accordance with section 200.4(c)(1) of the Regulations:

3. The relevant behavior noted during the observation of the student and the relationship of that behavior to the student's academic functioning indicate:

4. The educationally relevant medical findings, if any, indicate:

5. To ensure that underachievement in a student suspected of having a learning disability is not due to lack of appropriate instruction in reading or mathematics, the CSE must, as part of the evaluation procedures pursuant to section 200.4(b) and (c), consider:
   - ❑ data that demonstrate that prior to, or as part of, the referral process, the student was provided appropriate instruction in regular education settings, delivered by qualified personnel.

   AND

   - ❑ data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, which was provided to the student's parents.

6. The CSE has determined, consistent with section 200.4(j)(3) of the Regulations, that:

   ❑ the student does not achieve adequately for the student's age or to meet State-approved grade-level standards in one or more of the following areas: oral expression, listening comprehension, written expression, basic reading skills, reading fluency skills, reading comprehension, mathematics calculation, mathematics problem solving;

   AND

   ❑ the student either does not make sufficient progress to meet age or State-approved grade-level standards in one or more of the areas identified in this paragraph when using a process based on the student's response to scientific, research-based intervention pursuant to section 100.2(ii);

   OR

   ❑ exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade level standards or intellectual development that is determined by the CSE to be relevant to the identification of a learning disability, using appropriate assessments consistent with section 200.4(b).

   AND

   ❑ the student's learning difficulties are not primarily the result of a visual, hearing or motor disability; mental retardation; emotional disturbance; cultural factors; environmental or economic disadvantage; or limited English proficiency.

7. Complete this item if the student has participated in a process that assesses the student's response to scientific, research-based intervention.

   ❑ The following instructional strategies were used and student-centered data was collected:

   AND

   ❑ Document how parent's were notified about the amount and nature of student performance data that will be collected and the general education services that will be provided; strategies for increasing the student's rate of learning; and the parents' right to request an evaluation for special education programs and/or services.

8. CSE Member Certification of the Determination of a Learning Disability:

   The determination of eligibility for special education for a student suspected of having a learning disability must be made by the CSE, which must include the student's regular education teacher and a person qualified to conduct individual diagnostic examinations of students (such as a school psychologist, teacher of speech and language disabilities, speech/language pathologist or reading teacher). Each CSE member must certify in writing whether the report reflects his or her conclusion. If not, the member must submit a separate statement presenting his or her conclusions.

Title	Signature	Agree	Disagree
District Representative	_____	❑	❑
Parent of Student	_____	❑	❑
Regular Education Teacher	_____	❑	❑
Special Education Teacher	_____	❑	❑
School Psychologist	_____	❑	❑
Parent Member	_____	❑	❑
Others: Specify	_____	❑	❑
	_____	❑	❑
	_____	❑	❑

Date: _____

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INDIVIDUALIZED EDUCATION PROGRAM (IEP), MEETING NOTICE AND PRIOR WRITTEN NOTICE (PWN)

Summary Extract
NYS Education Department (NYSED) Guidance Documents
with Basic References to Regulations of the NYS Commissioner of Education

I. LEGAL CONTEXT

A. A purpose behind the Federal Individuals with Disabilities Education Act (IDEA) is to ensure that students with disabilities have available to them a Free Appropriate Public Education (FAPE). 20 U.S.C. §1400(d)(1)(A). A FAPE includes special education and related services designed to meet the student's unique needs, provided in conformity with a comprehensive written IEP. 20 U.S.C. §1401(9). *See* 20 U.S.C. §1414(d). The appropriateness of an IEP is determined by assessing whether it was reasonably calculated to provide educational benefit at the time the IEP was formulated, not in hindsight. *Antonaccio v. Bd. of Educ.*, 281 F.Supp.2d 710, 724-25 (S.D.N.Y. 2003); *Application of the Board of Education of Harrison CSD*, Appeal No. 04-34 (SRO 2004). In *Walczak v. Florida Union Free School District*, 142 F.3d 119 (2nd Cir. 1998), the United States Court of Appeals, Second Circuit, observed that "[t]he [Individuals with Disabilities Education Act] does not itself articulate any specific level of educational benefits that must be provided through an individualized education program." *Id.*, at 130. Further, as noted in *Walczak*, *supra*, a hearing officer or court must examine the record for "any objective evidence indicating whether the child is likely to produce progress, not regression." *Walczak*, 142 F.3d at 130 (*quoting Mrs. B. v. Milford Bd. of Educ.*, 103 F.3d 1114, 1121 (2d Cir. 1997)). Objective evidence of progress is most easily interpreted in the form of grades in mainstream classes, but test scores and similar objective measures can be considered. *Grim v. Rhinebeck Central School District*, 346 F.3d 377 (2d Cir. 2003) (*quoting Walczak*, 142 F.3d at 130).

II. STUDENT SUMMARY FORM FOR IEP

A. NYSED Model Student Summary Form is discretionary and can be modified by District to add or replace suggested fields.

B. Medical Information/Current Medications

1. In light of a student's right to confidentiality of medical information, NYSED has indicated that the IEP and Student Summary Form should only include health-related information, including current medications, that school personnel would need to know to implement the IEP.

C. Changes to the Student Summary Form are not considered to be an amendment to the IEP.

III. INDIVIDUALIZED EDUCATION PROGRAM (IEP)

A. NYSED Model IEP Form must be used. The only permissible changes to the appearance or content of the Model IEP Form are:

1. Rows may be added or deleted within Sections of IEP as needed.

2. District must select as appropriate the "Measurable Annual Goals" Section of the IEP or the "Alternate Section For Students Whose IEPs Will Include Short-Term Instructional Objectives And/Or Benchmarks (Required for Preschool Students and for School-Age Students Who Meet Eligibility Criteria to take NYS Alternate Assessment)."

3. For students who do not require post-school transition planning (preschool & elementary age students), can delete "Measurable Post-Secondary Goals" and "Coordinated Set of Transition Activities."

4. Can add student's name or other identifying information to each page of IEP.

5. All other Sections of the IEP must appear for each student, whether or not there are recommendations to be documented.

B. NYSED Model Form is designed and intended to serve as a guide for the CSE's development of the IEP. CSE meetings should proceed in the order of the Sections of the Model IEP.

1. Exception: The "Disability Classification" Section appears at the top of the first page of the IEP. Whether student is or continues to be eligible for classification as a student with a disability should be determined at every CSE meeting after reviewing the information for

the "Present Levels of Performance and Individual Needs" Section of the IEP.

2. CSE Meetings should be conducted in the following order – following along with the Model IEP:

   a. Review the information for the "Present Levels of Performance and Individual Needs" Section. 8 NYCRR §200.4(d)(2)(i).

      (1) Review evaluations/reports, test results and state and district-wide assessments.

         (a) Individual evaluation means any procedures, tests or assessments used selectively with an individual student to determine whether a student has a disability and the extent of his/her special education needs, but does not include basic tests administered to, or procedures used with, all students in a school grade or class. 8 NYCRR §200.1(aa).

         (b) The initial individual evaluation shall be completed within 60 days of receipt of consent unless extended by mutual agreement of the student's parents and the CSE. The individual evaluation shall include a variety of assessment tools and strategies, including information provided by the parent, to gather relevant functional, developmental and academic information about the student that may assist in determining whether the student is a student with a disability and the content of the student's IEP, including information related to enabling the student to participate and progress in the general education curriculum. The individual evaluation must be at no cost to the parent, and the initial evaluation must include at least:

            - a physical examination;
            - an individual psychological evaluation, except when a school psychologist determines after an assessment of a school-age student that further evaluation is unnecessary;
            - a social history;
            - an observation of the student in the student's learning environment (including the regular classroom setting) to document the student's academic performance and behavior in the areas of difficulty; and

- other appropriate assessments or evaluations, including a functional behavioral assessment for a student whose behavior impedes his or her learning or that of others, as necessary to ascertain the physical, mental, behavioral and emotional factors which contribute to the suspected disabilities. 8 NYCRR §200.4(b)(1).

(c) A CSE shall arrange for an appropriate reevaluation of each student with a disability if the school district determines that the educational or related services needs, including improved academic achievement and functional performance of the student, warrant a reevaluation or if the student's parent or teacher requests a reevaluation, but not more frequently than once a year unless the parent and representatives of the school district appointed to the CSE agree otherwise; and at least once every three years, except where the school district and the parent agree in writing that such reevaluation is unnecessary. 8 NYCRR §200.4(b)(4).

(2) Review student's then current functioning (levels, strengths and/or needs, including consideration of parent concern as appropriate) in:

- academic achievement, functional performance and learning characteristics;
- social development;
- physical development; and
- management needs.

(3) Discuss effect of student's needs on involvement and progress in the general education setting

b. Determine whether student is or continues to be eligible for classification as a student with a disability and, if so, designate the appropriate classification in the "Disability Classification" Section. 8 NYCRR §200.4(d)(2)(ii).

(1) The areas of classification are Autism, Deafness, Deaf-Blindness, Emotional Disturbance, Hearing Impairment, Learning Disability, Intellectual Disability, Multiple Disabilities, Orthopedic Impairment, Other Health-Impairment, Speech or Language Impairment, Traumatic

Brain Injury and Visual Impairment including Blindness. 8 NYCRR §200.1(zz).

c. Answer the specific questions listed in the "Student Needs Relating to Special Factors" Section. 8 NYCRR §200.4(d)(3). These questions whether there are:

(1) Any needed strategies and supports to address behaviors that impede student's learning or that of others.

- Positive Behavioral Interventions and Supports (PBIS) is a research-based approach for schools and districts which is used to teach positive behavior to all students and offers additional behavioral support for students with or at risk of developing socially challenging behaviors. PBIS focuses on creating and sustaining primary (school-wide), secondary (classroom), and tertiary (individual) systems of support that improve results for all students by reducing problem behavior and increasing positive behavior.

- Behavioral Intervention Plan (BIP) means a plan that is based on the results of a Functional Behavioral Assessment (FBA) and, at a minimum, includes a description of the problem behavior, global and specific hypotheses as to why the problem behavior occurs and intervention strategies that include positive behavioral supports and services to address the behavior. 8 NYCRR §200.1(mmm).

- FBA means the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment. The FBA shall include, but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it. 8 NYCRR §200.1(r).

(2) Any needed special education services to address IEP related language needs for Limited English proficiency student.

(3) Any needed Braille instruction for blind or visually impaired student.

(4) Any needed communication device or service for student, plus various considerations for any needed device or service for deaf or hard of hearing student.

(5) Any needed assistive technology device and/or service.

d. For students beginning not later than the first IEP to be in effect when the student is age 15 (and at a younger age, if determined appropriate), develop the "Measurable Postsecondary Goals" Section. 8 NYCRR §200.4(d)(2)(ix).

(1) The measurable postsecondary goals are based upon age appropriate transition assessments relating to training, education, employment and, where appropriate, independent living skills. 8 NYCRR §200.4(d)(2)(ix)(b).

(2) Include a statement of the transition service needs of the student that focuses on the student's courses of study, such as participation in advanced-placement courses or a vocational education program. 8 NYCRR §200.4(d)(2)(ix)(a).

e. Develop the "Measurable Annual Goals" Section or the "Alternate Section For Students Whose IEPs Will Include Short-Term Instructional Objectives And/Or Benchmarks." 8 NYCRR §200.4(d)(2)(iii)-(iv).

(1) The IEP shall list measurable annual goals, including academic and functional goals, consistent with the student's needs and abilities. The measurable annual goals must relate to: (1) meeting the student's needs that result from the student's disability to enable the student to be involved in and progress in the general education curriculum; and (2) meeting each of the student's other educational needs that result from the student's disability. 8 NYCRR §200.4(d)(2)(iii).

(2) For a student who takes a New York State alternate assessment, the IEP shall include a description of the short-term instructional objectives and/or benchmarks

that are the measurable intermediate steps between the student's present level of performance and the measurable annual goal. 8 NYCRR §200.4(d)(2)(iv).

f. Complete the "Reporting Progress to Parents" Section. 8 NYCRR §200.4(d)(2)(iii)(c).

(1) Identify when periodic reports on the progress the student is making toward the annual goals (such as through the use of quarterly or other periodic reports that are concurrent with the issuance of report cards) will be provided to the student's parents. 8 NYCRR §200.4(d)(2)(iii)(c)..

g. Discuss and make recommendations, as appropriate, in the "Recommended Special Education Programs and Services" Section. 8 NYCRR §200.4(d)(2)(v).

(1) Special education program.

- Students with disabilities shall be provided special education in the least restrictive environment. 8 NYCRR §200.6(1)(a).

- Least restrictive environment means that placement of students with disabilities in special classes, separate schools or other removal from the regular educational environment occurs only when the nature or severity of the disability is such that even with the use of supplementary aids and services, education cannot be satisfactorily achieved. The placement of an individual student with a disability in the least restrictive environment shall: (1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; an (3) be as close as possible to the student's home. 8 NYCRR §200.1(cc).

- The continuum of special education services for school-age students with disabilities is an array of services to meet an individual student's needs that includes: consultant teacher services (direct and/or indirect), resource room services, related

services, integrated co-teaching services and/or special class.

(2) Related services.

- Related services means developmental, corrective, and other supportive services as are required to assist a student with a disability and includes speech-language pathology, audiology services, interpreting services, psychological services, physical therapy, occupational therapy, counseling services, including rehabilitation counseling services, orientation and mobility services, medical services as defined in this section, parent counseling and training, school health services, school nurse services, school social work, assistive technology services, appropriate access to recreation, including therapeutic recreation, other appropriate developmental or corrective support services, and other appropriate support services and includes the early identification and assessment of disabling conditions in students. 8 NYCRR §200.1(qq).

(3) Supplementary aids and services/program modifications/accommodations.

- Supplementary aids and services means aids, services, and other supports that are provided in regular education classes, other education-related settings and in extracurricular and nonacademic settings to enable students with disabilities to be educated with nondisabled students to the maximum extent appropriate in accordance with the least restrictive environment. 8 NYCRR §200.1(bbb).

- Program modifications may be used to describe a change in the curriculum or measurement of learning, for example, when a student with a disability is unable to comprehend all of the content an instructor is teaching.

- Examples are refocusing and redirection, visual cues, use of a graphic organizer, preferential seating and pre-teaching and re-teaching.

(4) Assistive technology devices and/or services;

- 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. Such term does not include a medical device that is surgically implanted, or the replacement of such a device. 8 NYCRR §200.1(e).

- Assistive technology service means any service that directly assists a student with a disability in the selection, acquisition, or use of an assistive technology device. 8 NYCRR §200.1(f).

(5) Supports for school personnel on behalf of the student.

- Supports for school personnel are supports that would help staff members more effectively work with the student.

- Examples are staff member consultations for information on a specific disability, implications for instruction, training and/or assistance with program modifications and/or behavior management.

h. Consider whether student qualifies for extended school year services in the "12-Month Service and/or Program" Section. 8 NYCRR §200.4(d)(2)(x).

(1) 12-month special service and/or program means a special education service and/or program provided on a year-round basis, for students whose disabilities require a structured learning environment of up to 12 months duration to prevent substantial regression. A special service and/or program shall operate for at least 30 school days during the months of July and August, inclusive of legal holidays, except that a program consisting solely of related service(s) shall be provided with the frequency and duration specified in the student's IEP. 8 NYCRR §200.1(eee).

(2) Students must be considered for 12-month special services and/or programs to prevent substantial regression if they are:

- Students whose management needs are determined to be highly intensive and require a high degree of individualized attention and intervention who are placed in special classes;

- Students with severe multiple disabilities, whose programs consist primarily of habilitation and treatment and are placed in special classes;

- Students who are recommended for home and hospital instruction whose special education needs are determined to be highly intensive and require a high degree of individualized attention and intervention or who have severe multiple disabilities and require primarily habilitation and treatment;

- Students whose needs are so severe that they can be met only in a residential program; or

- Other students who, because of their disabilities, exhibit the need for a 12-month special service and/or program provided in a structured learning environment of up to 12 months duration in order to prevent substantial regression as determined by the committee on special education. 8 NYCRR §200.6(k).

(3) Substantial regression means a student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year. 8 NYCRR Section §200.1(aaa).

(4) If yes, discuss and make recommendations, as appropriate, for extended school year program/services during July – August. The recommendation does not have to be identical to the academic school year program/services recommended during September – June.

i. Discuss and make recommendations, if needed, in the "Testing Accommodation" Section. 8 NYCRR §200.4(d)(2)(vi).

(1) The IEP shall provide a statement of any individual testing accommodations to be used consistently by the student in the recommended educational program and in the administration of districtwide assessments of student achievement and, in accordance with department policy, State assessments of student achievement that are necessary to measure the academic achievement and functional performance of the student. 8 NYCRR § 200.4(d)(2)(iv).

- Examples are extended time, flexible setting, listening tasks repeated and directions read.

j. For students beginning not later than the first IEP to be in effect when the student is age 15 (and at a younger age, if determined appropriate), develop the "Coordinated Set of Transition Activities" Section. 8 NYCRR §200.4(d)(2)(ix)(c)-(e).

- Transition services means a coordinated set of activities for a student with a disability, designed within a results-oriented process, that is focused on improving the academic and functional achievement of the student with a disability to facilitate the student's movement from school to post-school activities, including, but not limited to, post-secondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation. The coordinated set of activities must be based on the student's strengths, preferences and interests, and shall include needed activities in the following areas: (1) instruction; (2) related services; (3) community experiences; (4) the development of employment and other post-school adult living objectives; and (5) when appropriate, acquisition of daily living skills and provision of a functional vocational evaluation. 8 NYCRR §200.1(fff).

k. Discuss and complete the "Participation in State and District-Wide Assessments" Section. 8 NYCRR §200.4(d)(2)(vii).

(1) If the student will participate in an alternate assessment on a particular State or districtwide assessment of student achievement, the IEP shall provide a statement of why the student cannot participate in the regular assessment and why the particular alternate assessment selected is appropriate for the student. 8 NYCRR §200.4(d)(2)(vii).

(2) Discuss and complete the "Participation with Students Without Disabilities" Section. 8 NYCRR §200.4(d)(2)(viii).

- Include an explanation of the extent, if any, to which the student will not participate with nondisabled students in the regular class and in other school activities. 8 NYCRR §200.4(d)(2)(viii).

- If a student is not participating in a regular physical education program, describe the extent to which the student will participate in specially-designed instruction in physical education, including adapted physical education. 8 NYCRR §200.4(d)(2)(viii).

- Consider whether an exemption from the language other than English diploma requirement is appropriate.

l. Discuss and make recommendations, if needed, in the "Special Transportation" Section.

(1) Note the difference between special transportation accommodations/services and transportation to and from special classes or programs at another site.

m. Discuss and make recommendation, as appropriate, for the "Placement Recommendation" Section. 8 NYCRR §200.4(d)(2)(xii).

(1) Specific school name is not required. Can state home public school district, BOCES class, BOCES class in a public school, approved private school-day, etc.

C. Start/Review Dates in IEP

1. Specify projected date for initiation of the recommended special education services in the "Recommended Special Education Programs and Services" Section. 8 NYCRR §200.4(d)(v)(9).

2. Except for an initial referral, each student must have an IEP in effect at the beginning of each school year. 8 NYCRR §200.4(e)(1)(ii).

3. Indicate projected date of the annual review of student's need for special education services in the "Projected Date of Annual Review" Section. 8 NYCRR §200.4(d)(2)(xii).

D. Native Language

1. No requirement for an IEP to be provided in parent's native language or other mode of communication.

2. District must take action to ensure that the parent understands the proceedings at the CSE meeting, including arranging for an interpreter for parents.

3. If IEP is used as part of the Prior Written Notice ("PWN"), the PWN including the IEP must be provided in the native language of the parent, unless it is clearly not feasible to do so.

IV. MEETING NOTICE FOR CSE MEETINGS

A. Must use NYSED Model Meeting Notice Form.

B. Mandatory Meeting Notice contents are:

1. Date, time, location of CSE meeting.

2. Purpose of meeting.

3. If CSE Subcommittee meeting, the Notice must state: Upon receipt of a written request from the parents, the Subcommittee will refer to the CSE any matter on which the parent disagrees with the Subcommittee's recommendation.

4. Name and title of all meeting attendees.

a. If considering post-secondary goals and transition services, the Notice must:

(1) State that the student will be invited to the meeting.

(2) Identify other agencies responsible to provide or pay portion of transition services and, with parental or student (if 18 or older) consent, such agencies will be invited to send a representative to the meeting.

5. Statement that parent has right to be accompanied by individuals that the parent has determined have knowledge or special expertise about the student.

6. Statement that parent has to request, in writing at least 72 hours before the meeting, the presence of the school physician member and an additional parent member and include a statement, prepared by NYSED, explaining the role of having the additional parent member attend the meeting. 8 NYCRR §200.5(c)(2)(iv).

C. District can add language as appropriate to the Model Meeting Notice Form, provided the content of information in the template is not modified or deleted.

D. Native Language: No Federal or State requirement that the Meeting Notice be translated into native language of parent, but recommended NYSED recommends doing so to ensure parent understands the Meeting Notice. NYSED has had the Model Meeting Notice Form translated into Spanish, Russian, Haitian Creole, Chinese and Korean.

E. Parents must the Meeting Notice at least five days prior to the CSE meeting unless the parent and the school district agree to a meeting that will occur within five days. 8 NYCRR §200.5(c)(1).

V. PRIOR WRITTEN NOTICE (PWN)

A. Purpose:

1. Inform parents about recommendations by the District relating to the initiation/change in the identification, evaluation, educational placement or the provision of Free Appropriate Public Education ("FAPE"). 8 NYCRR §200.5(a).

B. PWN is required to be given:

1. PWN must be sent to parents of a student a reasonable time before the District proposes or refuses to the initiation/change in the identification, evaluation, educational placement or the provision of FAPE.

2. If the PWN relates to an action proposed by the District that requires parental consent, the District must give notice at the same time it requests parent consent.

C. Form to be used:

1. PWN must be completed using the NYSED Model Prior Written Notice Form.

D. PWN is required to include:

1. A subject of the notice.

2. A description of the action proposed or refused.

    a. This includes, but is not limited to, changes to information included in program recommendations, annual goals, frequency and duration of recommended services, modifications, accommodations, supplementary services and/or assistive technology. It does not include changes in present levels of performance; however this would presumably result in other changes on the IEP.

3. An explanation of why the action is proposed or refused.

4. A description of each evaluation procedure, assessment, record, or report used as a basis for the proposed or refused action.

5. For initial evaluations/reevaluations – A description of the proposed evaluation and the uses to be made of the information.

    a. The District may identify the types of assessments without identifying the specific tests.

6. A description of any other options considered and the reasons why those options were rejected.

7. A description of other factors that are relevant to the proposed or refused action.

8. A statement about parent protections under Procedural Safeguards and how to obtain a copy of the Procedural Safeguards Notice, if not enclosed.

9. Sources for parents to contact to obtain assistance in understanding the special education process.

10. An indication that the parent(s) have the right to address the Committee in person or in writing on the appropriateness of the Committee's recommendations.

E. In addition, the PWN must also include certain specific statements as additional information related to the subject of the Notice in the following circumstances:

1. Prior to conducting initial evaluations/reevaluations.

2. Prior to the initial provision of special education services to a student who has not previously been identified as having a disability.

3. Prior to the initial provision of special education services to a student during the months of July and August.

4. Prior to the declassification of a student.

5. Prior to the student's graduation with a local high school or Regents diploma.

6. Prior to the student's graduation with an IEP diploma.

F. The PWN must be written in:

1. The language understandable to the general public; and

2. The native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.

3. If the native language of the parent is not a written language, the District must take steps to ensure:

   a. The notice is translated orally or by other means to the parent(s) in his/her native language or other mode of communication;

   b. The parent(s) understand the content of the notice; and

   c. There is written evidence that the above requirements are met.

G. According to NYSED, an IEP does not provide all the information required in the PWN. The PWN may reference in the applicable sections specific citations to enclosed documents where the information is provided, which may include an IEP. If this is done, the enclosed documents must be provided in the native language of the parent(s).

H. A parent of a student with a disability may elect to receive the PWN and other required notifications by an e-mail communication if the District makes this option available.

NYSED Sources:

NYSED Guidance Document, *New York State Model Forms: Student Information Summary Form and Individualized Education Program (IEP)*, dated January 2010.

NYSED Guidance Document, *Questions and Answers on the Student Information Summary Form and IEP*, dated October 2010, updated April 2011.

NYSED Guidance Document, *New York State Model Forms: Meeting Notice Relating to Special Education*, dated January 2010.

NYSED Guidance Document, *Questions and Answers on the Meeting Notice*, dated September 2010, updated May 2011.

NYSED Field Advisory, *Special Education Mandatory Committee on Special Education Meeting Notice*, dated September 2012.

NYSED Guidance Document, *New York State Model Forms: Prior Written Notice (Notice of Recommendation) Relating to Special Education*, dated January 2010.

NYSED Guidance Document, *Questions and Answers on the Prior Written Notice*, dated December 2010, updated May 2011.

NYSED Field Advisory, *Revised New York State Required Form: Prior Written Notice (Notice of Recommendation) Relating to Special Education*, dated July 2013

NYSED Guidance Document, *Positive Behavioral Interventions and Supports (PBIS)*, dated May 2010.

NYSED Guidance Document, *Continuum of Special Education Services for School-Age Students with Disabilities*, dated April 2008.

EXHIBIT 1

(*a*) within 10 school days of the date of receipt of consent, the committee on special education or multidisciplinary team shall forward the report, including all relevant information in its possession, to the commissioner of the appropriate agency or such commissioner's designee; and

(*b*) in the event that the committee on special education or multidisciplinary team is notified by the commissioner of the State agency receiving the report that such agency is not responsible for determining the need for and recommending adult services for the student, the committee on special education or multidisciplinary team shall forward the report to another of the commissioners identified in clause (ii)(*b*) of this paragraph, or, if there exists a dispute as to which agency may be responsible, shall forward the report to the Council on Children and Families for resolution of the dispute; and

(iv) state that in the event that consent is withheld, the notice shall be renewed each year until consent is granted or until the student is no longer eligible for tuition-free educational services.

(3) In addition to the requirements of paragraph (2) of this subdivision, the notice to the parent, or student, where appropriate, shall:

(i) identify all the documents to be forwarded by the committee on special education or multidisciplinary team pursuant to paragraph (2) of this subdivision;

(ii) inform the person notified of the opportunity to review the information to be forwarded and to provide additional relevant information that may be in that person's possession; and

(iii) provide assurances of the confidentiality of personally identifiable data which shall be in accordance with section 200.5(e) of this Part and section 247.5 of this Title, as applicable.

(4) The committee on special education or the multidisciplinary team shall forward additional and updated relevant information to the Commissioner of Mental Health, Commissioner of Mental Retardation and Developmental Disabilities, Commissioner of the Office of Children and Family Services or Commissioner of Education, or their designees, upon the request for such information by such commissioner or designee, and upon obtaining appropriate consent.

(5) On or before October 1st of each year, the committee on special education or the multidisciplinary team shall prepare and submit an annual report to the State Education Department, the form and content of which shall be prescribed by the Commissioner of Education in accordance with the provisions of section 4402(1)(b)(5)(e) of the Education Law.

(j) Additional procedures for identifying students with learning disabilities.

(1) A student suspected of having a learning disability as defined in section 200.1(zz)(6) of this Part

must receive an individual evaluation that includes a variety of assessment tools and strategies pursuant to subdivision (b) of this section. The CSE may not rely on any single procedure as the sole criterion for determining whether a student has a learning disability. The individual evaluation shall be completed within 60 days of receipt of consent, unless extended by mutual written agreement of the student's parent and the CSE.

(i) The individual evaluation must include information from an observation of the student in routine classroom instruction and monitoring of the student's performance that was either done before the student was referred for an evaluation or from an observation of the student's academic performance in the regular classroom after the student has been referred for an evaluation and parental consent, consistent with section 200.5(b) of this Part, is obtained. Such observation shall be conducted by an individual specified in paragraph (2) of this subdivision.

(ii) To ensure that underachievement in a student suspected of having a learning disability is not due to lack of appropriate instruction in reading or mathematics, the CSE must, as part of the evaluation procedures pursuant to subdivisions (b) and (c) of this section, consider:

(*a*) data that demonstrate that prior to, or as part of, the referral process, the student was provided appropriate instruction in regular education settings, delivered by qualified personnel; and

(*b*) data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, which was provided to the student's parents.

(2) The determination of eligibility for special education for a student suspected of having a learning disability must be made by the CSE, which shall include the student's regular education teacher as defined in section 200.1(pp) of this Part and at least one person qualified to conduct individual diagnostic examinations of students (such as a school psychologist, teacher of speech and language disabilities, speech/language pathologist or reading teacher).

(3) A student may be determined to have a learning disability if, when provided with learning experiences and instruction appropriate for the student's age or State-approved grade-level standards, the student does not achieve adequately for the student's age or to meet State-approved grade-level standards in one or more of the following areas: oral expression, listening comprehension, written expression, basic reading skills, reading fluency skills, reading comprehension, mathematics calculation, mathematics problem solving; and

(i) The student either:

(*a*) does not make sufficient progress to meet age or State-approved grade-level standards in one or more of the areas identified in this paragraph when using a process based on the student's response to scientific, research-based intervention pursuant to section 100.2(ii) of this Title; or

(*b*) exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade-level standards, or intellectual development that is determined by the CSE to be relevant to the identification of a learning disability, using appropriate assessments consistent with subdivision (b) of this section; and

(ii) The CSE determines that its findings under this paragraph are not primarily the result of a visual, hearing, or motor disability; mental retardation; emotional disturbance; cultural factors; environmental or economic disadvantage; or limited English proficiency.

(4) In addition to the criteria in paragraph (3) of this subdivision, the CSE is not prohibited from considering whether there is a severe discrepancy between achievement and intellectual ability in oral expression, listening comprehension, written expression, basic reading skill, reading fluency skills, reading comprehension, mathematical calculation and/or mathematical problem solving; provided that effective on and after July 1, 2012, a school district shall not use the severe discrepancy criteria to determine that a student in kindergarten through grade four has a learning disability in the area of reading.

(5) Specific documentation for the eligibility determination.

(i) When determining eligibility for a student suspected of having a learning disability, the CSE shall prepare a written report containing a statement of:

(*a*) whether the student has a learning disability;

(*b*) the basis for making the determination, including an assurance that the determination has been made in accordance with paragraph (c)(1) of this section;

(*c*) the relevant behavior, if any, noted during the observation of the student and the relationship of that behavior to the student's academic functioning;

(*d*) the educationally relevant medical findings, if any;

(*e*) whether, consistent with paragraph (3) of this subdivision:

(*1*) the student does not achieve adequately for the student's age or to meet State-approved grade-level standards; and

(*2*) the student;

(*i*) does not make sufficient progress to meet age or State-approved grade-level standards; or

(*ii*) exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade level standards or intellectual development;

(*f*) the determination of the CSE concerning the effects of a visual, hearing, or motor disability; mental retardation; emotional disturbance; cultural factors; environmental or economic disadvantage; or limited English proficiency on the student's achievement level; and

(*g*) if the student has participated in a process that assesses the student's response to scientific, research-based intervention pursuant to section 100.2(ii) of this Title:

(*1*) the instructional strategies used and the student-centered data collected; and

(*2*) the documentation that the student's parents were notified in accordance with section 100.2(ii)(1)(vi) of this Title.

(ii) Each CSE member must certify in writing whether the report reflects the member's conclusion. If it does not reflect the member's conclusion, the CSE member must submit a separate statement presenting the member's conclusions.

Sec. filed Nov. 6, 1968; amds. filed: Oct. 31, 1969; July 23, 1971; repealed, new filed: Nov. 1, 1976; Dec. 21, 1976; amds. filed: May 12, 1977; Nov. 28, 1977; Jan. 27, 1978; June 1, 1979; June 23, 1980; renum. 200-1.4, filed May 1, 1981; new added by renum. and amd. 200-2.4, filed March 31, 1982; amds. filed: March 28, 1983; Dec. 20, 1983; May 1, 1984; Feb. 4, 1985; June 25, 1986; Jan. 22, 1987; Aug. 2, 1988; Dec. 20, 1988; July 11, 1989 as emergency measure; July 28, 1989 as emergency measure; Sept. 19, 1989 as emergency measure; Oct. 16, 1989; June 26, 1990 as emergency measure; July 31, 1990; April 30, 1991 as emergency measure; June 25, 1991; Sept. 17, 1991 as emergency measure; Oct. 22, 1991 as emergency measure; Nov. 19, 1991 as emergency measure; Dec. 24, 1991; Jan. 17, 1992 as emergency measure; Jan. 24, 1992; Nov. 24, 1992; June 29, 1993 as emergency measure; Aug. 16, 1993 as emergency measure; Sept. 28, 1993 as emergency measure; Sept. 28, 1993; Oct. 15, 1993 as emergency measure; Oct. 15, 1993; Nov. 23, 1993 as emergency measure; Dec. 20, 1993; Dec. 20, 1994 as emergency measure; Feb. 7, 1995; July 25, 1995 as emergency measure; Sept. 19, 1995; Nov. 12, 1996 as emergency measure; Dec. 24, 1996; Feb. 13, 1998; Dec. 20, 1999; April 27, 2001; Dec. 21, 2001; Dec. 16, 2002 as emergency measure; Feb. 18, 2003 as emergency measure; March 28, 2003; May 2, 2003; July 27, 2004; Sept. 13, 2005 as emergency measure; Dec. 9, 2005 as emergency measure; Dec. 9, 2005; June 23, 2006 as emergency measure; Sept. 19, 2006 as emergency measure; Nov. 17, 2006 as emergency measure; Jan. 16, 2007 as emergency measure eff. Jan. 16, 2007; Jan. 16, 2007 eff. Jan. 31, 2007. Amended (d)(3)(i); June 29, 2007 as emergency measure; Sept. 18, 2007 as emergency measure eff. Sept. 27, 2007; Sept. 18, 2007 eff. Oct. 4, 2007. Amended (a)-(e), (g)-(i); added (j); filed Aug. 4, 2008 eff. Aug. 21, 2008; emergency measure eff. Oct. 28, 2008, expired Jan. 24, 2009; emergency measure eff. Jan. 26, 2009, expired Mar. 26, 2009; emergency rule-making eff. Mar. 27, 2009 expired May 23, 2009; amds. filed June 29, 2009 eff. July 16, 2009.

8 NYCRR 200.4, 8 NY ADC 200.4

EXHIBIT 2

School District Identifying Information

INDIVIDUALIZED EDUCATION PROGRAM (IEP)

STUDENT NAME: DATE OF BIRTH: LOCAL ID #:	DISABILITY CLASSIFICATION:
PROJECTED DATE IEP IS TO BE IMPLEMENTED:	PROJECTED DATE OF ANNUAL REVIEW:

PRESENT LEVELS OF PERFORMANCE AND INDIVIDUAL NEEDS

DOCUMENTATION OF STUDENT'S CURRENT PERFORMANCE AND ACADEMIC, DEVELOPMENTAL AND FUNCTIONAL NEEDS

EVALUATION RESULTS (INCLUDING FOR SCHOOL-AGE STUDENTS, PERFORMANCE ON STATE AND DISTRICT-WIDE ASSESSMENTS)

ACADEMIC ACHIEVEMENT, FUNCTIONAL PERFORMANCE AND LEARNING CHARACTERISTICS

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:

STUDENT STRENGTHS, PREFERENCES, INTERESTS:

ACADEMIC, DEVELOPMENTAL AND FUNCTIONAL NEEDS OF THE STUDENT, INCLUDING CONSIDERATION OF STUDENT NEEDS THAT ARE OF CONCERN TO THE PARENT:

SOCIAL DEVELOPMENT

THE DEGREE (EXTENT) AND QUALITY OF THE STUDENT'S RELATIONSHIPS WITH PEERS AND ADULTS; FEELINGS ABOUT SELF; AND SOCIAL ADJUSTMENT TO SCHOOL AND COMMUNITY ENVIRONMENTS:

STUDENT STRENGTHS:

SOCIAL DEVELOPMENT NEEDS OF THE STUDENT, INCLUDING CONSIDERATION OF STUDENT NEEDS THAT ARE OF CONCERN TO THE PARENT:

PHYSICAL DEVELOPMENT

THE DEGREE (EXTENT) AND QUALITY OF THE STUDENT'S MOTOR AND SENSORY DEVELOPMENT, HEALTH, VITALITY AND PHYSICAL SKILLS OR LIMITATIONS WHICH PERTAIN TO THE LEARNING PROCESS:

STUDENT STRENGTHS:

PHYSICAL DEVELOPMENT NEEDS OF THE STUDENT, INCLUDING CONSIDERATION OF STUDENT NEEDS THAT ARE OF CONCERN TO THE PARENT:

MANAGEMENT NEEDS

THE NATURE (TYPE) AND DEGREE (EXTENT) TO WHICH ENVIRONMENTAL AND HUMAN OR MATERIAL RESOURCES ARE NEEDED TO ADDRESS NEEDS IDENTIFIED ABOVE:

EFFECT OF STUDENT NEEDS ON INVOLVEMENT AND PROGRESS IN THE GENERAL EDUCATION CURRICULUM OR, FOR A PRESCHOOL STUDENT, EFFECT OF STUDENT NEEDS ON PARTICIPATION IN APPROPRIATE ACTIVITIES

STUDENT NEEDS RELATING TO SPECIAL FACTORS

BASED ON THE IDENTIFICATION OF THE STUDENT'S NEEDS, THE COMMITTEE MUST CONSIDER WHETHER THE STUDENT NEEDS A PARTICULAR DEVICE OR SERVICE TO ADDRESS THE SPECIAL FACTORS AS INDICATED BELOW, AND IF SO, THE APPROPRIATE SECTION OF THE IEP MUST IDENTIFY THE PARTICULAR DEVICE OR SERVICE(S) NEEDED.

Does the student need strategies, including positive behavioral interventions, supports and other strategies to address behaviors that impede the student's learning or that of others? ☐ Yes ☐ No

Does the student need a behavioral intervention plan? ☐ No ☐ Yes:

For a student with limited English proficiency, does he/she need a special education service to address his/her language needs as they relate to the IEP?

☐ Yes ☐ No ☐ Not Applicable

For a student who is blind or visually impaired, does he/she need instruction in Braille and the use of Braille? ☐ Yes ☐ No ☐ Not Applicable

Does the student need a particular device or service to address his/her communication needs? ☐ Yes ☐ No

In the case of a student who is deaf or hard of hearing, does the student need a particular device or service in consideration of the student's language and communication needs, opportunities for direct communications with peers and professional personnel in the student's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the student's language and communication mode?

☐ Yes ☐ No ☐ Not Applicable

Does the student need an assistive technology device and/or service? ☐ Yes ☐ No

If yes, does the Committee recommend that the device(s) be used in the student's home? ☐ Yes ☐ No

BEGINNING NOT LATER THAN THE FIRST IEP TO BE IN EFFECT WHEN THE STUDENT IS AGE 15 (AND AT A YOUNGER AGE IF DETERMINED APPROPRIATE)

MEASURABLE POSTSECONDARY GOALS

LONG-TERM GOALS FOR LIVING, WORKING AND LEARNING AS AN ADULT

EDUCATION/TRAINING:

EMPLOYMENT:

INDEPENDENT LIVING SKILLS (WHEN APPROPRIATE):

TRANSITION NEEDS

In consideration of present levels of performance, transition service needs of the student that focus on the student's courses of study, taking into account the student's strengths, preferences and interests as they relate to transition from school to post-school activities:

MEASURABLE ANNUAL GOALS			
THE FOLLOWING GOALS ARE RECOMMENDED TO ENABLE THE STUDENT TO BE INVOLVED IN AND PROGRESS IN THE GENERAL EDUCATION CURRICULUM, ADDRESS OTHER EDUCATIONAL NEEDS THAT RESULT FROM THE STUDENT'S DISABILITY, AND PREPARE THE STUDENT TO MEET HIS/HER POSTSECONDARY GOALS			
ANNUAL GOALS WHAT THE STUDENT WILL BE EXPECTED TO ACHIEVE BY THE END OF THE YEAR IN WHICH THE IEP IS IN EFFECT	**CRITERIA** MEASURE TO DETERMINE IF GOAL HAS BEEN ACHIEVED	**METHOD** HOW PROGRESS WILL BE MEASURED	**SCHEDULE** WHEN PROGRESS WILL BE MEASURED

REPORTING PROGRESS TO PARENTS
Identify when periodic reports on the student's progress toward meeting the annual goals will be provided to the student's parents:

Alternate Section for Students Whose IEPs will Include Short-term Instructional Objectives and/or Benchmarks

(required for preschool students and for school-age students who meet eligibility criteria to take the New York State alternate assessment)

Measurable Annual Goals

The following goals are recommended to enable the student to be involved in and progress in the general education curriculum or, for a preschool child, in appropriate activities, address other educational needs that result from the student's disability, and, for a school-age student, prepare the student to meet his/her postsecondary goals.

Annual Goal What the student will be expected to achieve by the end of the year in which the IEP is in effect	Criteria Measure to determine if goal has been achieved	Method How progress will be measured	Schedule When progress will be measured

Short-term Instructional Objectives and/or Benchmarks (intermediate steps between the student's present level of performance and the measurable annual goal):

Annual Goal	Criteria	Method	Schedule

Short-term Instructional Objectives and/or Benchmarks (intermediate steps between the student's present level of performance and the measurable annual goal):

Annual Goal	Criteria	Method	Schedule

Short-term Instructional Objectives and/or Benchmarks (intermediate steps between the student's present level of performance and the measurable annual goal):

(Duplicate table/rows as needed)

Reporting Progress to Parents

Identify when periodic reports on the student's progress toward meeting the annual goals will be provided to the student's parents:

RECOMMENDED SPECIAL EDUCATION PROGRAMS AND SERVICES					
SPECIAL EDUCATION PROGRAM/SERVICES	SERVICE DELIVERY RECOMMENDATIONS*	FREQUENCY HOW OFTEN PROVIDED	DURATION LENGTH OF SESSION	LOCATION WHERE SERVICE WILL BE PROVIDED	PROJECTED BEGINNING/ SERVICE DATE(S)
SPECIAL EDUCATION PROGRAM:					
RELATED SERVICES:					
SUPPLEMENTARY AIDS AND SERVICES/PROGRAM MODIFICATIONS/ACCOMMODATIONS:					
ASSISTIVE TECHNOLOGY DEVICES AND/OR SERVICES:					
SUPPORTS FOR SCHOOL PERSONNEL ON BEHALF OF THE STUDENT:					

* Identify, if applicable, class size (maximum student-to-staff ratio), language if other than English, group or individual services, direct and/or indirect consultant teacher services or other service delivery recommendations.

12-MONTH SERVICE AND/OR PROGRAM – Student is eligible to receive special education services and/or program during July/August: ☐ No ☐ Yes

If yes:

☐ Student will receive the same special education program/services as recommended above.

OR

☐ Student will receive the following special education program/services:

SPECIAL EDUCATION PROGRAM/SERVICES	SERVICE DELIVERY RECOMMENDATIONS	FREQUENCY	DURATION	LOCATION	PROJECTED BEGINNING/ SERVICE DATE(S)

Name of school/agency provider of services during July and August:

For a preschool student, reason(s) the child requires services during July and August:

TESTING ACCOMMODATIONS (TO BE COMPLETED FOR PRESCHOOL CHILDREN ONLY IF THERE IS AN ASSESSMENT PROGRAM FOR NONDISABLED PRESCHOOL CHILDREN)

INDIVIDUAL TESTING ACCOMMODATIONS, SPECIFIC TO THE STUDENT'S DISABILITY AND NEEDS, TO BE USED CONSISTENTLY BY THE STUDENT IN THE RECOMMENDED EDUCATIONAL PROGRAM AND IN THE ADMINISTRATION OF DISTRICT-WIDE ASSESSMENTS OF STUDENT ACHIEVEMENT AND, IN ACCORDANCE WITH DEPARTMENT POLICY, STATE ASSESSMENTS OF STUDENT ACHIEVEMENT

TESTING ACCOMMODATION	CONDITIONS*	IMPLEMENTATION RECOMMENDATIONS**
☐ NONE		

*Conditions – Test Characteristics: Describe the type, length, purpose of the test upon which the use of testing accommodations is conditioned, if applicable.

**Implementation Recommendations: Identify the amount of extended time, type of setting, etc., specific to the testing accommodations, if applicable.

BEGINNING NOT LATER THAN THE FIRST IEP TO BE IN EFFECT WHEN THE STUDENT IS AGE 15 (AND AT A YOUNGER AGE, IF DETERMINED APPROPRIATE).

COORDINATED SET OF TRANSITION ACTIVITIES

NEEDED ACTIVITIES TO FACILITATE THE STUDENT'S MOVEMENT FROM SCHOOL TO POST-SCHOOL ACTIVITIES	SERVICE/ACTIVITY	SCHOOL DISTRICT/ AGENCY RESPONSIBLE
Instruction		
Related Services		
Community Experiences		
Development of Employment and Other Post-school Adult Living Objectives		
Acquisition of Daily Living Skills (if applicable)		
Functional Vocational Assessment (if applicable)		

PARTICIPATION IN STATE AND DISTRICT-WIDE ASSESSMENTS

(TO BE COMPLETED FOR PRESCHOOL STUDENTS ONLY IF THERE IS AN ASSESSMENT PROGRAM FOR NONDISABLED PRESCHOOL STUDENTS)

☐ The student will participate in the same State and district-wide assessments of student achievement that are administered to general education students.

☐ The student will participate in an alternate assessment on a particular State or district-wide assessment of student achievement.
Identify the alternate assessment:
Statement of why the student cannot participate in the regular assessment and why the particular alternate assessment selected is appropriate for the student:

PARTICIPATION WITH STUDENTS WITHOUT DISABILITIES

REMOVAL FROM THE GENERAL EDUCATION ENVIRONMENT OCCURS ONLY WHEN THE NATURE OR SEVERITY OF THE DISABILITY IS SUCH THAT, EVEN WITH THE USE OF SUPPLEMENTARY AIDS AND SERVICES, EDUCATION CANNOT BE SATISFACTORILY ACHIEVED.

FOR THE PRESCHOOL STUDENT:
Explain the extent, if any, to which the student will not participate in appropriate activities with age-appropriate nondisabled peers (e.g., percent of the school day and/or specify particular activities):

FOR THE SCHOOL-AGE STUDENT:
Explain the extent, if any, to which the student will not participate in regular class, extracurricular and other nonacademic activities (e.g., percent of the school day and/or specify particular activities):

If the student is not participating in a regular physical education program, identify the extent to which the student will participate in specially-designed instruction in physical education, including adapted physical education:

EXEMPTION FROM LANGUAGE OTHER THAN ENGLISH DIPLOMA REQUIREMENT: ☐ No ☐ Yes - The Committee has determined that the student's disability adversely affects his/her ability to learn a language and recommends the student be exempt from the language other than English requirement.

SPECIAL TRANSPORTATION

TRANSPORTATION RECOMMENDATION TO ADDRESS NEEDS OF THE STUDENT RELATING TO HIS/HER DISABILITY

☐ None.

☐ Student needs special transportation accommodations/services as follows:

☐ Student needs transportation to and from special classes or programs at another site:

PLACEMENT RECOMMENDATION

EXHIBIT 3

NYSED.gov

Special Education

General Directions to Use the State's Model Individualized Education Program (IEP) Form

Attachment 3
General Directions to Use the State's Model IEP Form - March 2010 - Word (307 KB)

The State's model IEP Form is provided as a Word document (version 2003) which includes form fields to enter or select typed information. Directions for use of this document in Word 2007 can be found at http://www.emsc.nysed.gov/specialed/formsnotices/.

The form is 'lock protected' in order for the form fields to function properly. The form should be used when it is in 'lock' mode. Unlocking the form during use may result in a modification to the form itself. It is recommended that each district password protect the form to prevent inadvertent form modifications. To do so, go to 'Tools', 'Options' and click on 'Security' and follow the directions.

The State's IEP form may be used in its current Word format, or may be converted to another format, including a computerized format. However, for all IEPs developed for the 2011-12 school year and thereafter, the State's IEP form may not be modified to otherwise change its appearance or content, except as specifically noted below.

- Rows may be added or deleted within sections of the IEP as necessary.
- Districts must select the appropriate Measurable Annual Goal section of the IEP.
  - For students needing annual goals only, select the section that does not include short-term instructional objectives and/or benchmarks.
  - For students needing short-term instructional objectives and/or benchmarks with the annual goals, select the section of the IEP entitled 'Alternate Section for Students Whose IEPs will Include Short-term Instructional Objectives and/or Benchmarks'
- For students for whom post-school transition planning is not required (such as preschool and elementary age students), the sections on 'Measurable Postsecondary Goals' and 'Coordinated Set of Transition Activities' may be deleted.
- The footer "New York State Education Department IEP form" may be removed.
- The student's name and other identifying information may be added to each page of the IEP.

All other sections of the IEP must appear for each student's IEP, whether or not there are recommendations for the student to be documented in that section of the IEP.

To use this form as a Word form document, you must follow the directions below.

1. A district may save the IEP form on the district's letterhead or use the 'School District Identifying Information' section found on the form itself. In order to save the document on the district's letterhead, it is necessary that the form appear as a Word document and be in 'unlock' mode.
   To unlock the form, go to 'View', 'Toolbars' and click on 'Forms'. This action will activate the 'Forms' toolbar. From the 'Forms' toolbar, click the 'Protect Form' symbol (padlock). The form will then be in 'unlock' mode. Go to 'Edit', 'Select All' and 'Copy'. Paste the highlighted form onto district letterhead. The form, now on district letterhead, must be locked in order to be functional. To lock the form, go back to the 'Forms' toolbar and click the 'Protect Form' symbol (padlock). The form will then be locked and ready for use.
2. Use the Tab button to advance from field (grey box) to field to insert the required information as appropriate. These fields will automatically expand as text is entered. In the event that there is no relevant information to be included in a particular text field, then the district should enter 'none' or 'not applicable.'
3. Select from the 'drop-down' options for the Disability Classification. Note that for a preschool student, the only appropriate disability classification is 'Preschool Student with a Disability'. For a school-age student, select from one of the other 13 disability classifications. Disability Classification:
4. Select from the 'drop-down' options for 'Special Education Programs/Services', 'Testing Accommodations' and 'Special Transportation Accommodations/ Services'. These sections also include text fields (shown on the computer screen as a grey box) to enter information that is not included in the 'drop-down' choices.
5. Some sections of the IEP form require a 'Yes', 'No' or 'Not Applicable' response. To choose one of these options, simply click on the check box and an 'X' will appear in the box indicating a choice has been made.
   For example: Does the student need a particular device or service to address his/her communication needs? Yes No
6. The model form includes a limited number of rows for each section of the IEP. However, rows should be added as appropriate for each student. To insert additional rows (e.g., measurable annual goal section, special education services, etc.), the form must first be unlocked (see directions in #1 above). To add rows, go to 'Table', 'Insert', 'Rows Below'. Once the rows have been added, relock the form (see directions under #1 above).
7. After completing the IEP information for each student, SAVE the document to the

appropriate file. The document may then be printed.

The IEP form has been developed to present Committee recommendations in the same sequence that the development of IEP recommendations should occur, beginning with present levels of performance and, for adolescent students, post-secondary goals and transition needs, followed by identification of the goals the student is expected to achieve in the school year the IEP is to be in effect. These sections are followed by recommendations to provide the student with the needed special education services, accommodations, modifications, etc. to assist him/her to reach those annual goals and to document the decisions of the Committee to provide such services to the maximum extent appropriate in regular classes and settings with the student's nondisabled peers. The final decision of the Committee is the identification of the least restrictive placement where the student's IEP can be implemented.

Further information on each section of the State's model IEP form is provided below, with examples. Please note that the examples provided for the individual sections of the IEP are each from different students' IEPs and are not intended to represent one student or one disability classification. Therefore, when compiled, the examples would not represent recommendations for one individual student's IEP. The assessment and other information used in these examples are fictional and do not represent real students. In providing names of assessments in the examples, the Department is not promoting or encouraging use of these particular assessments over others.

Identifying Information

This section of the IEP includes identifying information for the student and identifies the disability classification for the student (which must be selected from the options that appear in the drop down menu).

Disability Classification:

- For all preschool students, select 'Preschool Student with a Disability'
- For school-age students, select one of the following disability classifications:
  - Autism
  - Deafness
  - Deaf-blindness
  - Emotional disturbance
  - Hearing impairment
  - Learning disability

- Mental retardation
- Multiple disabilities
- Orthopedic impairment
- Other health-impairment
- Speech or language impairment
- Traumatic brain injury
- Visual impairment (which includes blindness)

The IEP must also indicate the projected date the IEP is to be implemented. Each student must have an IEP in effect at the beginning of each school year. The IEP must indicate the projected date of review of the student's need for the services recommended in the student's IEP. This date cannot be more than one year from the date the Committee conducted its last review of the student's IEP to determine if the annual goals are being achieved.

For example:

Student Name: Johnny Jones Date of Birth: 7/4/95 Local ID #: 123456	Disability Classification: Autism
Projected date IEP is to be implemented: September 7, 2010	Projected date of annual review: June 1, 2011

Present Levels of Performance and Individual Needs

The student's 'Present Levels of Performance and Individual Needs' must include documentation of information that is required to be considered in the development of the student's IEP. Required considerations include:

1. Evaluation/assessment results.
2. The student's current functioning and individual needs in academic achievement, functional performance and learning characteristics; social development; physical development; and management needs. These considerations must include the strengths of the student and the concerns of the parent(s) for enhancing the education of the child.
3. The affect the student's disability has on the student's participation and progress in the general curriculum (or, for preschool students, in appropriate activities); and
4. Special considerations relating to behavior, communication, students with limited English proficiency, use of Braille and instruction in the use of Braille and use of assistive

technology devices. The form includes templates to ensure the Committee documents, as appropriate, its considerations for each of these areas.

Evaluation Results:

In developing the recommendations for the IEP, the Committee must consider the results of the initial or most recent individual evaluation of the student as well as the results of the student's performance on any general State or district-wide assessment programs. For students beginning with the first IEP to be in effect when the student turns age 15, and annually thereafter, this section must include information from the age appropriate transition assessment provided to the student that is being considered in the development of the student's IEP. This does not mean that an updated transition assessment is required annually.

The following section of the IEP provides space for the Committee to document the evaluation results considered. The example shows this section of the IEP completed to include a list of the evaluations considered and a brief summary of the results.

Alternately, this section could just list the assessments conducted as long as the instructionally relevant findings from these reports, that were considered and that reflect the students needs and strengths, are reported under the four need areas.

For example: Student with Other Health Impairment - age 15

Present Levels of Performance and Individual Needs

Documentation of student's current performance and academic, developmental and functional needs
Evaluation Results (including for school-age students, performance on State and district-wide assessments)

Functional Behavioral Assessment - 10-11-09 - Problems identified in the areas of self-regulation, attention and aggression in the form of destruction of materials. Aggression found to be avoidance / escape behaviors in response to stress and skill deficits.

Psycho-educational Assessment - 10-20-09
Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV): 95 (average) in verbal comprehension, 86 (low average) in perceptual reasoning, 71 (borderline) in working memory, and 88 (low average) in processing speed

Woodcock-Johnson Tests of Achievement-Third Edition (WJ-III ACH): standard (and percentile) scores of 85 (14) in broad math, 80 (11) in basic reading skills, 87 (9) in math calculation skills, and 85 (13) in academic skills).

Silent Reading Test, score of 72 - borderline range.
Test of Written Language-Third Edition, standard composite score in the borderline range

Speech and Language Assessment - 10-5-09 - Clinical Evaluation of Language Fundamentals-Third Edition standard score in the below average range for the sentence repetition subtest and in the very low range for the listening to paragraphs subtest.

Physical Examination – 9-1-09 – Physical development is within normal range. Seizures medically controlled. Some side effects of seizure medication noted.

Classroom Observation - 10-15-09 - Difficulties with transition from one activity to the next. When presented with reading tasks, he ripped pages from the book. Broke pencils during math assignments. Attempted to leave the classroom 5 times during instructional periods. These behaviors did not present during the observation of the student during lunch, art and adapted physical education classes.

Transition Assessment - May 2009 - Parent Transition Planning Interview, Independent Living Assessment Inventory. Vineland II Independent Living Skills; Informal Money management checklist.
Enderle-Severson Transition Rating Scale (ESTR-R); Jobs & Job Training - score 46%, Recreation & Leisure - score 77%, Home Living - score 25%, Community Participation - score 60%, and Post Secondary Training - score 10%. Has expressed an interest in animal care. Has one work experience working in his father's Veterinary Office. Does not understand factors that influence job retention, dismissal, and promotion. Does not know how to use resources for assistance in job searching. Lacks skills necessary to complete a job application or job interview; and does not understand information on a paycheck. Enjoys swimming at the YMCA. His family supports the goal that he live outside of their home after high school, in a setting with supervision and support.

State and District-wide Assessments -
Iowa test results (March 2009) grade equivalent scores of 4.9 in reading, 2.5 in mathematics, 3.0 in science, and 4.6 in social studies.
State Assessment English language arts - Grade 8 - Level 2 (partially proficient).
State Assessment Mathematics - Grade 8 - Level 3 (proficient).

Four Need Areas:

The following section of the IEP provides the template for documentation of the student's present levels of academic achievement and functional performance and individual needs of the student according to each of the following four need areas:

- academic achievement, functional performance and learning characteristics;
- social development;
- physical development; and
- management needs.

The form includes the State's definition of these four need areas. The form also includes fields for the Committee to document the student's strengths and needs, including the concerns of the parents for enhancing the education of their child considered in the development of the IEP for each of the need areas.

For example: Student with a Learning Disability - age 10 (grade 4)

Academic Achievement, Functional Performance and Learning Characteristics

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:

Reading: Although Damien's listening comprehension is age- and grade appropriate, his ability to read and understand grade level materials is hampered by decoding errors that appear comparable to those of a "typical" second grade student. Specifically, when reading material is too difficult, Damien tends to use the initial and final letters/sounds to guess unfamiliar words, skipping over the middle of multi-syllabic words. As the percentage of errors increases, Damien soon abandons any attempt to self-correct and make sense of what he is reading. Fluency is dependent on both automatic decoding and comprehension of the passage; when faced with overly challenging tasks, strategy use is replaced by random guesses.

When Damien attempts books written at the mid-to-late second grade level, his oral reading fluency is within normal limits (for a second grade student) at 85 words per minute. In contrast, when he attempts grade level text, fluency is greatly reduced to approximately 40 words per minute and Damien resorts to "word calling" with little attention to accuracy or meaning. Reading comprehension scores are similarly impacted. Damien benefits greatly from strong introductions to new material, which effectively lowers the text level challenges for him. Currently, in the area of reading Damien:

- Reads second grade material with adequate fluency and accuracy.
- Reads 40 words correctly within 1 minute on 4th grade level reading material, and 85 words per minute when attempting second grade materials.

- His fluency and accuracy is influenced by text difficulty, familiarity with the topic and relevant vocabulary, and opportunities for multiple readings of the same or related text.
- Decoding skills are not fully mastered, and irregular spelling patterns are especially challenging. He successfully identifies shorter words in isolation and context, but is less successful with multi-syllabic words, as he does not always analyze the whole word.
- He has mastered most of the second grade Dolch word list, and is able to identify several from the third grade list. He is able to identify "chunk" compound words and identify their segments.

Writing: Damien demonstrates slow writing speed, difficulty with writing out math problems, difficulty taking notes and poor spelling and handwriting.

Math: Given Damien's grade level math probes, his fluency/accuracy average in math facts is 7 digits per minute. Word problems above the second grade level are frustrating for Damien both in reading content and computation. He is working on computational and problem-solving skills in addition and subtraction, while his classmates are currently working on developing multiplication skills.

Organization: Damien comes to classes without the appropriate books on the average of 4 times per week. He rarely turns in homework, even when his parents report assignments were completed. Last month he turned in 12 out of 20 homework assignments.

Attention: Damien is easily distracted. His average time for attention to task is 10 minutes for instruction in reading and math. His average time for attention to task for science when engaged in hands on experiments is 15 minutes.

Student strengths, preferences, interests:
Good memory for details from information that he has either read or heard
Enjoys computers
Likes sports, animals and music
Responds well to hands-on work

Academic, developmental and functional needs of the student, including consideration of student needs that are of concern to the parent:
Damien needs to:

- develop decoding strategies which will enable him to read grade level materials more independently.
- practice fluent reading in challenging texts to build his "sight vocabulary" (words he recognizes on sight).

- employ self-correction strategies when he makes an error in reading, especially when the miscue interrupts meaning.
- build fine motor skills stamina and learn strategies to use assistive technology.
- master multiplication and division concepts and reliance on key word strategies for math word problems.
- learn how to create a schedule and use self-regulatory skills to deal with distractions.
- learn techniques for coping with frustration and reducing worry so he can focus on the task and not on anxiety.

Parents are concerned about how frustrated he gets doing homework and how this is affecting his behavior at home and motivation in school.

Social Development
The degree (extent) and quality of the student's relationships with peers and adults; feelings about self; and social adjustment to school and community environments:

When presented with a change in routine, or a novel situation, Damien frequently demonstrates confusion and anxiety (e.g., asks repeated questions, stands up, tenses his muscles, pinches himself). These behaviors occur on the average of five times per academic class period. Often makes negative comments about himself or his work (e.g., "I am not smart." "I cannot do this." "Oh, this is not good work.") These statements occur on the average of 10-15 times per class period, and primarily for any work involving writing. He maintains a long term friendship with one classmate. His peer group rarely initiates conversations/activities with Damien. Damien's comments and actions are often off topic/task from the group.

Student strengths:
Participates willingly in individual sports activities, such as wrestling, that are not team sports
Rarely makes negative comments about himself or his performance during sports activities
Initiates interaction with adults and peers
Responds appropriately to authority figures

Social development needs of the student, including consideration of student needs that are of concern to the parent:
Damien needs to:

- engage in activities and reinforcement strategies which encourage peer interaction and emphasize his role as a successful group member; and
- develop strategies to transition between activities.

Parents are also concerned about his difficulty with transitions from activity to activity that are increasingly resulting in resistive behaviors (refusal to change activities) and the impact of his low self-esteem on his academic and social engagement.

Physical Development
The degree (extent) and quality of the student's motor and sensory development, health, vitality and physical skills or limitations which pertain to the learning process:

Damien's physical growth, hearing and vision are within normal development. His fine motor skills are delayed. He has a history of seizures, for which he takes medication. He has reported side effects from medication such as fatigue and these affect his ability to learn. His parents report that he is often tired and falling asleep during afterschool homework. His sleep patterns make it difficult for him to get up in the morning. He shows fatigue as the school day progresses. He puts his head down on the desk 10-15 times during class periods scheduled after lunch. He tends to be most alert in the morning before lunch.

Student strengths:
Damien is physically strong and likes to exercise and work out with weights.

Physical development needs of the student, including consideration of student needs that are of concern to the parent:
Damien's fatigue level needs to be monitored, particularly as it impacts his ability to concentrate on his school work. Parents ask that, when possible, his academic classes be scheduled in the morning to accommodate for his fatigue.

Management Needs
The nature (type) and degree (extent) to which environmental and human or material resources are needed to address needs identified above:
Scheduled rest periods
Assistance with transitions as he develops self-regulatory strategies
Activities and reinforcement to build and encourage peer interaction
Frequent monitoring when completing independent assignments
Assistive technology for content area reading and activities that include extensive physical writing
Monitoring and adjusting of student class work and homework requiring extensive fine motor skills and/or extensive time (due to fatigue issues)
Alternate formats of assessments that require less fine motor skill activity

Involvement and Progress in the General Curriculum / Appropriate Activities

The following section is used to document how the student's disability affects involvement and progress in the general education curriculum; or for preschool students, as appropriate, how the disability affects the student's participation in appropriate activities. Consider the affect of the student's disability needs as they relate to each of the following: instructional content, instructional method, method of assessment, instructional materials and physical environment.

For example: Student with Traumatic Brain Injury - age 13

Effect of Student Needs on Involvement and Progress in the General Education Curriculum or, for a Preschool Student, Effect of Student Needs on Participation in Appropriate Activities

Craig's short attention span and his difficulties applying organization strategies affect his ability to complete homework and class assignments in a timely manner. He forgets to take home materials and assignments and often forgets to turn in completed homework.

His decoding skills and physical difficulties with written work affect his ability to keep pace with his peers in activities which require independent reading and manual writing. As a result, he is falling behind in learning and does not always get credit for completed work or assessed knowledge.

His behavior when frustrated is distancing him from his peer group and taking time from instruction.

Special Considerations

Present levels of performance statements must also include documentation that the Committee considered special factors in the development of the student's IEP as noted below. If any of the following special considerations are checked 'Yes', then the Committee must ensure that a device or service, including an intervention, accommodation or other program modification needed for the student to receive a free appropriate public education is indicated in the IEP under the applicable section of the IEP.

'Yes', 'No' or 'Not Applicable' must be indicated for each consideration. If 'Yes' is indicated, then the IEP must identify the specific supports or other strategies (e.g., counseling, special seating, speech and language therapy) under the 'Recommended Special Education Programs and Services' section of the IEP. If 'Yes' is checked indicating the need for a behavioral intervention plan, there is a text field provided in this section where additional information, as applicable, could be inserted (see example below).

For example: Student with Autism – age 8

Student Needs Relating to Special Factors

Based on the identification of the student's needs, the Committee must consider whether the student needs a particular device or service to address the special factors as indicated below, and if so, the appropriate section of the IEP must identify the particular device or service(s) needed.

Does the student need strategies, including positive behavioral interventions, supports and other strategies to address behaviors that impede the student's learning or that of others? X Yes No
Does the student need a behavioral intervention plan? No X Yes: To address self-abusive behaviors.

For a student with limited English proficiency, does he/she need a special education service to address his/her language needs as they relate to the IEP?
Yes No X Not Applicable

For a student who is blind or visually impaired, does he/she need instruction in Braille and the use of Braille? Yes No X Not Applicable

Does the student need a particular device or service to address his/her communication needs?
X Yes No
In the case of a student who is deaf or hard of hearing, does the student need a particular device or service in consideration of the student's language and communication needs, opportunities for direct communications with peers and professional personnel in the student's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the student's language and communication mode?
Yes No X Not Applicable

Does the student need an assistive technology device and/or service? X Yes No
If yes, does the Committee recommend that the device(s) be used in the student's home? X Yes No

Measurable Postsecondary Goals and Transition Needs

For students beginning with the first IEP to be in effect when the student is age 15 (and at a younger age, if determined appropriate) and updated each year, the IEP must include measurable postsecondary goals (the student's long-term goals for living, working and learning as an adult) based on the student's preferences and interests, as they relate to transition from school to post-school activities. The IEP must document measurable postsecondary goals in the areas of education and training (e.g., career and technical education and training, continuing

and adult education, college), employment (e.g., integrated competitive employment), and community living (e.g., adult services, independent living or community participation).

For example: Student with Other Health Impairment - age 16

Beginning not later than the first IEP to be in effect when the student is age 15 (and at a younger age if determined appropriate)

Measurable Postsecondary Goals

long-term goals for living, working and learning as an adult

Education/Training: Lisa will attend a two year college to take courses in animal care.

Employment: Lisa will work as a dog groomer as she pursues courses in veterinary science.

Independent Living Skills (when appropriate): Lisa will obtain her driving license. She will live in an apartment assisted by friends and family.

In addition, the IEP for these students must include a statement of the transition service needs of the student that focuses on the student's courses of study, taking into account the student's strengths, preferences and interests, as they relate to transition from school to post-school activities. The Committee identifies the coursework (e.g., Regents classes, career and technical education courses) the student will be enrolled in to achieve the student's desired post-school goals.

Transition Needs

In consideration of present levels of performance, transition service needs of the student that focus on the student's courses of study, taking into account the student's strengths, preferences and interests as they relate to transition from school to post-school activities:

Needs

Lisa needs to:

- develop self-advocacy, time management, computer and independent travel skills.
- be able to complete job application forms independently.
- learn appropriate work habits when supervisor is not present.
- develop community leisure skills.

Courses of study

Lisa plans to go to college for animal care. Beyond the required curriculum for a regular diploma, she needs to take courses that include animal biology and computer word processing. To provide job exploration and skill development, her courses of study should include career and technical education courses in veterinary science.

Measurable Annual Goals

The IEP must list measurable annual goals, consistent with the student's needs and abilities, to be followed during the period in which the IEP will be in effect. For each annual goal, the IEP must indicate the evaluative criteria (the measure used to determine if the goal has been achieved), evaluation procedures (how progress will be measured) and schedules (when progress will be measured) to be used to measure progress toward meeting the annual goal.

For example: Student with Multiple Disabilities - age 9

Measurable Annual Goals

The following goals are recommended to enable the student to be involved in and progress in the general education curriculum, address other educational needs that result from the student's disability, and prepare the student to meet his/her postsecondary goals.

Annual Goals What the student will be expected to achieve by the end of the year in which the IEP is in effect	Criteria Measure to determine if goal has been achieved	Method How progress will be measured	Schedule When progress will be measured
Dawn will solve math word problems that involve addition and subtraction of two-, three- and four-digit numbers.	90% accuracy on 8/10 classroom assessments or worksheets	Classroom assessments and worksheets	Every two weeks
Dawn will complete actions in response to 3-step verbal requests.	5 out of 5 times on 4 consecutive weekly trials	Charting of student responses	Weekly
Dawn will remain in class for 45/50 minute periods, requesting a 'break' from class work not more than three times per class period.	5 out of 7 class periods per day over 5 week period	Daily charting of time in class	Monthly

For students who meet the eligibility criteria to take the New York State Alternate Assessment

(NYSAA) and for preschool students with disabilities, the IEP must include a description of the short-term instructional objectives and/or benchmarks that are the measurable intermediate steps between the student's present levels of performance and the measurable annual goals. A district may establish policy to include short-term instructional objectives and/or benchmarks in other students' IEPs (e.g., all elementary age students; all students recommended for special classes).

Alternate Section for Students Whose IEPs will Include Short-term Instructional Objectives and/or Benchmarks

(required for preschool students and for school-age students who meet eligibility criteria to take the New York State alternate assessment)

For example: Student with Learning Disability - age 10

Measurable Annual Goals

The following goals are recommended to enable the student to be involved in and progress in the general education curriculum or, for a preschool child, in appropriate activities, address other educational needs that result from the student's disability, and, for a school-age student, prepare the student to meet his/her postsecondary goals.

Annual Goal What the student will be expected to achieve by the end of the year in which the IEP is in effect	Criteria Measure to determine if goal has been achieved	Method How progress will be measured	Schedule When progress will be measured
Given reading passage at the 2nd grade level, Mike will orally read 100 words per minute with no more than 6 errors.	8 out of 10 trials over 3 consecutive weeks.	Reading curriculum based oral reading fluency probes	Every two weeks
Short-term Instructional Objectives and/or Benchmarks (intermediate steps between the student's present level of performance and the measurable annual goal): By November, Mike will orally read 70 – 80 words per minute By February, Mike will orally read 80 – 90 words per minute By April, Mike will orally read 90 – 100 words per minute			

If needed, additional rows may be inserted into each of the annual goal charts.

Reporting Progress to Parents

The IEP must identify when periodic reports on the progress the student is making toward the annual goals will be provided to the student's parent(s). The method or combination of methods to inform the parents of their child's progress is left to local discretion. Based on the unique needs of the student, the manner selected to inform parent(s) might vary from student to student.

Reporting Progress to Parents

Identify when periodic reports on the student's progress toward meeting the annual goals will be provided to the student's parents:

Quarterly (November, February, April and June) at the same time school report cards are issued.

Recommended Special Education Programs and Services

The IEP must indicate the recommended program and services, including related services, as defined in law and regulation from the options set forth in sections 200.6 and 200.16 of the Regulations of the Commissioner of Education that will be provided for the student. These options are provided in a drop-down format in the IEP form for both preschool and school-age students to ensure the recommendations are stated based on the State's special education program and services options. Any information typed into the text box that is also provided in this section must be consistent with this requirement.

For special education programs and services, the options are as follows:

- For preschool students, the drop-down options include:
  - Special education itinerant teacher services
  - Special class in an integrated setting
  - Special class
- For school-age students, the drop-down options include:
  - Consultant teacher services
  - Integrated co-teaching services
  - Resource room program
  - Special class
  - Travel training
  - Adapted physical education

The form also includes a text box following each drop-down option so that clarifying information may be provided by the Committee, as appropriate (e.g., identifying another term by which the special education service is known by in the school district).

Example: Integrated co-teaching services - (Collaborative Team Teaching) In this example, another term used by a particular school district meaning the same as integrated co-teaching services is identified in the IEP.

The drop-down list of related service options is not a finite list. These options include: Speech-Language Therapy; Audiology Services; Interpreting Services; Psychological Services; Physical Therapy; Occupational Therapy; Counseling Services; Orientation and Mobility Services; Medical Services; Parent Counseling and Training; School Health Services; School Nurse Services; and School Social Work.

In addition to the drop-down options, text boxes on the form should be used to identify any recommended related service(s) not included in the drop-down options. The form allows a Committee to recommend multiple programs/services/related services by utilizing multiple drop-down boxes.

The State form allows documentation of other clarifying information related to a recommended program/service under the column "Applicable Service Delivery Recommendations." A Committee should use this section of the IEP to document recommendations including special class size (required), group or individual service, program/service provided in a language other than English or direct or indirect consultant teacher services for school age students, as applicable to the recommended service and the student's needs.

For example:

Applicable Service Delivery Recommendations

Bilingual - Spanish

The IEP must indicate the anticipated frequency, duration, location and initiation date of each recommended special education program, related service, supplementary aid and service, program modification or accommodation, use of an assistive technology device and/or service and, if applicable, support for school personnel.

The IEP must also indicate the projected beginning date of each recommended program/service. In addition, because the Committee may recommend a program/service for a limited time period, an end date of service may be documented if appropriate.

For example: Student with Other Health Impairment

Recommended Special Education Programs and Services					
Special Education Program/Services	Service Delivery Recommendations*	Frequency How often provided	Duration Length of session	Location Where service will be provided	Projected Beginning/Service Date(s)
Special Education Program:					
Integrated co-teaching		4 days/ week	40 minutes	English class	9/7/10
Consultant teacher services	Direct	2 days/ week	40 minutes	Math class	9/7/10
Resource room program	Instruction on use of assistive technology,organization and self-regulation strategies	3 days/ week	40 minutes	Resource Room	9/7/10
Related Services:					
Speech-Language Therapy	Individual	Once weekly	30 minutes	Therapy Room	9/7/10
Speech-Language Therapy	Small group	Once weekly	40 minutes	Therapy Room	9/7/10
Supplementary Aids and Services/Program Modifications/Accommodations:					
One to one aide	For transitions in hall during class	Daily	Duration of transition	Hallways	9/7/10
Individualized daily visual schedule	Pictures accompanied with written words	Daily - all classes	Duration of class instruction	Student's academic classes	9/7/10
Preferential seating in regular classes	Away from window, front of the room, near teacher,	Daily - all classes	Duration of class (except for small	All general education classes	9/7/10

			group work)		
Assistive Technology Devices and/or Services:					
Text to speech software and speech to text software		Daily	Duration of academic and resource room class periods	English and Resource Room classes (Device will also be used in the student's home)	9/7/10
Computer with headphones and microphone		As above	As above	As above	9/7/10
Supports for School Personnel on Behalf of the Student:					
Instruction on use of text to speech and speech to text software	For Resource Room teacher	3 sessions	1 hour each session	Conference Room	9/7/10 - 9/15/10
*Identify (if applicable) class size (maximum student-to-staff ratio), language if other than English, group or individual services, direct and/or indirect consultant teacher services or other service delivery recommendations.					

12-Month Service and/or Program

The IEP form must identify if the Committee recommends that the student receive special education services during the months of July and August. If so, the IEP must include:

- the identity of the provider of services during the months of July and August; and
- for a preschool student, the reason(s) the student requires special education programs and services during July and August.

If the program/services recommended for July and August are not the same as recommended for the 10-month school year, the July and August recommendations must be documented in the following section of the IEP.

For example:

12-Month Service and/or Program

Student is eligible to receive special education services and/or program during July/August: No
X Yes
If yes: Student will receive the same special education program/services as recommended above.
OR X Student will receive the following special education program/services:

Special Education Program/Services	Applicable Service Delivery Recommendations	Frequency	Duration	Location	Projected Beginning/ Service Date (s)
Speech and Language Therapy	Bilingual - Spanish Individual	2 times weekly	30 minutes	Therapy Room	7/5/10 - 8/14/10
Name of school/agency provider of services during July and August: Related Services Only - ABC School For a preschool student, reason(s) the child requires services during July and August: N/A					

Testing Accommodations

The IEP must indicate the individual testing accommodations needed by the student, if any, to be used consistently by the student in his or her recommended education program, in the administration of district-wide assessments of student achievement and consistent with Department policy, in State assessments of student achievement that are needed by the student to participate in the assessment. This section would only be completed for preschool students if there is an assessment program for nondisabled preschool students.

The State form provides testing accommodation drop-down options. These options include the following: extended time; breaks; multiple day administration; revised test format; revised test directions; use of aids/assistive technology device; separate location/room; adaptive or special equipment; special lighting; special acoustics; location with minimal distractions; preferential seating; additional paper for math calculations; use of scribe; on-task focusing prompts; waive spelling requirements; waive paragraphing requirements; waive punctuation requirements; use of calculator; use of abacus; use of arithmetic tables; use of spell check device; and use of grammar check device.

However, since the list of testing accommodations is not finite, text boxes allow entry of other testing accommodation recommendations as appropriate. For each recommended testing

accommodation, the Committee must, as applicable, identify the conditions or types of tests that will require testing accommodations (e.g., type, length, purpose of test) as well as any implementation recommendations (e.g., amount of extended time, duration and interval of breaks).

For example:

Testing Accommodations (to be completed for preschool children only if there is an assessment program for nondisabled preschool children): Individual testing accommodations, specific to the student's disability and needs, to be used consistently by the student in the recommended educational program and in the administration of district-wide assessments of student achievement and, in accordance with Department policy, State assessments of student achievement

Testing Accommodation	Conditions*	Implementation Recommendations**
None		
Extended time	For tests requiring written essays	Time and a half
*Conditions – Test Characteristics: Describe the type, length, purpose of the test upon which the use of testing accommodations is conditioned, if applicable. **Implementation Recommendations: Identify the amount of extended time, type of setting, etc., specific to the testing accommodations, if applicable.		

Coordinated Set of Transition Activities

Beginning with the first IEP to be in effect when the student is age 15 (and at a younger age, if determined appropriate) and updated annually, the IEP must include a statement of needed transition services. These services focus on improving the academic and functional achievement of the student with a disability to facilitate the student's movement from school to post-school activities.

All recommended transition services and activities are documented here to show the coordinated nature of the services and activities that are designed to promote movement from school to post-school opportunities before the student leaves the school setting. For each activity, the IEP must include a statement of the responsibilities of the school district and, when applicable, participating agencies for the provision of transition services.

For example: Student with Learning Disability - age 16

Beginning not later than the first IEP to be in effect when the student is age 15 (and at a

younger age, if determined appropriate).

Coordinated Set of Transition Activities

Needed activities to facilitate the student's movement from school to post-school activities	Service/Activity	School District/ Agency Responsible
Instruction	Instruction in problem solving	ABC Public School
Instruction	CTE Courses in Culinary Arts	BOCES
Instruction	Instruction in computer word processing skills	ABC Public School
Related Services	Counseling to work on self-advocacy skills	ABC Public School
Community Experiences	Visits to community agencies to develop an understanding of the location of services and their functions.	Independent Living Center
Community Experiences	Practice banking in the community	ABC Public School
Development of Employment and Other Post-school Adult Living Objectives	Facilitate meeting of student with Independent Living Center to explore post-school supports available	ABC Public School and Independent Living Center
Development of Employment and Other Post-school Adult Living Objectives	Complete sample college and job applications	ABC Public School
Development of Employment and Other Post-school Adult Living Objectives	Explore summer job opportunities	ABC PublicSchool
Development of Employment and Other Post-school Adult Living Objectives	Apply for local transportation pass and discount card if available	Independent Living Center
Development of Employment and Other Post-school Adult Living Objectives	Initiate application to VESID Vocational Rehabilitation (VR)	ABC Public School and VESID VR
Acquisition of Daily Living Skills	Considered, but not needed	N/A

(if applicable)		
Functional Vocational Assessment (if applicable)	Considered, but not needed	N/A

Participation in State and District-Wide Assessments

All students with disabilities must be included in State or district-wide assessment programs. If the Committee determines that the student will participate in an alternate assessment on a particular State or district-wide assessment of student achievement, the IEP must provide a statement of why the student cannot participate in the regular assessment, and why the particular alternate assessment selected is appropriate for the student.

For example:

Participation in State and District-Wide Assessments

(To be completed for preschool students only if there is an assessment program for nondisabled preschool students)

The student will participate in the same State and district-wide assessments of student achievement that are administered to general education students.

X The student will participate in an alternate assessment on a particular State or district-wide assessment of student achievement.
Identify the alternate assessment: New York State Alternate Assessment (NYSAA)
Statement of why the student cannot participate in the regular assessment and why the particular alternate assessment selected is appropriate for the student: The student meets the eligibility criteria for the NYSAA because of her limited cognitive abilities combined with physical limitations. She is nonverbal and uses a picture communication device to communicate basic needs. She requires direct care for personal needs. Her chronological age is 12 but her instructional levels are at the Kindergarten level.

Participation with Students without Disabilities

The following section of the IEP is used to document the extent to which a student's disability precludes his/her participation with students without disabilities, including:

- an explanation of the extent, if any, to which a student will not participate in regular class and/or extracurricular and nonacademic activities, or, for preschool students, in appropriate activities, with age-appropriate nondisabled peers. This may be indicated as the percent of

the school day or by identifying particular activities that the student will not participate in with his/her nondisabled peers.

- the extent to which the student will participate in specially-designed physical education; and
- when the Committee recommends that a student be exempt from the language other than English (LOTE) requirement because the student's disability affects his/her ability to learn a language.

For example:

Participation with Students Without Disabilities

Removal from the general education environment occurs only when the nature or severity of the disability is such that, even with the use of supplementary aids and services, education cannot be satisfactorily achieved.

For the preschool student:
Explain the extent, if any, to which the student will not participate in appropriate activities with age-appropriate nondisabled peers (e.g., percent of the school day and/or specify particular activities): N/A

For the school-age student:
Explain the extent, if any, to which the student will not participate in regular class, extracurricular and other nonacademic activities (e.g., percent of the school day and/or specify particular activities): Student will not participate in regular classes for English or Math - 100 minutes per day.
If the student is not participating in a regular physical education program, identify the extent to which the student will participate in specially-designed instruction in physical education, including adapted physical education: Adapted physical education - 30 minutes per day - 3 days per week.
Exemption from language other than English diploma requirement:
X No
Yes. The Committee has determined that the student's disability adversely affects his/her ability to learn a language and recommends the student be exempt from the language other than English requirement.

Special Transportation

The IEP must include recommendations to address each of the student's disability-related special transportation needs, as appropriate. The IEP must specify any special transportation, including any specialized transportation equipment (e.g., special or adapted buses, lifts and

ramps), needed by the student based on his or her unique needs related to the student's disability to travel to and from school (including such school-related programs as work programs and settings other than the school where the student receives education or special education services); and, as appropriate, in and around the school.

The State form provides the following drop-down options for documenting a student's special transportation needs:

- Special seating;
- Vehicle and/or equipment needs;
- Adult supervision;
- Type of transportation; and
- Other accommodations.

Text boxes are provided after each of the above options to document the specific transportation recommendation to address each of the student's needs (e.g., seating away from the bus window, car seat, bus with bus attendant).

In addition, the IEP must indicate if the student needs transportation to and from special education services to be provided at another site.

For example:

Special Transportation

Transportation recommendation to address needs of the student relating to his/her disability

None.
Student needs special transportation accommodations/services as follows:
Vehicleand/or equipment needs - Wheel chair ramp
Adult supervision - to assist the student on and off the bus
Student needs transportation to and from special classes or programs at another site: To and from BOCES to receive related services.

Placement Recommendation

The IEP must indicate the recommended placement of the student. The student's placement is the educational setting in which the student's IEP will be implemented. Placement should indicate the type of setting where the student will receive special education services (e.g.,

public school district, BOCES class, approved private school).

For example:

Placement Recommendation

Approved private day school

For additional guidance on IEP development, see
http://www.emsc.nysed.gov/specialed/publications/iepguidance.htm.

EXHIBIT 4

SCHOOL DISTRICT IDENTIFYING INFORMATION

STUDENT INFORMATION SUMMARY

STUDENT NAME: AGE: DATE OF BIRTH: DISABILITY CLASSIFICATION:	LOCAL STUDENT ID #: DATE IEP DEVELOPED / DATE OF COMMITTEE MEETING: TYPE OF MEETING:

ADDRESS: TELEPHONE #: COUNTY OF RESIDENCE: MALE ☐ FEMALE ☐ NATIVE LANGUAGE OF STUDENT: INTERPRETER FOR STUDENT NEEDED: YES ☐ NO ☐ IF YES, SPECIFY LANGUAGE: RACIAL/ETHNIC GROUP OF STUDENT: SURROGATE PARENT NEEDED: YES ☐ NO ☐	ELIGIBLE FOR 12-MONTH SERVICE AND/OR PROGRAM: YES ☐ NO ☐ PROJECTED DATE OF ANNUAL REVIEW MEETING: PROJECTED DATE OF THREE-YEAR REEVALUATION: CURRENT GRADE / GRADE EQUIVALENT: CREDITS EARNED TOWARD GRADUATION WITH A REGENTS OR LOCAL DIPLOMA: DIPLOMA TYPE EXPECTED: STUDENT WITH LIMITED ENGLISH PROFICIENCY: YES ☐ NO ☐ MEDICAL ALERTS AND/OR CONCERNS: TRANSPORTATION: ☐ PER DISTRICT POLICY ☐ SPECIAL TRANSPORTATION REQUIRED TRANSPORTATION OPTIONS FOR PRESCHOOL CHILD: ☐ NO TRANSPORTATION NEEDED ☐ TRANSPORTATION PROVIDED BY MUNICIPALITY ☐ PARENT WILL TRANSPORT CHILD AT PUBLIC EXPENSE
MEETING PARTICIPANTS:	

EXHIBIT 5

Meeting Notice
Committee on Preschool Special Education (CPSE)

Date:

Dear Parent(s) or Guardian of

Student's DOB: Local ID Number:

We have scheduled a CPSE meeting to discuss your child's educational needs. Your participation in this meeting is very important and you are encouraged to attend. As a member of the CPSE, you have a right to participate in discussions and decisions about the identification, evaluation and educational placement of your child. The meeting has been scheduled for the following date, time and location:

Date	Time	Location

Purpose of this meeting:

Names and titles of the persons who will attend the meeting:

Name	Title

If your child is transitioning from early intervention (EI) services, and this is your child's first CPSE meeting, you may request that we invite an EI representative to this meeting by contacting (name) at (telephone number).

You have the right to invite other individuals who you determine to have knowledge or special expertise about your child. Please notify us in advance of the names and titles of any individuals you have invited to the meeting.

In addition to you, another parent of a student with a disability enrolled in a preschool or elementary level education program will be a member of the CPSE, unless you prefer that no additional parent member be included. You must notify us, in writing, of your intent to decline the participation of the additional parent member.

If you have any questions regarding information contained in this meeting notice or if the scheduled date, time or location of the meeting is not convenient and/or if you need assistance understanding the special education process, please contact (name) at (telephone number). If you are unable to attend but wish to participate in this meeting, please contact us to discuss alternative means of participation, such as a conference telephone call. You may also address the CPSE in writing. We look forward to your participation in this important meeting.

Sincerely,

Meeting Notice
Committee on Special Education (CSE)

Date:

Dear Parent(s) or Guardian of

Student's DOB: Local ID Number:

We have scheduled a meeting of the to discuss your child's educational needs. Your participation in this meeting is very important and you are encouraged to attend. As a member of the Committee, you have a right to participate in discussions and decisions about the identification, evaluation and educational placement of your child. The meeting has been scheduled for the following date, time and location:

Date	Time	Location

Purpose of this meeting:

Names and titles of the persons who will attend the meeting:

Name	Title

If post-secondary goals and transition services will be considered at this meeting, your child will be invited to the meeting. In addition, a representative from the following agency/agencies likely to be responsible for providing or paying for transition services will be invited with your consent, or the consent of your child if he/she is 18 years of age or older.

You have the right to invite other individuals who you determine to have knowledge or special expertise about your child. Please notify us in advance of the names and titles of any individuals you have invited to the meeting.

For a CSE meeting: You have the right to request that the additional parent member of the CSE (who is a parent of a student with a disability residing in the district or a neighboring district) attend the meeting. This request must be made in writing at least 72 hours (three days) before the meeting. The role of the additional parent member is to bring another perspective as a parent of a child with a disability to the discussions and decision-making process. This individual can also help you to understand and participate in the meeting by explaining procedures, asking questions and clarifying information.

You may also request that the school district include the participation of the school physician in the CSE meeting. This request must also be made in writing at least 72 hours (three days) before the meeting.

For a Subcommittee meeting: A Subcommittee of the CSE includes the same members as a CSE, except that the additional parent member, the school physician and the school psychologist (except under certain circumstances), are not members of a Subcommittee. If you disagree with any recommendation made by a Subcommittee, you may request, in writing, that the Subcommittee refer the matter to the CSE.

If you have any questions regarding information contained in this meeting notice or if the scheduled date, time or location of the meeting is not convenient and/or if you need assistance understanding the special education process, please contact (name) at (telephone number). If you are unable to attend but wish to participate in this meeting, please contact us to discuss alternative means of participation, such as a conference telephone call. We look forward to your participation in this important meeting.

Sincerely,

EXHIBIT 6

Prior Written Notice
(Notice of Recommendation)

Date:

Dear Parent or Guardian of

Student's DOB: Local ID Number:

The purpose of this notice is to inform you, in writing, of the school district's recommendation(s) regarding the identification, evaluation, educational placement and/or provision of special education services to your child.

SUBJECT OF THIS NOTICE:

DESCRIPTION OF ACTION PROPOSED OR REFUSED:

EXPLANATION OF WHY THE ACTION IS PROPOSED OR REFUSED:

DESCRIPTION OF EACH EVALUATION PROCEDURE, ASSESSMENT, RECORD, OR REPORT USED IN THE DECISION TO PROPOSE OR REFUSE THE ACTION:

FOR AN INITIAL OR REEVALUATION - DESCRIPTION OF THE PROPOSED INITIAL OR REEVALUATION AND THE USES TO BE MADE OF THE INFORMATION:

DESCRIPTION OF ANY OTHER OPTIONS CONSIDERED AND THE REASONS WHY THOSE OPTIONS WERE REJECTED:

DESCRIPTION OF OTHER FACTORS THAT ARE RELEVANT TO THE PROPOSED OR REFUSED ACTION:

YOU HAVE PROTECTION UNDER THE PROCEDURAL SAFEGUARDS OF THE REGULATIONS OF THE COMMISSIONER OF EDUCATION.

☐ A copy of the Procedural Safeguards Notice is enclosed.
☐ A copy of the Procedural Safeguards Notice may be obtained by:

SOURCES YOU MAY CONTACT TO OBTAIN ASSISTANCE IN UNDERSTANDING THE SPECIAL EDUCATION PROCESS:

ADDITIONAL INFORMATION RELATED TO THE SUBJECT OF THE NOTICE:

You have the right to address the Committee, either in person or in writing, on the appropriateness of the Committee's recommendations. If you have any questions or would like to request a meeting to further discuss information contained in this notice, please contact at .

Sincerely,

Enclosures:

OBLIGATIONS OF SCHOOL DISTRICTS IN DEVELOPING AN APPROPRIATE IEP

NYSBA

Special Education Law Update 2013

Buffalo, NY

November 1, 2013

Gayle T. Murphy, Esq.

Overview

- Pre referral interventions
- Referral to the CSE
- Notice and Consent
- Individual Evaluations
- The CSE
- The CSE meeting
  - Eligibility
  - IEP
  - IEP Implementation
  - Annual Review/Reevaluation
  - Due Process

Consideration of Pre-referral Interventions

- CSE must consider the following before developing a recommendation
  - Appropriateness of the resources of the general education program
  - Educationally related support services
  - Academic intervention services
  - 8 NYCRR 200.4(d)

General Education Services

- Academic Intervention Services
- Speech and Language Improvement
- Direct Student Support Team
- Title I and PCEN
- Supplemental Education Services
- Response to Intervention

Academic Intervention

- 8 NYCRR 100.1(g)
  - Academic instruction and/or student support services
  - Designed to assist students at risk of not achieving NYS standards or at risk of falling short of designated NYS performance levels
  - Can be provided before/after school, during school, beyond school year
  - Notice to parents

Speech and Language Improvement

- 8 NYCRR 100.1(p)
- Provided to eligible students with speech impairments
- Educational performance not affected by severity of speech impairment
- Severity presents barrier to student's communication

Direct Student Support Team

- 8 NYCRR 100.1(s)
- General education, individualized instruction, and support services for eligible students

Title I & PCEN

- 8 NYCRR 149-1.1
- Federally funded program for low income students (title I)
- NYS funded program for students with compensatory education needs (PCEN)
- Minimal disruption, integrated remedial strategies
- Small group, adjusted programs, technology, after school/summer programs, other remedial strategies

Supplemental Education Services

- 8 NYCRR120
- NCLB
- Academic instruction to increase student achievement in low performing schools
- Eg: tutoring, remediation & other educational interventions

Response to Intervention

- 8 NYCRR 100
- Multi tier, general ed intervention
- Scientific research based instruction

Child Find

- Education Law §4402
  - Identify, locate and evaluate all students with disabilities in the district in need of special education
  - Including children with disabilities who are homeless or wards of the State

Referral to the CSE

- 8 NYCRR 200.4 (a)
- Written request to CSE chair or building administrator
- For individual determination of eligibility for special education and related services
- District required to make referral if student fails to make adequate progress ….when provided instruction described in 8 NYCRR 100.2 (ii)

- Requests for referrals made by persons other than the student or judicial officer must specify
  - Reason for referral; records/data upon which referral is based
  - Intervention services, programs, methodologies used to remediate student performance
  - Extent of parental contact/involvement
  - 8 NYCRR 200.4(a)(2)

- CSE chair who receives referral shall immediately notify the parent
  - 8 NYCRR 200.5(a)
- Building administrator may hold meeting with parent to explore use of additional gen ed services 8 NYCRR 200.4(9)
  - 10 days of receipt of written referral
  - Shall not impede CSE duties/functions

Consent

- 8 NYCRR 200.1(l)
  - Fully informed
  - Native language or mode of communication
  - All relevant information
  - Parent understands and agrees in writing
  - Voluntary, may be revoked at any time
    - Consent is not retroactive

Parent Refusal to Grant Consent

- Informal conference
- Due process may be utilized by district for initial evaluation
- No child find violation where parent refuses consent for initial evaluation and district does not pursue due process
- 8 NYCRR 200.4(8)

Individual Evaluations

- 8 NYCRR 200.4(b)
- CSE required to consider a variety of assessment tools and strategies
- Including info from parent
- Relevant, functional, developmental and academic information
- Assist in determining eligibility and IEP content

Minimal Components

- 8 NYCRR 200.4(b)(1)
  - Physical evaluation
  - Individual psychological evaluation
  - Social history
  - Observation of student
  - Other appropriate assessments

Other Evaluations

- Speech/language
- OT
- PT
- AT
- Audiology
- Specific skill assessments-reading, math, written language
- Functional Behavior Assessment
- CAP
- Psychiatric
- Neurological
- Neuropsychological
- Vision/visual

Important considerations

- 8 NYCRR 200.4(b)(6)
- Native language/mode of communication
- Valid and reliable, technically sound
- Trained personnel
- Free from racial/cultural bias
- Standard test considerations
- Assess specific area of educational need

- Aptitude/achievement reflected, not skill deficits
- No single measure used as sole criterion
- Multidisciplinary team evaluation
- Assess in all areas related to suspected disability
- Voc assessments begin at age 12

- Relevant information
- Results to parents
- Expedited as required
- LEP evaluations must measure extent of disability, not lack of English language skill
- Coordination between schools for transfer students
- LD assessments

Evaluation timeframe

- District must complete the evaluations within 60 days of district's receipt of consent to evaluate 8 NYCRR 200.4(b)(1)

Re-evaluations

- 8 NYCRR200.4(b)(4)
- At least once every 3 years, unless dist and parent agree in writing that such reeval is unnecessary
- Sufficient to determine
  - Student's individual needs
  - Educational progress and achievement
  - Ability to participate in gen ed
  - Continuing eligibility for special education

- School psychologist may determine psychological evaluation is unnecessary 8 NYCRR 200.4(b)(2)
- CSE may conduct additional evaluations to appropriately assess the student 8 NYCRR 200.4(b)(3)
- Parents may request additional assessments by the CSE 8 NYCRR 200.4(b)(5)(iv)

- Educational screenings are not evaluation for eligibilty determination 8 NYCRR 200.4(b)(8)
- Districts prohibited from requiring students to obtain medication as condition of receiving an evaluation 8 NYCRR 200.4(b)(9)

Independent Educational Evaluations

- 8 NYCRR 200.5(g)
- Parents have right to obtain IEE at district expense if they disagree with district's evals
- CSE must consider parents' evals
- District's response
  - Pay for requested eval
  - File due process complaint

The CSE

- 8 NYCRR 200.3
- Multidisciplinary team
- Coordinates and conducts evaluations
- Meets at least annually
- Provides required parent notice
- Recommends programs
- Reports to BOE and NYS on status of students with disabilities

CSE membership

- 8 NYCRR 200.3(a)
  - Parent or persons in parental relation
  - Student's general ed teacher
  - Student's special ed teacher or special ed provider
  - School psychologist
  - District rep/CSE chair
  - Individual who interprets instructional implications of evaluations

- School physician upon written parent request
- Parent of school age SWD upon written parent request
- Other persons with knowledge or special expertise
- Student, if appropriate
- School/agency rep for out of district placements

Subcommittees

- 8 NYCRR 200.3(c)
  - Parent/person in parental relations
  - Child's gen ed teacher
  - Child's special ed teacher/provider
  - District representative
  - School psychologist in specific instances
  - Individual who can interpret instructional implications of evaluations
  - Other persons with specialized knowledge or expertise

- Subcommittees duties consistent with CSE except for initial placement considerations in
- Special class
- Special class outside school of attendance
- School primarily serving SWD or school outside district

Teacher participation at CSE

- Critical general education teacher input
- Appropriate positive behavior interventions, supports and services
- Supplementary aids and services, program modifications and support for school personnel

- CSE mandatory member attendance unless district and parent agree to excusal 8 NYCRR 200.3(f)
  - Area of expertise not being discussed
  - Attendance in whole/part
  - Submit written input
  - 5 days prior to CSE meeting
  - Acknowledges emergency/unavoidable conflicts
  - Not applicable to parents or municipal appointees

Notice of CSE meeting

- 8 NYCRR 200.5(c)
  - Required to be on form prescribed by Commissioner
  - http://www.p12.nysed.gov/specialed/formsnotices/meetingnotice/CSEmeetform.htm

Eligibility

- 8 NYCRR 200.4(c)(1)
  - CSE interprets evaluation data to determine student's eligibility as SWD and student's edu needs
    - Considers info from variety of sources
    - Ensures info is documented and carefully considered
    - Provide parent with copy of eval report and documentation of eligibility

- No special ed eligibility if determinant factor is
  - Lack of appropriate instruction in reading including explicit and systematic instructing in phonemic awareness, phonics, vocabulary development, reading fluency, including oral reading skills) and reading comprehension strategies
  - Lack of appropriate math instruction
  - Limited English proficiency
  - 8 NYCRR 200.4(c)(3)

- Evaluation required when determining student no longer a SWD * NYCRR 200.4(c)(3)
- FAPE must be available to SWD even though SWD advancing from grade to grade 8 NYCRR 200.4(c)(5)
- LD evals made pursuant to 8 NYCRR 200.4(j)
- No reeval required before eligibility ends, graduation or exceeding age eligibility 8 NYCRR 200.4(c)(4)
  - Summary of academic achievement and functional performance
    - Including recommendations on how to assist student in meeting postsecondary goals

Recommendation

- CSE provides recommendation to BOE which must arrange for special ed programs/services within 60 *school* days of receipt of consent to evaluate 8 NYCR 200.4(d)

Determination of ineligibility

- Copy of recommendation provided to parent
- Copy with eval info provided to building administrator, who is to determine appropriate support services for student
- Indicate reasons for ineligibility
- 8 NYCRR 200.4(d)(1)(i &ii)

Student no longer needs special education services

- Full time gen ed class placement
- Declassification support services
- Start date, frequency and duration of declassification support services
  - Shall not continue for more than one year after student enters full time gen ed
  - 8 NYCRR 200.4(d)(1)(iii)

The IEP

- 8 NYCRR §200.4(d)(2)
- On form prescribed by Commissioner
  - http://www.p12.nysed.gov/specialed/formsnotices/IEP/memo-Jan10.htm

- CSE must consider
  - Results of initial/most recent eval
  - Student strengths
  - Parent concerns for enhancing child's edu
  - Academic, developmental & functional needs
    - Including state/district wide assessment results
    - 8 NYCRR 200.4(d)(2)

- Special considerations:
  - Where behavior impedes learning, strategies, including positive behavioral interventions and supports
  - LEP students, consider language needs
  - Blind/visually impaired, consider instruction in Braille and use of Braille
  - Communication needs of student, for deaf or hard of hearing students
  - Assistive technology devices and services needed for FAPE
  - IEP statement required for consideration of special factors for student to receive FAPE
  - 8 NYCRR 200.4(d)(3)

Present levels of performance

- 8 NYCRR 200.4(d)(2)(i)
- Present levels of academic achievement, functional performance and individual needs
  - Social development
  - Physical development
  - Academic achievement, including learning characteristics
  - Management needs

- Disability Classification
  - 8 NYCRR §200.1(zz)
    - Autism
    - Deafness
    - Deaf-blindness
    - Emotional disturbance
    - Hearing impairment
    - Learning disability
    - Intellectual disability
    - Multiply disabled
    - Orthopedic impairment
    - Other health impairment
    - Speech or language impairment
    - Traumatic brain injury
    - Visual impairment including blindness

Measurable annual goals

- 8 NYCRR 200.4(d)(2)(iii)
  - Includes academic and functional goals consistent with the student's needs and abilities
  - Enables student to be involved in and progress in general education
  - Meets each of the students other educational needs

- Includes evaluative criteria, evaluation procedures and schedules
- Indicates periodic progress reporting
- Includes short term instructional objectives and benchmarks
  - Students who take alternative assessments and preschoolers
  - Measurable intermediate steps between present levels and measurable annual goal
  - 8 NYCRR 200.4(d)(iii)(iv)

Special education programs and services

- 8 NYCRR 200.4(d)(2)(v)(a)
- Advance appropriately toward attaining annual goals
- Enable student to be involved and progress in the general curriculum and participate in extracurricular and other nonacademic activities
- To be educated and participate with other SWD and non disabled students in school activities

Recommended Program & Services

- Program and services based on peer reviewed research and indicate:
  - Regular ed classes in which SWD receives CT services
  - Special education class size
  - Supplementary aids and services provided to student or on behalf of student
  - Program mods or supports for school personnel
  - Parent counseling and training
  - AT devices or services for the student to benefit from instruction, including use of AT devices in home or other settings

- Frequency, duration, location for each of recommended programs and services
- Including supplementary aids and services and program mods to be provided to or on behalf of SWD
- Projected date for start of special ed and related services and supplementary aids and services
- 8 NYCRR 200.4(d)(2)(v)(b)

Testing Accommodations

- Individual testing accommodations
- Used consistently by student
- In recommended program, and
- Administration of district wide assessments of student achievement, and
- In accord with SED policy, State assessments of student achievement necessary to measure student academic achievement and functional performance
- For alternate assessments
  - Why SWD cannot participate in regular assessment
  - Why alternate assessment selected is appropriate for SWD
- 8 NYCRR 200.4 (d)(2)(vi)(vii)

- http://www.p12.nysed.gov/specialed/publications/policy/testaccess/policyguide.htm

Participation in Regular Class

- Explain extent to which SWD will not participate with non disabled peers in the regular class and activities
- If SWD is not participating in regular physical education program, extent to which SWD will participate in specially designed instruction in physical education, including adaptive physical education
- 8 NYCRR 200.4(d)(2)(viii)

Transition Services

- http://www.p12.nysed.gov/specialed/publication/transitionplanning-2011.htm
- Statement of transition services for SWD not later than the first IEP in effect when the SWD turns 15, or earlier where appropriate
- PLEP statement of needs, taking into account strengths, preferences and interests, as related to transition from school to post school activities
- Appropriate measurable postsecondary goals based upon age appropriate transition assessments relating to training, education, employment and independent living skills
- Transition service needs focusing on courses of study “such as participation in advanced placement courses or a vocational education program”

- Needed activities to facilitate movement from school to post school activities in areas of
  - Instruction
  - Related services
  - Community experiences
  - Dev employment and other post school adult living objectives
  - Acquisition of daily living skills and
  - Functional vocational evaluation

- District responsibilities and participating agencies for provision of services and activities
  - That promote movement from school to post school opportunities
  - Before student leaves the school setting
  - 8 NYCRR 200.4(2)(ix)

12 month services

- SWD who require structured learning environment of 12 month to prevent substantial regression
- Statement of reasons for recommendation
- Identity of service provider
  - 8 NYCRR 200.4(2)(x)
  - 8 NYCRR 200.1(aaa)
  - 8 NYCRR 200.6(k)

Projected date of Annual Review

- 8 NYCRR 200.4(d)(2)(xi)

Recommended placement

- 8 NYCRR 200.4(d)(2)(xii)
- Least Restrictive Environment
  - 8 NYCRR 200.1(cc)
    - Removal from regular ed environment occurs only when nature/severity of disability is such that even with use of supplementary aids and services education cannot be satisfactorily achieved
    - Provides special education needed by SWD
    - Provides to maximum extent appropriate, education of SWD with nondisabled peers
    - As close as possible to student's home

- LRE
- 8 NYCRR 200.4(d)(4)(ii)(a-d)
  - Placement shall be based on the student's IEP and determined at least annually
  - Placement as close as possible to student's home and in "home school" unless IEP requires some other arrangement
  - Consider any potential effect on the student or on the quality of service he needs
  - "must not be removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum." 8 NYCRR 200.4(d)(4)(ii)(d)

Continuum of Services

- 8 NYCRR 200.6
- Consultant teacher direct/indirect
- Resource room
- Self contained classes
  - 15:1
  - 12:1:1
  - 8:1:1
  - 6:1:1
  - 12:1:4
  - Private special education school
  - Residential school
  - Home and hospital instruction

IEP Implementation

- BOE must arrange for appropriate special ed programs and services within 60 school days of receipt of consent to evaluate or of referral for review
  - No delays in implementing a student's IEP are allowed
  - IEP must be in effect at beginning of school year
  - 8 NYCRR 200.4(e)

- Ensure implementation by providing
  - Paper or electronic copy of IEP or accessing electronic IEP for teachers, related service providers and other service providers responsible for implementation of SWD IEP and informing all professionals (including support staff) of their duty to implement IEP
  - Copy of IEP and ongoing access to IEP to supplementary school personnel responsible for assisting in IEP implementation
  - Copy of IEP at no cost to parents
  - 8 NYCRR 200.4(e)(3)

- Referral back to CSE by parent, teacher, administrator or agency if SWD program/placement no longer appropriate 8NYCRR 200.4(e)(4)
- Consultant teachers and gen ed teachers are to participate in instructional planning 8 NYCRR 200.4(e)(5)
- Where participating agency fails to provide transition services, CSE shall meet to identify alt strategies and revise IEP 8 NYCRR 200.4(e)(6)

- District must make good faith effort to assist SWD to achieve annual goals, short term instructional objectives or benchmarks 8NYCRR 200.4(e)(7)

- Transfer students with IEP 8 NYCRR 200.4(e)(8)
- In NYS
  - New district provides SWD with FAPE
  - including services comparable to those in previous IEP, in consultation with parents
  - until CSE adopts previously held IEP or develops, adopts and implements new IEP
  - Reasonable steps to promptly obtain SWD records; prior school shall promptly respond

- SWD who transfer from outside NYS
  - New district provides SWD with FAPE
  - Including services comparable to those described in IEP, in consultation with parents
  - Until evaluation conducted, if necessary, and
  - New IEP developed
  - Reasonable steps to promptly obtain SWD records; prior school shall promptly respond

Annual review

- 8 NYCRR 200.4(f)
- Review IEP periodically but not less than annually
  - Based on review of IEP and other current info pertaining to student performance
  - Student strengths
  - Parent concerns
  - Evaluation data and performance on state or district assessments
  - Academic, developmental and functional needs
  - Special factors
  - Educational progress and achievement & ability to participate in reg ed instructional programs and in LRE

IEP Amendments

- Rewriting IEP or developing written document to amend or modify current IEP
  - Prior written notice to parent of changes
  - CSE notified of changes
  - Parent receives copy of document amending or modifying IEP, or upon request, revised IEP with incorporated amendments
  - 8 NYCRR 200.4(g)(1)

- IEP can be amended/modified without a CSE
  - 8 NYCRR 200.4(g)(2)
  - Parent makes written request to school, district and parent agree in writing, or
  - District provides parent with written proposal to amend/modify
  - IEP amendments/modifications does not affect annual review requirement 8 NYCRR 200.4(g)(3)

Due process procedures-notice

- 8 NYCRR §200.5(a)
- Prior written notice
- On form prescribed by commissioner
  - http://www.p12.nysed.gov/specialed/formsnotices/PWN/form.htm
- Provided to parents of SWD before district proposes or refuses to initiate or change the identification, evaluation, educational placement or provision of FAPE

- Procedural Due Process Safeguards
- On form prescribed by the Commissioner
  - http://www.p12.nysed.gov/specialed/formsnotices/psgn/psgn713.htm

Consent

- 8 NYCRR 200.5(b)
  - Prior to conducting initial evaluation or reevaluation
  - Prior to initial provision of special education
  - Prior to initial provision of 12 month services
  - Prior to releasing personally identifiable information
  - Prior to accessing student's or parent's public benefits or insurance for the first time 8 NYCRR 200.5(b)(8)

Notice of CSE meeting

- 8 NYCRR 200.5(c)

Parent Participation in CSE

- 8 NYCRR 200.5(d)
  - Notice of meetings
  - Scheduling of meetings
  - Ensuring parent participation
  - When a meeting does not include parents
  - CSE meetings without parents present
  - Parents' understanding of meeting
  - Right to inspect and review records: FERPA

Mediation

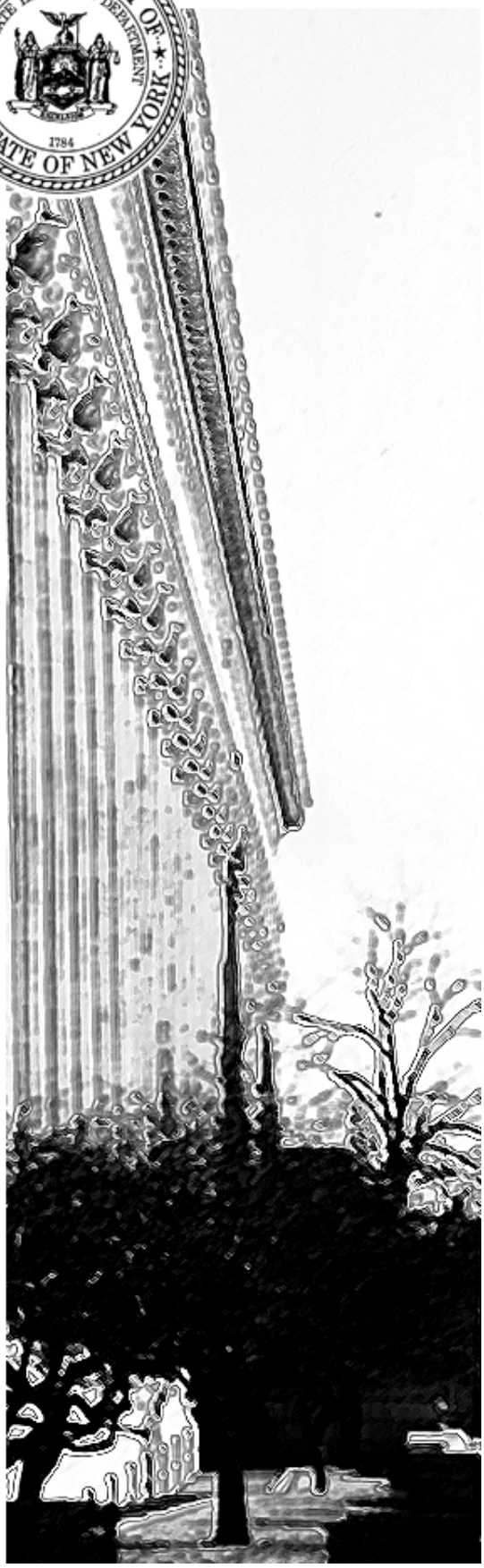
- 8 NYCRR 200.5(h)
  - Districts must ensure procedures are established and implemented to allow parties to resolve disputes through mediation

Due Process Complaints and Hearings

- 8 NYCRR 200.5(i)(j)(k)

State Complaint Procedures

- 8 NYCRR 200.5(l)



The University of the State of New York
The State Education Department

Guide to Quality Individualized Education Program (IEP) Development and Implementation

February 2010
(Revised December 2010)

THE UNIVERSITY OF THE STATE OF NEW YORK

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Table of Contents

Page

INTRODUCTION

Research and experience has shown that to improve results for students with disabilities, schools must:

- have high expectations for students with disabilities;
- meet the student's needs to enable the student to access, participate and progress in the general education curriculum to the maximum extent possible;
- ensure that parents have meaningful opportunities to participate in the development, review and revision of the individualized education program (IEP);
- ensure that families have meaningful opportunities to participate in the education of their children at school and at home;
- ensure that special education is a service, rather than a place where students are sent;
- provide appropriate special education services and supplementary supports and services in the general education classroom, whenever appropriate;
- provide effective systems of school-wide, classroom, small group and individualized systems of behavior supports;
- ensure that all those who work with students with disabilities have the skills and knowledge necessary to help such students to meet academic and functional goals;
- prepare students for their transition to adult living, working and learning to lead productive independent adult lives to the maximum extent possible;
- provide high quality research-based instruction and supports; and
- focus resources on teaching and learning.

The IEP is the cornerstone of the special education process for each individual student. It is the tool to document how one student's special needs related to his/her disability will be met within the context of an educational environment. This guidance document provides important information for Committees on Preschool Special Education (CPSE) and Committees on Special Education (CSE)[1] in developing IEPs that are reasonably calculated to result in educational benefit to a student.

[1] References to the CSE throughout this document include the Subcommittee, unless otherwise specified.

DEVELOPING IEPS LINKED TO THE STANDARDS

"The New York State Standards apply to all students, regardless of their experiential background, capabilities, developmental learning differences, interests or ambitions. There are multiple pathways to learn effectively, participate meaningfully and work towards attaining the curricular standards. Students with a wide range of abilities may pursue multiple pathways to learn effectively, participate meaningfully and work toward attaining the curricular standards." (Learning Standards for English-Language Arts, New York State Education Department, March 1996).

The New York State Learning Standards include learning standards, performance indicators and sample tasks a student is expected to know or demonstrate at different levels (alternate, elementary, intermediate and commencement). Standards serve as the basis for developing instructional curriculum.

In developing a student's IEP, it is the responsibility of the Committee to recommend goals and services that will assist the student to be involved and progress in the general education curriculum (or for preschool students, in appropriate activities). This means that members of a Committee will need to consider both the State's learning standards as well as the school-based instructional curriculum, which should be aligned to the State's learning standards. They will need to know the expectations of the general education classroom for the corresponding age of the student both in terms of what learning is expected (general curriculum) as well as how the students are expected to access/demonstrate that learning. This information will assist the Committee in determining if the student needs adaptations, accommodations, or modifications to the general curriculum for all or part of his/her learning. This is one reason it is essential that the student's general education teacher(s) participate in the Committee meetings and for the school district representative to be knowledgeable about the general education curriculum.

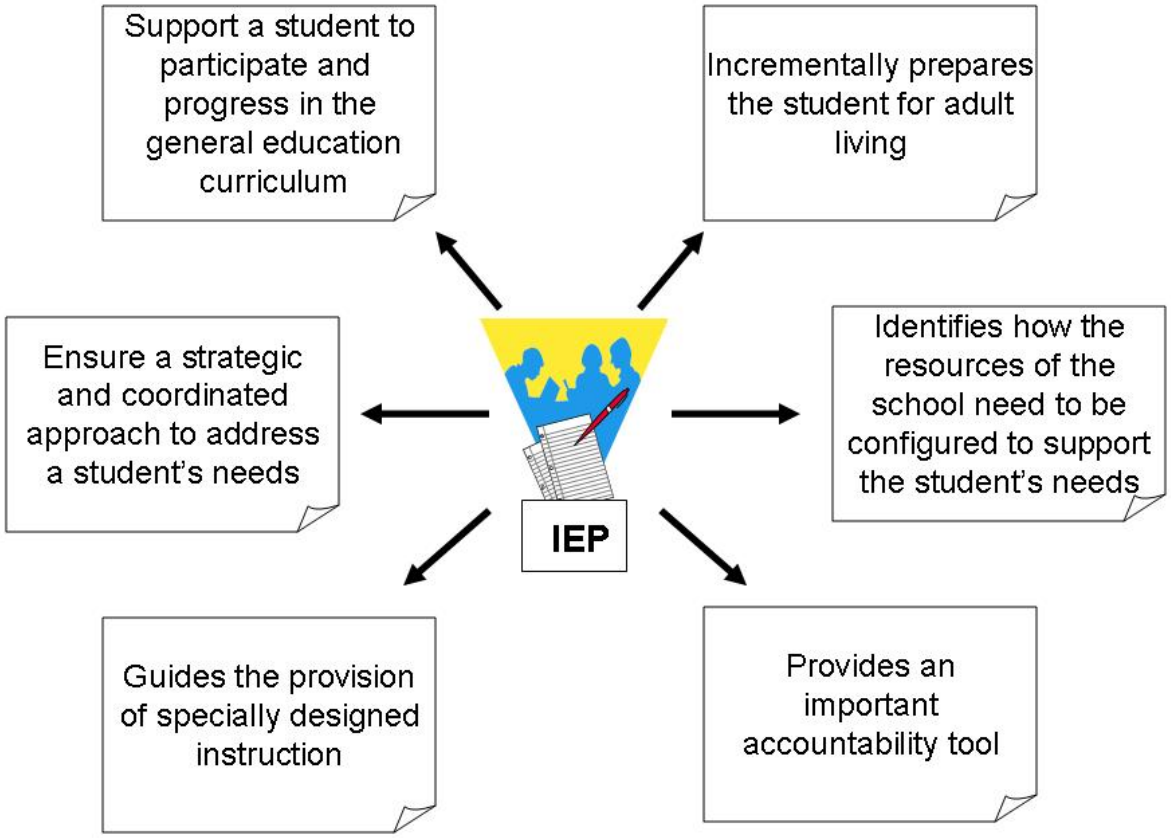
To develop IEPs that are linked to the standards, the Committee should:

1. Review the content as well as the expectations for how the student will learn or demonstrate knowledge and skill in the content areas.
2. Identify the strengths and challenges for the student in relation to those expectations in the present levels of performance section of the IEP.
3. Identify how a student's needs are linked to the general curriculum (e.g., a student's difficulty with visual processing may affect graphing skills required to achieve the math standards).
4. Identify the goals that the student will be expected to achieve in one year and, when appropriate, short-term instructional objectives or benchmarks that are the intermediate steps to reach those annual goals). Standard-based goals do not mean that a student's goals and objectives in an IEP are a re-statement of a standard or a curriculum goal in a specific content area, but rather are a statement that reflects the necessary learning that will lead to attainment of the standard. For example, a student may have goals to acquire essential learning strategies (e.g., mnemonics, self-questioning, paraphrasing and summarizing) that will help him or her better meet the expectations around how to learn the content.

5. Identify the special education services, including the adaptations, accommodations, or modifications to the general curriculum, and/or instructional environment and materials, as needed by the student to reach those standards.

THE IEP AS THE CORNERSTONE OF THE SPECIAL EDUCATION PROCESS

The IEP is a strategic planning document that should be far reaching in its impact. An IEP identifies a student's unique needs and how the school will strategically address those needs. IEPs identify how specially designed instruction will be provided in the context of supporting students in general education curriculum and in reaching the same learning standards as nondisabled students. IEPs guide how the special education resources of a school will be configured to meet the needs of the students with disabilities in that school. IEPs identify how students will be incrementally prepared for adult living. IEPs also provide an important accountability tool for school personnel, students and parents. By measuring students' progress toward goals and objectives, schools should use IEPs to determine if they have appropriately configured how they use their resources to reach the desired outcomes for students with disabilities.



OVERVIEW

The Individualized Education Program (IEP)

An IEP is a written statement for a student with a disability that is developed, reviewed and revised by a Committee on Special Education (CSE), Subcommittee on Special Education or Committee on Preschool Special Education (CPSE). The IEP is the tool that ensures a student with a disability has access to the general education curriculum and is provided the appropriate learning opportunities, accommodations, adaptations, specialized services and supports needed for the student to progress towards achieving the learning standards and to meet his or her unique needs related to the disability. Each student with a disability must have an IEP in effect by the beginning of each school year. Federal and State laws and regulations specify the information that must be documented in each student's IEP. In New York State (NYS), IEPs developed for the 2011-12 school year and thereafter, must be on a form prescribed by the Commissioner of Education.

Who develops the IEP?

An IEP must be initially developed and annually reviewed and, if appropriate, revised by the CSE, Subcommittee on Special Education or CPSE (hereinafter referred to as the Committee). The Committee is required to include certain individuals who know the student and his or her unique needs and who can commit the resources of the school to address the student's needs.

To develop an appropriate IEP for the student, a group of individuals with knowledge and expertise about the student, curriculum and resources of the school must consider individual evaluation information and reach decisions in an effective and efficient manner. Information about the student's strengths, interests and unique needs gathered from parents, teachers, the student, related service providers, evaluations and observations are the foundation upon which to build a program that will result in effective instruction and student achievement. Each member of the multidisciplinary team that makes up the Committee brings information and a unique perspective to the discussion of the student's needs and has an important role and responsibility to contribute to the discussion and the recommendations for the student.

Each Committee has a chairperson who has certain responsibilities under the law and regulations. The school district representative must serve as the chairperson of the Committee. The required members of the Committee include the following:

STUDENT

Whenever appropriate, the student should be invited to participate in the Committee meetings. It is the student, after all, who will be most affected by the recommendations of the Committee. The concerns, interests and recommendations of the student need to be considered. An IEP that builds on the strengths of the student and includes recommendations that the student can support is more likely to result in successful outcomes for the student. The decision to invite the student should be discussed with the student's parent(s) to determine if the student's attendance at the

meeting will be helpful in developing the IEP and/or directly beneficial to the student. If the purpose of the meeting is to consider the postsecondary goals for the student and transition services needed to assist the student in reaching those goals, the student must be invited. If the student does not attend, the district must take steps to ensure that the student's preferences and interests are considered.

PARENTS OF THE STUDENT

As Committee members, the student's parents or guardian participate in the development, review and revision of their child's IEP. Parents are the constant individuals on the Committee from year to year for that student. They bring a history as well as current information on their child's strengths and needs and their concerns and ideas for enhancing their child's education. Parents bring information on what expectations and hopes and dreams they have for their child, and often can speak to those approaches that have been successful and/or unsuccessful for their child. They can also provide information on their child's interests that can be used to motivate the child's learning, the skills that the child shows at home and in other settings and whether skills learned in school are being demonstrated elsewhere. The concerns of the parent for the education of their child must be considered in the IEP development process.

REGULAR EDUCATION TEACHER OF THE STUDENT

Whenever the child is or may be participating in the general education environment, at least one regular education teacher of the child must participate as a member of the Committee. The regular education teacher of the student has knowledge of the school's general education curriculum requirements and helps the Committee determine appropriate positive behavioral interventions, instructional strategies, supplementary aids and services, program modifications and supports for school personnel for and on behalf of the student that are necessary for the student to participate to the fullest extent possible in general education curriculum and classes. While only one regular education teacher of the student is required to attend the meeting, the Committee is encouraged to seek the input of the student's other regular education teachers who will not be attending the Committee meeting.

INDIVIDUAL WHO CAN INTERPRET THE INSTRUCTIONAL IMPLICATIONS OF THE EVALUATION

At least one individual must participate in the Committee meeting who can interpret evaluation information so that the instructional implications of those evaluations are understood and considered in the IEP development process. This individual may, as appropriate to the evaluations to be discussed, be a member of the Committee who is also serving as the regular education teacher, special education teacher or special education provider, (e.g., related service provider), school psychologist, representative

of the school district or a person having knowledge or special expertise regarding the student when such member is determined by the school district to have the knowledge and expertise to fulfill this role on the Committee.

SCHOOL DISTRICT REPRESENTATIVE

The school district representative must be someone who is qualified to provide or supervise special education and who is knowledgeable about the general education curriculum and the availability of resources of the district. This individual brings knowledge of the continuum of special education supports and services and should have the authority to commit the resources of the school and to ensure that whatever services are set out in the IEP will be provided.

The individual who meets these qualifications may also be the same individual appointed as the regular education teacher, special education teacher or special education provider of the student or the school psychologist on the Committee. The school district representative on the Committee must serve as the chairperson of the Committee.

INDIVIDUALS WITH KNOWLEDGE OR SPECIAL EXPERTISE ABOUT THE STUDENT

In addition to the other required members, parents and school personnel have discretion to invite other individuals who have knowledge or special expertise regarding the student. This is important to ensure that the Committee includes the input of those persons that can add to the discussion of the student's needs and recommendations for supports and services. The determination of the knowledge or special expertise of any such individual is made by the party (parents or school) who invited the individual to the meeting. When these individuals attend the meeting, they participate as Committee members for the student.

SPECIAL EDUCATION TEACHER, OR RELATED SERVICE PROVIDER, OF THE STUDENT

Not less than one special education teacher of the student, or if appropriate, not less than one special education provider of the student must participate in the Committee meetings. If the student is being considered for initial provision of special education, this individual must be a teacher qualified to provide special education in the type of program in which the student may be placed and be the teacher likely to implement the student's IEP. The student's special education teacher provides information on the specially designed instruction needed to address the student's unique needs.

SCHOOL PSYCHOLOGIST

A school psychologist is a member of the CSE, and under certain circumstances, the Subcommittee. (The school psychologist is not a required member of the CPSE.) This individual contributes to an understanding of the individual evaluations conducted on the

student, assists to identify the positive behavioral intervention supports and strategies needed by the student, assists to plan school programs to meet the student's needs and to identify, plan and manage any psychological services the student might need.

ADDITIONAL PARENT MEMBER

In addition to the parent of the student, another parent of a student with a disability must participate in meetings of the CSE and CPSE, except when the parents of the student request, in writing, that the additional parent member not participate or when the parents and school district agree, in writing, that the participation of the additional parent member is not necessary. For the CSE, the additional parent member must be a parent of a student with a disability residing in the school district or a neighboring school district, provided that the additional parent member may be the parent of a student who has been declassified within a period not to exceed five years or the parent of a student who has graduated within a period not to exceed five years., For the CPSE, the additional parent member must be a parent of a child with a disability residing in the school district or a neighboring school district and whose child is enrolled in a preschool or elementary level education program. The additional parent member may not be employed by or under contract with the school districts. The additional parent member is not a required member of a Subcommittee.

The additional parent member can provide important support and information to the parents of the student during the meeting and, in addition to the student's parents, participates in the discussions and decision making from the perspective of a parent of a student with a disability.

SCHOOL PHYSICIAN

A school physician, if specifically requested in writing by the parent or school district at least 72 hours before the meeting, is a required member of the CSE.

OTHER AGENCY REPRESENTATIVES

When the purpose of the meeting is to discuss transition services, a representative of any participating agency likely to be responsible for providing or paying for transition services must be invited to the meeting to the extent appropriate and with the consent of the student's parent (or the student who is 18 years of age or older). Written consent is needed because personally confidential information about a student will be shared at the Committee meeting. If an agency invited to send a representative to a meeting does not attend, the district must take steps to involve the other agency in the planning of any transition services.

When a student is or may be attending an approved private school or facility, a representative of that school or facility must be invited

to participate in the student's Committee meetings. This is also the case when a student is attending an education program operated by another State department or agency (e.g., Office of Mental Health, Office of Children and Family Services). If the private school or facility representative cannot attend, the school district must use other methods to ensure participation by the private school or facility, including individual or conference telephone calls.

For CPSE meetings, a representative of the municipality must be invited, but if that representative does not attend, the meeting can legally proceed. For students transitioning from early intervention (EI) programs and services to the CPSE, an EI service coordinator or other appropriate representative of the EI system must be invited at the request of the parent.

ATTENDANCE NOT NECESSARY

The parent and the school district may agree in writing that the attendance of one or more of the Committee members is not necessary for all or a portion of a particular Committee meeting because that individual's area of service will not be discussed or modified at the meeting. The regulations for these procedures are provided in Attachment 1.

EXCUSAL OF COMMITTEE MEMBERS

If a particular Committee member's area of service will be discussed or modified at a meeting, but the individual is not able to participate in the meeting, the parent and the district may consent in writing to excuse the individual from all or a portion of the meeting. In this case, the Committee member must have provided the Committee members with a written report. The regulations for these procedures are provided in Attachment 1.

Attachment 1 provides further information on the required members of these Committees.

STEPS TO DEVELOPING AND IMPLEMENTING AN IEP

The IEP needs to be developed in a particular sequence. The information considered and discussed in each step provides the basis for the next step in the process.

Step 1: Obtain and consider evaluation information

Evaluation information must be obtained in all areas of the student's disability or suspected disability. Evaluations need to identify and provide instructionally relevant information as to the unique needs of the student, current functioning, cognitive, physical, developmental and behavioral factors that affect learning and how the disability affects the student's participation and progress in the general education curriculum and in general education classes (or, for preschool students with disabilities, participation in age appropriate activities).

Before a student is identified as needing special education services, the Committee must ensure that the appropriateness of the resources of the general education program, including but not limited to academic interventions services, has been considered.

Step 2: Determine eligibility for special education services

The Committee must review the evaluation information to determine if the student has a disability that requires special education services. A Committee may not determine that a student needs special education services if the determinant factor is:

- lack of appropriate instruction in reading, including explicit and systematic instruction in phonemic awareness, phonics, vocabulary development, reading fluency (including oral reading skills) and reading comprehension strategies;
- lack of appropriate instruction in math; or
- limited English proficiency.

If the Committee determines that the student is eligible for special education services, it must identify the student's disability classification. For school-age students, one of the following disabilities must be identified: autism, deafness, deaf-blindness, emotional disturbance, 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.

Each 3 - 4 year old in need of special education is identified as a "preschool student with a disability." In making this determination, the CPSE must determine if the preschool student exhibits a significant delay or disorder in one or more functional areas or meets the criteria for a disability classification of autism, deafness, deaf/blindness, hearing impairment, orthopedic impairment, other health-impaired, traumatic brain injury or visual impairment including blindness.

Step 3: **Identify the student's present levels of performance and indicate the individual needs of the student according to each of four need areas:**

- academic achievement, functional performance and learning characteristics;
- social development;
- physical development; and
- management needs.

At the Committee meeting, the student's present skills, strengths and individual needs must be discussed and documented. This includes how the student's disability affects his or her participation and progress in the general education curriculum (or for preschool students, participation in appropriate activities), consideration of specific student strengths and needs and concerns of the parents for enhancing the education of their child.

Consideration of special factors

The Committee must include a statement in the IEP if, in considering the special factors of behavior, limited English proficiency, blind or visual impairment, communication needs and/or assistive technology requirements, the Committee has determined a student needs a particular device or service (including an intervention, accommodation or other program modification) in order for the student to receive a free appropriate public education.

Attachment 2 provides examples of guiding questions that may be used by a Committee to determine whether a student needs such an intervention, accommodation or program modification to address one of these special considerations.

Step 4: **Identify the measurable postsecondary goals and transition needs, including courses of study, of the student**

Beginning not later than the first IEP to be in effect when the student is age 15 (and at a younger age, if determined appropriate) and updated annually, the IEP must include:

- appropriate measurable postsecondary goals based upon age appropriate transition assessments relating to training, education, employment and, where appropriate, independent living skills; and
- a statement of transition service needs that focuses on the student's courses of study, taking into account the student's strengths, preferences and interests, as they relate to transition from school to post-school activities.

Step 5: **Set realistic and measurable annual goals for the student**

After determining and discussing the student's present levels of performance and, as appropriate, the student's measurable post-secondary goals, the Committee must make a recommendation as to the measurable annual goals that the student can realistically reach in the year in which the IEP will be in effect. For each annual goal, the IEP must indicate the evaluative criteria (the measure used to determine if the goal has been achieved),

evaluation procedures (how progress will be measured) and schedules (when progress will be measured) to be used to measure progress toward meeting the annual goal.

These goals should relate to the student's unique needs and promote the student's participation and progress in the general education curriculum in the least restrictive environment. For students beginning with the first IEP to be in effect when the student is age 15 and updated annually, the Committee must identify appropriate annual goals to address the student's transition needs.

For students eligible to take the New York State Alternate Assessment (NYSAA) and for preschool students with disabilities, each annual goal must also include short-term instructional objectives and/or benchmarks (measurable intermediate steps between the student's present levels of performance and the annual goal). In accordance with district policy, short-term instructional objectives and benchmarks may be established for other students as well.

Step 6: Reporting progress to parents

The Committee must identify and document in the IEP when periodic reports on the progress the student is making toward the annual goals will be provided to the student's parents.

Step 7: Determine the special education program and services the student will need

Based on the student's needs and goals, the Committee must decide what special education program and services, including as appropriate related services, accommodations, program modifications and supports the student needs to meet the annual goals, participate and progress in the general education curriculum and participate in extracurricular and other nonacademic activities with other students including students without disabilities. The Committee must also decide the extent (frequency and duration) as well as the location where each program, service, accommodation, etc. will be provided.

Step 8: Determine eligibility for twelve-month (July/August) services

The Committee must determine the student's eligibility for 12-month services. If a student is recommended for July/August services, the IEP must identify the provider of services during the months of July and August, and, for preschool students determined by the CPSE to require a structured learning environment of 12 months duration to prevent substantial regression, a statement of the reasons for such recommendation.

Step 9: Determine individual testing accommodations the student will need

The Committee must identify any individual testing accommodations, needed by the student because of his/her disability, to be used consistently by the student in the recommended educational program and on State and district-wide assessments. Documentation of testing accommodations is required for preschool students only if there is an assessment program for nondisabled preschool children.

Step 10: Determine the coordinated set of transition activities

For students beginning not later than the first IEP to be in effect when the student is age 15 (and at a younger age, if determined appropriate) and updated annually, the Committee must identify needed activities to facilitate the student's movement from school to post-school activities, including instruction, related services, community experiences, the development of employment and other post-school adult living objectives and, when appropriate, acquisition of daily living skills and functional vocational evaluation.

Step 11: Determine which State and district-wide assessments the student will participate in

The Committee must recommend whether the student will participate in the same or alternate State and district-wide assessments of student achievement, or for preschool students, the student's participation in the same assessments of student achievement, that are administered to nondisabled students.

Step 12: Determine participation in regular class, or, for preschool students, in settings/activities with nondisabled peers

Based on the Committee's recommendation, the IEP must identify the extent, if any, to which the student will not participate in regular classes and extracurricular activities with nondisabled peers. For preschool students, the CPSE must document the extent the preschool student would not be participating in appropriate activities with age appropriate peers.

Step 13: Determine special transportation needs

The Committee must identify special transportation needs of the student, and, as appropriate, if the student will need transportation to and from special education programs and services that may be provided in settings outside the school program. For preschool students, the Committee must indicate if the parent has agreed to transport the student to and from his/her special education program at public expense.

Step 14: Determine placement

The Committee must decide the type of setting where the student's IEP will be implemented (e.g., public school district, board of cooperative educational services (BOCES) classroom, approved private day or residential school, private preschool or daycare setting). Placement is determined based on the least restrictive environment where the student's IEP can be implemented.

Unless the student's IEP requires some other arrangement, the student with a disability must be educated in the school he/she would have attended if the student did not have a disability.

Step 15: Implementation

The IEP must document the projected date the IEP will be implemented. Each student with a disability must have an IEP in effect at the beginning of each school year. There may be no delay in implementing a student's IEP, including any case in which the payment source for providing or paying for special education services for the student is being determined. The student's IEP needs to be implemented as soon as possible following the Committee meeting.

The school must take steps to ensure a student's IEP is implemented as recommended by the Committee, including but not limited to:

- providing copies of the student's IEP, as appropriate;
- informing each individual of his or her IEP implementation responsibilities; and
- providing a student with his or her instructional materials in an accessible alternative format if recommended in the student's IEP.

Step 16: Review and, if appropriate, revise the IEP

The Committee must reconvene to review the student's IEP when requested by the student's teacher or parent, but at least annually. At the IEP review meeting, the Committee must consider the student's progress toward meeting the annual goals, the concerns of the parents for the education of their child, any new evaluation information, the student's progress in the general education curriculum (or for preschool students, participation in appropriate activities), the student's need for testing accommodations and identify the least restrictive environment for the student. For students ages 15 and older, the measurable post secondary goals and transition services must be reviewed annually.

Upon consideration of these factors, the IEP should be revised, as appropriate, to address any lack of expected progress toward the annual goals and in the general education curriculum; the results of any reevaluation and any information about the student provided to, or by, the parents; the student's anticipated needs; or other matters, including a student's need for test accommodations.

In making changes to a student's IEP after the annual review has been conducted, the parent and the school district may agree, in writing, not to convene a meeting of the Committee for the purpose of making these changes, and instead may develop a written document to amend or modify the student's current IEP.

Step 17: Conduct a meeting to review reevaluation information on the student

The needs of students change over time. Therefore, a reevaluation of each student's individual needs, eligibility for special education and the continued

appropriateness of the special education services that have been provided to the student must be conducted at least once every three years, except where the school district and the parent agree in writing that such reevaluation is unnecessary. A reevaluation may be conducted more frequently if conditions warrant or if the parent or the teacher requests a reevaluation of the student, but not more frequently than once a year unless the parent and representatives of the school district appointed to the Committee agree otherwise. The Committee must convene a meeting to discuss and, if appropriate, revise the student's IEP in consideration of the results of the reevaluation.

Guiding Principles for IEP Development

The following guiding principles for IEP development are important to ensure that each student's IEP is developed and implemented consistent with the intent of the law.

- The IEP development process is a student-centered process. No other issues, agenda or purposes should interfere.
- Information provided by parents regarding their child's strengths and needs is a vital part of the evaluation and is critical in developing an IEP that will lead to student success.
- The input of each individual on the Committee should be encouraged and valued.
- All members of the Committee share the responsibility to contribute meaningfully to the development of a student's IEP.
- Meaningful efforts are made to ensure that parents and students participate in the IEP development process.
- Information is shared in the language or communication mode a parent and student can understand.
- Special education is a service, not a place. The IEP development process evolves to address concerns and considerations so as to support the student's progress toward the State's learning standards and to ensure the student receives services in the least restrictive environment appropriate for the student.
- The IEP recommendations are based on the student's present levels of performance and in consideration of the student's strengths, needs, interests and preferences.
- The IEP recommendations reflect consideration of the concerns of the parent for the education of their child.
- The IEP is developed in such a way that it is a useful document that guides instruction and provides a tool to measure progress.
- The IEP appropriately addresses all the student's unique needs without regard to the current availability of needed services.
- Positive behavioral supports and services needed by the student are identified.

- A student's need for transition services is considered throughout the IEP development process, including during discussions of the student's present levels of performance, annual goals, services, accommodations, program modifications and placement.
- The student's parents participate in developing, reviewing and revising the IEP, having concerns and information considered and being regularly informed of their child's progress.

INDIVIDUALIZED EDUCATION PROGRAM (IEP) DEVELOPMENT

The following sections of this document provide guidance on developing, documenting and implementing recommendations for each student's IEP.

- IEP Identifying Information
- Present Levels of Performance and Individual Needs
- Measurable Post-secondary Goals/Transition Needs
- Measurable Annual Goals, Short-Term Objectives and Benchmarks
- Reporting Progress to Parents
- Recommended Special Education Programs and Services
- Coordinated Set of Transition Activities
- Participation in State and District-wide Assessments
- Participation with Students Without Disabilities
- Transportation
- Placement Recommendation
- IEP Implementation

In general, each chapter presents regulatory requirements, followed by guidance on each of the required components and quality indicators for that section.

The New York State Education Department (NYSED) has developed model Student Information Summary and IEP forms recommended for use by all school districts. A copy of the State Model IEP form may be found at http://www.p12.nysed.gov/specialed/formsnotices/IEP/memo-Jan10.htm. Beginning in the 2011-12 school year and annually thereafter, IEPs developed for NYS students must be on the State developed IEP form.

IEP IDENTIFYING INFORMATION

STUDENT IDENTIFYING INFORMATION

The student's name is indicated in the IEP. The IEP may also indicate the student's date of birth and locally developed identification number.

DISABILITY CLASSIFICATION

The IEP must designate the disability classification of the student from one of the disability categories defined in State regulations. Only one disability category may be listed in the IEP.

- For preschool students, the disability category must be designated as "preschool student with a disability." The criteria used for the preschool student's eligibility determination shall be either:
  - a functional delay: a significant delay or disorder in one or more functional areas related to cognitive, language and communicative, adaptive, socio-emotional or motor development which adversely affects the student's ability to learn; or
  - a specific disability classification of autism, deafness, deaf/blindness, hearing impairment, orthopedic impairment, other health-impaired, traumatic brain injury or visual impairment including blindness. The definition of these terms may be found in section 200.1(mm) of the Regulations of the Commissioner of Education.

- For school-age students, the IEP must specify one of the following disabilities: autism, deafness, deaf-blindness, emotional disturbance, 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. These disabilities are defined in section 200.1(zz) of the Regulations of the Commissioner of Education.

DATE IEP IS TO BE IMPLEMENTED

The IEP must indicate the projected date the IEP is to be implemented.

PROJECTED DATE OF ANNUAL REVIEW

The IEP must indicate the projected date of the review of the student's IEP. Each student's IEP must be reviewed and, if appropriate, revised at least annually to determine if the annual goals for the student are being achieved. Some students require more frequent reviews to adjust the student's educational program as a result of a student's changing needs.

PRESENT LEVELS OF PERFORMANCE AND INDIVIDUAL NEEDS

PURPOSE

An appropriate program for a student with a disability begins with an IEP that reflects the results of the student's individual evaluation and describes the needs of the student to be addressed through the provision of special education services, including a student's strengths, interests and preferences and concerns of the parents. This section of a student's IEP identifies the areas of unique needs related to the student's disability and the current level of functioning, including the strengths of the student, related to those areas. This is the foundation on which the Committee builds to identify goals and services to address the student's individual needs.

CONSIDERATIONS IN IDENTIFYING PRESENT LEVELS OF PERFORMANCE

The Committee must ensure that the present levels of performance and individual need statements are developed in consideration of:

- results of the student's most recent individual evaluation(s);
- student's strengths;
- student's results on State and district-wide assessments;
- parents' concerns for enhancing the education of their child;
- special factors related to the student's disability such as a student's needs in the areas of behavior, communication, limited English proficiency, instruction in and the use of Braille, and assistive technology devices and services;
- how the student's disability affects involvement and progress in the general curriculum, or for preschool students, participation in age-appropriate activities; and
- the results of age-appropriate transition assessments[2] and the student's strengths, preferences and interests as they relate to transition from school to post school activities.

Present levels of performance and need statements:

- summarize information from a variety of sources;
- translate information from technical evaluation reports to clear, concise statements;
- identify the instructional implications of evaluations; and
- describe, in language the parents and professionals can understand, the unique needs of the student that the IEP will address and identify the student's level of performance in those need areas.

[2] For guidance on age appropriate transition assessments, see http://www.nsttac.org/products_and_resources/tag.aspx

EVALUATION RESULTS

The IEP must document the results of the initial or most recent individual evaluation of the student as well as the results of the student's performance on any general State or district-wide assessment programs that identify the student's present levels of performance and individual needs. For example:

Behavioral Assessment - 10-11-09 - Student demonstrated difficulty in the areas of self-regulation and attention and showed aggression in the form of destruction of materials. Observations and reports from teachers indicate these behaviors are avoidance/escape motivated behaviors in response to stress and skill deficits.

State Assessments - 2008 grade 4 English language arts - Level 2; 2008 grade 4 Math - Level 2 (not proficient).

THE FOUR NEED AREAS THAT MUST BE ADDRESSED IN DOCUMENTING A STUDENT'S PRESENT LEVEL OF PERFORMANCE AND INDIVIDUAL NEEDS

The IEP recommendation must report the student's present levels of performance and indicate the individual needs according to each of four areas:

- academic achievement, functional performance and learning characteristics;
- social development;
- physical development; and
- management needs.

The report of the student's present levels of performance and individual needs in the above areas must include how the disability affects involvement and progress in the general curriculum (i.e., the same curriculum as for nondisabled students), or for preschool students as appropriate, how the disability affects participation in age-appropriate activities.

ACADEMIC ACHIEVEMENT, FUNCTIONAL PERFORMANCE AND LEARNING CHARACTERISTICS

The student's current levels of knowledge and development in subject and skill areas, including, as appropriate:

- activities of daily living (e.g., personal care, preparing meals, household activities, managing resources);
- level of intellectual functioning (e.g., general intelligence, attention, memory, problem-solving ability, language functioning);
- adaptive behavior (e.g., the effectiveness with which the individual copes with the natural and social demands of his or her environment; how the student makes judgments and decisions);
- expected rate of progress in acquiring skills and information (e.g., the pace in which a student learns new information or skills, in consideration of factors such as those associated with

the child's levels of cognitive skills, interests, age and history of rate of progress); and
- learning style (e.g., how the student learns best such as through visual or auditory modalities, hands-on approaches, cooperative learning, repetition).

SOCIAL DEVELOPMENT

The degree and quality of the student's:
- relationships with peers and adults;
- feelings about self; and
- social adjustment to school and community environment.

PHYSICAL DEVELOPMENT

The degree or quality of the student's:
- motor and sensory development;
- health;
- vitality; and
- physical skills or limitations that pertain to the learning process.

MANAGEMENT NEEDS

Management needs means the nature and degree to which the following are required to enable the student to benefit from instruction:
- environmental modifications (e.g., consistency in routine; limited visual/auditory distractions; adaptive furniture);
- human resources (e.g., assistance in locating classes and following schedules; assistance in note taking); and
- material resources (e.g., instructional material in alternative formats).

Management needs must be developed in accordance with the factors identified in the areas of academic or educational achievement and learning characteristics, social and physical development.

PRESENT LEVEL STATEMENTS SHOULD ANSWER THESE QUESTIONS:

Present levels of performance statements should answer such questions as:
- What are the student's unique needs that result from his or her disability?
- What is it that the student can and cannot do at this time?
- What are the student's strengths in this area?
- How do these needs affect the student's participation and progress in the general curriculum or, for a preschool student, participation in age-appropriate activities?
- What are the parents' concerns for the education of their child?
- What instructional and/or behavioral supports or services have been effective or not effective in addressing the need area in the past year?

- What accommodations and/or program modifications or supplementary aids and services have been effective or not effective in addressing the need area in the past year?
- What instructional supports and services will likely be supported and used by the student?

WHEN YOU COMPLETE THE STUDENT'S PRESENT LEVEL OF PERFORMANCE AND INDIVIDUAL NEED SECTION OF AN IEP, YOU SHOULD BE ABLE TO STATE:

The student's unique needs that require the student's educational program to be individualized:
We are individualizing this student's education program because of his unique needs related to his disability in the areas of . . . . (e.g., reading, writing, organization, memory, vision, hearing, problem solving, attention, motor skills).

What the student can and cannot do in each area of identified need:
In the area of _____, we know this student can currently _____, but cannot _____. (e.g., in the area of memory, he can remember a two-step sequence, but does not complete activities that involve multiple steps such as "get ready for school.)

The strengths of the student are upon which you can build:
He learns best through _____ (e.g., pairing auditory with written work; using music to trigger memory; redirection; modeling).

The areas of concern the parents have raised about their child's needs:
(e.g., He becomes upset and cries at home when he has to do writing assignments; he is not showing at home any of the language skills teachers report he has achieved in school; he has tantrums whenever we bring him out into the community).

The environmental, human or material resources the student will need to enable him/her to benefit from education:
(e.g., He will need structure and routine throughout his instructional day; close supervision during transitions; assistance with note taking; adaptive furniture for motor support; instructional materials in large print formats; a positive reward system for appropriate behavior).

HOW THE DISABILITY AFFECTS INVOLVEMENT AND PROGRESS IN THE GENERAL CURRICULUM, OR FOR PRESCHOOL

The present levels of performance must include a description of how a student's disability affects the student's involvement in the general curriculum.

Examples:

- *Kari's difficulty in organizing materials and information affects*

STUDENTS, HOW THE DISABILITY AFFECTS PARTICIPATION IN AGE APPROPRIATE ACTIVITIES

her ability to complete assignments independently and compose written essays.

- *Luis has difficulty organizing information into larger units (e.g., main ideas or themes). He understands parts of a text, but has difficulty determining the main ideas and writing summaries of information read.*

For preschool students, appropriate activities include those activities that children of that chronological age engage in such as coloring, pre-reading activities, play time, listening to stories, sharing-time, parallel play.

Examples:

- *Dayton prefers to play in isolation and becomes upset (e.g., cries and hits others) when another student comes too close. As a result his peer interactions at playtime are limited.*
- *Damien's attention problems result in failure to follow teacher's directions, talking out of turn and responding inappropriately during group activities.*

CONSIDERATION OF SPECIAL FACTORS

The IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address one or more of the following needs in order for the student to receive a free appropriate public education.

STRATEGIES, INCLUDING POSITIVE BEHAVIORAL INTERVENTION AND SUPPORTS TO ADDRESS THE BEHAVIOR WHEN A STUDENT HAS BEHAVIOR THAT IMPEDES HIS OR HER LEARNING OR THAT OF OTHERS

In the case of a student whose behavior impedes his or her learning or that of others, the Committee must consider strategies, including positive behavioral interventions and supports and other strategies to address that behavior. The behavioral interventions and/or supports should be indicated under the applicable section of the IEP. For example, a Committee may determine that the positive behavioral supports a student needs require a special education service (e.g., consultant teacher), a related service (e.g., counseling), a program modification (e.g., special seating arrangements), assistive technology (e.g., communication board) and/or supports for school personnel (e.g., consultation with the school psychologist).

A student's need for a behavioral intervention plan must be documented in the IEP. When a behavioral intervention plan is recommended, the Committee must ensure that a functional behavioral assessment (FBA) has or will be conducted prior to the development of the behavioral intervention plan. A student's IEP must specify when a behavioral intervention plan will include the use of a time out room for a student, including the maximum

amount of time a student will need to be in a time out room as a behavioral consequence as determined on an individual basis in consideration of the student's age and individual needs. In addition, if applicable, other information relating to a student's behavioral intervention plan as required by section 200.22(e)(9) of the Regulations must be specified.

LANGUAGE NEEDS OF THE STUDENT WITH LIMITED ENGLISH PROFICIENCY, AS SUCH NEEDS RELATE TO THE STUDENT'S IEP

In developing an IEP for a student with limited English proficiency (LEP), the Committee must consider how the student's level of English language proficiency affects the special education services that the student needs, including:

- whether a student with LEP may need special education services for those aspects of his or her educational program that addresses the development of English language skills and other aspects of the student's educational program (e.g., consultant teacher to be provided in the student's English as a second language course); and
- whether the special education services will be provided in a language other than English (e.g., bilingual speech and language therapy).

COMMUNICATION NEEDS OF THE STUDENT

For each student with a disability, the Committee must consider whether a student needs a particular device or service to address the student's communication needs.

For a student who is deaf or hard-of-hearing, such consideration must also include the:

- opportunities the student needs for direct communication with peers and professional personnel in the student's language and communication mode; and
- student's academic level and full range of needs, including opportunities for direct instruction in the student's language and communication mode.

The communication needs of the student would be addressed on the IEP under the applicable sections. For example:

- "Annual Goals/ Short Term Objectives/Benchmarks" (e.g., reflecting instruction in sign language or use of an augmentative communication device)
- "Related Services" (e.g., reader)
- "Program Modifications/Accommodations/Supplementary Aids and Services/ Assistive Technology Devices/Services " (e.g., instructional materials in alternative formats: audio text, tape recorder, computer, speech synthesizer, headphones; related hardware and software; instruction in the use of speech synthesizer software)
- "Testing Accommodations" (e.g., separate location with double

time)

IN THE CASE OF A STUDENT WHO IS BLIND OR VISUALLY IMPAIRED, THE STUDENT'S NEED FOR INSTRUCTION IN BRAILLE AND THE USE OF BRAILLE

In the case of a student who is blind or visually impaired, the IEP must recommend that the student be provided instruction in Braille and in the use of Braille, unless the Committee determines, after reviewing the results of the student's individual evaluation, that instruction in Braille or the use of Braille is not appropriate for that student. If instruction in Braille or the use of Braille is to be provided, this would be documented under the applicable sections of the IEP, for example:

- "Annual Goals/Short Term Objectives/Benchmarks" (e.g., reflecting instruction in the use of Braille and/or instruction in the use of a related assistive technology device)
- "Related Services" (e.g., orientation and mobility services; parent counseling and training in use of a portable word-processor/note taker Braille device)
- "Program Modifications/ Accommodations/ Supplementary Aids and Services/ Assistive Technology Devices/ Services/ Supports for School Personnel" (e.g., instructional materials in alternative formats: Braille text; refreshable Braille note taker; related hardware and software; instruction in the use of Braille, staff training in the use of a Braille word-processing device)

THE STUDENT'S NEED FOR ASSISTIVE TECHNOLOGY DEVICES AND SERVICES

The Committee must consider each student's need for assistive technology devices and/or services. If a student needs such devices and/or services, the appropriate sections of the IEP must specify the:

- nature of the assistive technology to be provided;
- services the student needs to use the assistive technology device;
- frequency, duration of such services;
- location where the assistive technology devices and/or services will be provided; and
- whether such device is required to be used in the student's home or another setting in order for the student to receive a free appropriate public education.

Attachment 2 provides examples of guiding questions that may be used by a Committee to determine whether a student needs such an intervention, accommodation or program modification to address one of these special considerations.

Quality Indicators	Present levels of performance and individual need statements: • provide instructionally relevant information about the student. • identify how the student is progressing towards the State learning standards. • are descriptive and specific. • provide the basis for annual goals and direction for provision of appropriate educational programs and services. • are written in such a way that they can be understood by parents, professionals and paraprofessionals. • are based on the results of the individual evaluation. • reflect the concerns of the parents for enhancing the education of their child. • identify what impact the student's disability is having on his or her ability to participate and progress in age-appropriate activities or in the same curriculum as nondisabled peers.

MEASURABLE POSTSECONDARY GOALS AND TRANSITION NEEDS

MEASURABLE POSTSECONDARY GOALS

For students beginning with the first IEP to be in effect when the student is age 15 (and at a younger age, if determined appropriate) and updated at least annually, the IEP must include measurable postsecondary goals based on the student's preferences and interests, as they relate to transition from school to post-school activities, in the areas of:

- employment (e.g., integrated competitive employment);
- postsecondary education and training (e.g., career and technical education and training, continuing and adult education, college); and
- independent living skills (when appropriate) (e.g., adult services, independent living or community participation).

The National Secondary Transition Technical Assistance Center defines a postsecondary goal to be "generally understood to refer to those goals that a child hopes to achieve after leaving secondary school (i.e., high school)" rather than "the process of pursuing or moving toward a desired outcome." http://www.nsttac.org/tm_materials/post_secondary_goals.aspx.

Postsecondary goals identify the student's long-term goals for living, working and learning as an adult. The projected postsecondary goals in the student's IEP establish a direction for the school, student, student's family and any participating agencies to work towards in recommending transition activities for the student. These post-school goals guide planning for activities that prepare the student to move from school to post-school activities and for discussion with appropriate public and private community agencies regarding their contributions to the student's transition process. The student's IEP should include goals, services and activities to incrementally prepare the student to achieve the measurable postsecondary goals.

Students and parents need to be involved in developing these goals. Information to develop a student's measurable postsecondary goals should be obtained using a variety of formal and/or informal methods which may vary from student to student, including but not limited to vocational assessments, assessment of postsecondary education skills, interviews with the student and/or parent, strength-based assessments and teacher observations.

The measurable postsecondary goals are intended to acknowledge the student's needs, preferences and interests and should be expressed in terms of the student's aspirations for the

future. Goals may be written using the student's own words, in answer to such questions as:

- What do you want to do when you finish high school?
- If you go to college, what do you want to study?
- What kind of work do you want to do?
- What do you want to learn more about?
- Where do you plan on living?

The measurable postsecondary goals can be general or specific since they will be reviewed and, as appropriate, revised annually to reflect the student's current aspirations as well as his or her ability to narrow general interests to specific directions concerning postsecondary plans. For example, when Maria first begins to participate in the transition planning process, projected postsecondary goals may be broad in scope: *"Maria will work in the technology field."* Later, after involvement in career and technical education courses and work experiences, the IEP might more specifically state that *"Maria will attend a 4-year college to study computers with the goal of working as a computer programmer."*

Examples of Post-Secondary Goals:

<u>Education/Training</u>

- *John will enroll in the general Associates Degree program at ZYX Community College in September 2012.*
- *Joan will attend a two-year community college course and gain a qualification in culinary arts.*
- *Karen will complete a one-year course at a cosmetology school.*
- *John will take a course in dog grooming.*
- *Emma will complete a training course as a Certified Nursing Assistant.*
- *Jack will participate in on-the-job training as a painter and decorator.*

<u>Employment</u>

- *Thomas will become employed as an apprentice carpenter.*
- *Damien will work for at least one year as a trainee veterinary*

technician in order to gain relevant employment experience.

Independent Living

- *Matthew will live in an apartment with friends.*
- *Chris will obtain his driving license after graduation from high school.*
- *Andrea will shop for groceries independently using a list.*

TRANSITION NEEDS AND COURSES OF STUDY

For students beginning with the IEP to be in effect when the student is age 15 (and at a younger age, if determined appropriate), the IEP must include a statement of the transition service needs of the student that focuses on the student's courses of study, such as participation in advanced placement courses or a vocational education program, taking into account the student's strengths, preferences and interests, as they relate to transition from school to post-school activities.

The IEP should identify the high school curriculum that will prepare the student to meet his/her post secondary goals. Examples of courses of study might include Regents coursework and/or sequence of courses in a career and technical education field related to the student's post-secondary goals.

This section of the IEP should also identify other needs of the student such as:

- *Joey needs adult assistance to travel in the community*
- *Darcy needs instruction in functional reading and mathematics.*
- *Guy needs to develop self-advocacy skills.*
- *Ravon needs to learn to use public transportation.*
- *Sydney needs to learn computer and time management skills.*
- *Savannah needs to complete necessary coursework for graduation with a regular diploma.*
- *John needs to complete courses in automotive career and technical education.*

Based on the postsecondary goals and transition needs of the student, annual goals and objectives or benchmarks and other activities can be developed to help the student incrementally develop skills, knowledge, experiences and contacts with resources, as needed, to work toward these desired postsecondary goals. The specific coordinated set of activities, including instruction, to be provided for the student to achieve his/her postsecondary goals is documented in a later section of the IEP (See "Coordinated Set of Transition Activities").

Quality Indicators	Measurable postsecondary goals and transition need statements: • reflect the dreams, aspirations and hopes of the student. • reflect the student's strengths, preferences and interests as they relate to transition from school to post-school activities. • are written to the greatest extent possible in the student's own words. • are reviewed and updated at least annually. • become increasingly specific as the student comes closer to the time he or she will be leaving school. • are developed with direct student involvement. • are written in such a way as to guide the development of annual goals and recommendations for transition services, linkages and activities. • are based upon age-appropriate transition assessments relating to training, education, employment and where appropriate, independent living skills.

ANNUAL GOALS, SHORT-TERM INSTRUCTIONAL OBJECTIVES AND/OR BENCHMARKS

REQUIREMENTS

Individual need determinations (i.e., present levels of performance and individual needs) must provide the basis for a student's written annual goals. The IEP must list measurable annual goals, consistent with the student's needs and abilities to be followed during the period in which the IEP will be in effect.

For each annual goal, the IEP must indicate the evaluative criteria (the measure used to determine if the goal has been achieved), evaluation procedures (how progress will be measured) and schedules (when progress will be measured) to be used to measure the student's progress toward meeting the annual goal.

For students who meet the eligibility criteria to take NYSAA and for preschool students with disabilities, the IEP must include a description of the short-term instructional objectives and/or benchmarks that are the measurable intermediate steps between the student's present level of performance and the measurable annual goal.

The measurable annual goals, including academic and functional goals, must be related to meeting:

- the student's needs that result from the student's disability to enable the student to be involved in and progress in the general education curriculum (or for preschool students, in appropriate activities); and
- each of the student's other educational needs that result from the student's disability.

For students beginning with the first IEP to be in effect when the student is age 15 and older, annual goals should be identified, as appropriate, to move the student toward his/her postsecondary goals. For transition goals, the CSE should consider the State's Career Development and Occupational Standards (CDOS).

WHAT ARE ANNUAL GOALS?

Annual goals are statements that identify what knowledge, skills and/or behaviors a student is expected to be able to demonstrate within the year during which the IEP will be in effect. The IEP must list measurable annual goals consistent with the student's needs and abilities, as identified in the present levels of performance.

HOW SHOULD ANNUAL GOALS BE LINKED TO THE STANDARDS?

Annual goals should focus on the knowledge, skills, behaviors and strategies to address the student's needs. A student's needs generally relate to knowledge and skill domains such as, but not limited to, reading, writing, listening, organization, study skills,

communication, physical development, motor skills, cognitive processing, problem-solving, social skills, play skills, memory, visual perception, auditory perception, attention, behavior, and career and community living skills. The goals in a student's IEP should relate to the student's need for specially designed instruction to address the student's disability needs and those needs that interfere with the student's ability to participate and progress in the general curriculum.

Goals should not be a restatement 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 learn in every curricular content area during the course of the school year or other areas not affected by the student's disability. In developing the IEP goals, the Committee needs to select goals to 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?"

For example, a student may be performing very poorly on written tests in global studies that require written expression. The IEP goal for this student should focus on developing written expressive skills (e.g., using outlines or other strategies to organize sentences in paragraphs) rather than the curriculum goal that the student will write an essay about the economy of a particular country. Generally, goals should address a student's unique needs across the content areas and should link to the standards so that a student has the foundation or precursor skills and strategies needed to access and progress in the general education curriculum.

HOW FAR … BY WHEN?

ONE YEAR FROM NOW, WE EXPECT THE STUDENT TO BE ABLE TO….

From information in the present levels of performance, the Committee has identified which need areas must be addressed and where the student is currently functioning in each of those areas. The next step is to identify what the focus of special education instruction will be over the course of the upcoming year. 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.

An annual goal indicates what the student is expected to be able to achieve during the year in which the IEP will be in effect. The annual goal takes the student from his/her present level of performance to a level of performance expected by the end of the year.

To be measurable, an annual goal should, in language parents

and educators can understand, describe the skill, behavior or knowledge the student will demonstrate and the extent to which it will be demonstrated.

Examples:

- *Given a 4-function calculator, Sue will solve one-step word problems using addition and subtraction with 90% accuracy.*
- *Given 5th grade material, Mike will read orally at 80-100 words per minute.*
- *Given 15 minutes of free play time, Sam will engage in interactive play with peers for at least 10 minutes.*

Terms such as "will improve…," "will increase…" and "will decrease…" are not specific enough to describe what it is the student is expected to be able to do. To be measurable, a behavior must be observable or able to be counted. In general, it is recommended that goals describe what the student will do, as opposed to what the student will not do.

Example:
"The student will ask for a break from work..." versus *"The student will not walk out of the classroom without permission."*

HOW DOES THE IEP MEASURE PROGRESS TOWARD THE ANNUAL GOAL?

For each annual goal, the IEP must indicate the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal.

EVALUATIVE CRITERIA

Evaluative criteria identify how well and over what period of time the student must perform a behavior in order to consider it met.

How well a student does could be measured in terms such as:

- frequency (e.g., 9 out of 10 trials)
- duration (e.g., for 20 minutes)
- distance (e.g., 20 feet)
- accuracy (90% accuracy)

The period of time a skill or behavior must occur could be measured in terms such as:

- number of days (e.g., over three consecutive days)
- number of weeks (e.g., over a four week period)
- occasions (e.g., during Math and English classes, on six consecutive occasions)

Examples:

- 85% accuracy over 5 consecutive trials
- 50 words/minute, with 3 or fewer errors, for 2 consecutive trials

- 3 out of 5 trials per week

EVALUATION PROCEDURES

Evaluation procedures identify the method that will be used to measure progress and determine if the student has met the objective or benchmark. An evaluation procedure must provide an objective method in which the student's behavior will be measured or observed.

Examples:
- *structured observations of targeted behavior in class*
- *student self-monitoring checklist*
- *written tests*
- *audio-visual recordings*
- *behavior charting*
- *work samples*

EVALUATION SCHEDULES

Evaluation schedules state the date or intervals of time by which evaluation procedures will be used to measure the student's progress toward the objective or benchmark. It is not a date by which the student must demonstrate mastery of the objective.

Examples:
- *Each class period*
- *Daily*
- *Weekly*
- *Monthly*
- *On January 5, March 15 and June 3*

The following template may assist in the writing of annual goals: Given (conditions, accommodations), *student name* will (do what – observable skill/behavior in functional term) (to what extent) (over what period of time) or (by when) as evaluated by _____. For example:

Measurable Goals			
Annual Goal	**Criteria**	**Method**	**Schedule**
Given 5th grade material, Mike will read orally at 80-100 words per minute with 95% accuracy	for 3 consecutive trials	1 minute oral reading probe with charting of words per minute and error count	weekly

SHORT-TERM INSTRUCTIONAL OBJECTIVES AND/OR BENCHMARKS

Short-term instructional objectives and/or benchmarks are required for students who take NYSAA and for all preschool students with disabilities. Short-term instructional objectives and/or benchmarks are the intermediate steps between the student's present level of performance and the measurable annual goal. Short-term instructional objectives and benchmarks should be general indicators of progress, not detailed instructional plans, that provide the basis to determine how well the student is progressing toward his or her annual goal and which serve as the basis for reporting to parents.

Generally, one annual goal would not include both short-term objectives and benchmarks. Whether short-term instructional objectives or benchmarks are used for a particular annual goal is at the discretion of the Committee.

SHORT-TERM INSTRUCTIONAL OBJECTIVES

Short-term instructional objectives are the intermediate knowledge and skills that must be learned in order for the student to reach the annual goal. Short-term instructional objectives break down the skills or steps necessary to accomplish an annual goal into discrete components.

For example, the sequential steps that one student must demonstrate in order for him to reach the annual goal to *"read orally at 80-100 words per minute with 95% accuracy"* are as follows:

- *Mike will identify and record unfamiliar words prior to engaging in oral reading.*
- *Mike will make a prediction about the topic of the passage(s) he will read.*
- *Mike will self-monitor his reading fluency and accuracy on a daily basis.*

BENCHMARKS

Benchmarks are the major milestones that the student will demonstrate that will lead to the annual goal. Benchmarks usually designate a target time period for a behavior to occur (i.e., the amount of progress the student is expected to make within specified segments of the year). Generally, benchmarks establish expected performance levels that allow for regular checks of progress that coincide with the reporting periods for informing parents of their child's progress toward the annual goals. For example:

- *By November, Mike will orally read 70 – 80 words per minute*
- *By February, Mike will orally read 80 – 90 words per minute*
- *By April, Mike will orally read 90 – 100 words per minute*

Quality Indicators	Annual goals, including short-term instructional objectives or benchmarks: • are directly related to the student's present levels of performance statements. • are written in observable and measurable terms. • identify an ending level of performance that is achievable within one year. • identify objective procedures to evaluate a student's progress. • incrementally provide knowledge and skills towards achieving the student's projected measurable postsecondary goals. • are achievable in relation to the student's current level of educational performance, expected rate of progress, strengths and needs. • are instructionally relevant. • are written in terms that parents and educators can understand. • support participation and progress in the general education curriculum and for preschool students, participation in age-appropriate activities.

REPORTING PROGRESS TO PARENTS

REQUIREMENTS

The IEP must identify when periodic reports on the progress the student is making toward the annual goals will be provided to the student's parents.

WHAT IS THE PURPOSE OF REPORTING PROGRESS TO PARENTS?

Regular reports to parents provide a mechanism to monitor a student's progress toward the annual goals and to evaluate the effectiveness of the student's special education services. If progress is such that the student is not expected to reach his/her annual goals, the Committee must review and revise the student's IEP to ensure that the student is being provided the appropriate supports and services.

WHAT SHOULD BE INCLUDED IN THE PROGRESS REPORT?

The report of the child's progress informs parents of:

- their child's progress toward the annual goals; and
- whether this progress is sufficient in order for their child to achieve the goals by the end of the school year.

The annual goal establishes the criteria, schedule and method for evaluating the student's progress. Establishing goals that are measurable is important so that progress can be adequately assessed. To report student progress, the teachers must have gathered evidence of what students are able to do in each annual goal area. Establishing a systematic data collection system is the very first step to effective progress reporting to parents.

IN WHAT MANNER SHOULD PROGRESS BE REPORTED?

The method or combination of methods to inform the parents of their child's progress is left to local discretion. Based on the unique needs of the students, the manner selected to inform parents might vary from student to student.

There are many ways a student's parents can be informed of their child's progress, including, but not limited to periodic parent-teacher conferences, written progress reports and student-parent-teacher conferences. The reports to the parent do not need to be lengthy or burdensome, but they need to be informative. For example, the report to parents could include a statement of the goals with a written report of where the student is currently functioning in that goal area and/or a rating of progress to indicate whether the student's progress to date will likely result in the student reaching the goal by the end of the year. The progress report to parents should be in addition to the student's regular report cards that provide grades for courses or subject areas.

Following is an example of how progress can be reported to parents.

Annual Goal: Kevin will use graphic organizers to write a three-paragraph essay using correct sequencing of sentences including topic sentence, supporting sentences and conclusion with 90% accuracy on 4 weekly trials.

Reporting Progress to Parents

1st period ending November	2nd period ending January	3rd period ending March	4th period ending June
Kevin is writing three-sentence paragraphs with correct sequencing, including a topic sentence, supporting sentence and conclusion. Objective met.	Kevin needs assistance to develop the outline, but once developed, he follows it to accurately write a five-sentence paragraph using a graphic organizer.	Kevin is writing two-paragraph essays when following a written outline.	Kevin independently develops a graphic organizer (outline) and writes three-sentence paragraphs using correct sequencing of sentences.

HOW OFTEN MUST PROGRESS BE REPORTED?

Progress should be reported at least as often as parents of nondisabled students are informed of their child's progress. The IEP could indicate frequency of reporting, for example, as:

- monthly,
- quarterly,
- at the end of each term, or
- at 3 month intervals.

Quality Indicators	• The frequency and manner of reporting to parents is determined in consideration of a student's unique needs. • Progress is reported to parents in a manner that is understood by them (e.g., jargon-free) and is objective, not subjective. • Specific data is included in measurable terms regarding the extent to which the student is progressing towards meeting annual goals. • The information included in reports to parents is sufficient to identify a student's lack of progress early enough that the Committee could, if 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.

RECOMMENDED SPECIAL EDUCATION PROGRAMS AND SERVICES

REQUIREMENTS

The IEP must indicate the recommended program and services, including related services that will be provided for the student to:

- advance appropriately toward his or her annual goals;
- be involved and progress in the general education curriculum (or for preschool students, in appropriate activities);
- participate in extracurricular and other nonacademic activities; and
- be educated and participate in activities with other students with disabilities and nondisabled students.

The regulations require that the IEP must indicate:

- the projected date for initiation of the recommended special education program and services;
- the recommended special education programs and services, (special education and related services) specified from the options set forth in Regulations for the continuum of services (section 200.6 for school-age students and section 200.16 for preschool students);
- the anticipated frequency, duration and location for each of the recommended programs and services, including the supplementary aids and services and program modifications to be provided to or on behalf of the student;
- whether the student is eligible for a 12-month special service and/or program and the identity of the provider of services during the months of July and August; for preschool students, the reasons the student needs a 12-month program;
- the class size, if appropriate;
- a statement of supports for school personnel on behalf of the student;
- the general education classes in which the student will receive consultant teacher services;
- any assistive technology devices or services needed for the student to benefit from education, including the use of such devices in the student's home or in other settings;
- a statement of any individual testing accommodations to be used consistently by the student in the recommended educational program and in the administration of district-wide assessments of student achievement and, in accordance with Department policy, in State assessments of student achievement that are necessary to measure the academic achievement and functional performance of the student;
- if the recommendation for a preschool student is for one or more related services selected from the list maintained by the municipality or itinerant services, the child care location arranged by the parent or other site at which each service will

be provided.

CONSIDERATIONS TO DEVELOP RECOMMENDED PROGRAMS AND SERVICES

The recommended special education programs and services in a student's IEP identify what the school will provide for the student so that the student is able to achieve the annual goals and to participate and progress in the general education curriculum (or for preschool students, age-appropriate activities) in the least restrictive environment. In determining the recommended programs and services for each student to achieve his or her annual goals, the Committee needs to consider the results of the student's evaluation, student's strengths, concerns of the parents for enhancing the education of their child, results of any general State or district-wide assessment programs and any special considerations unique to this student.

In all cases, the determination of programs and services must be individually determined on the basis of each student's abilities and needs. The recommendations of the programs and services a student needs 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.

SPECIAL EDUCATION PROGRAM / SERVICES

The IEP must specify the special education program and/or services needed by the student.

For school-age students, the continuum of special education programs and services includes:

- consultant teacher services
- integrated co-teaching services
- resource room program
- special class
- travel training
- adapted physical education

For preschool students, the continuum of special education programs and services includes:

- special education itinerant teacher services
- special class integrated setting
- special class half-day or full-day

Related services for both school-age and preschool students include, but are not limited to, such services as:

- speech/language therapy
- audiology services

- interpreting services
- psychological services
- counseling services
- physical therapy
- occupational therapy
- orientation and mobility services
- parent counseling and training
- school health services
- school social work
- assistive technology services

In recommending special education services for a preschool student, the CPSE must first consider the appropriateness of providing (1) related services only or (2) special education itinerant services only, or (3) related services in combination with special education itinerant services or (4) a half-day preschool program or (5) a full day program.

For guidance on the continuum of services for preschool students, see section 200.16 of the Regulations of the Commissioner of Education and/or the *Guide for Determining Eligibility and Special Education Programs and/or Services for Preschool Students with Disabilities* found at http://www.p12.nysed.gov/specialed/publications/preschool/guide/home.html.

For guidance on the continuum of special education programs and services for school-age students, see section 200.6 of the Regulations of the Commissioner of Education or the April 2008 memorandum entitled *Continuum of Special Education Services for School-age Students with Disabilities* found at http://www.p12.nysed.gov/specialed/publications/policy/schoolagecontinuum.html.

PROGRAM MODIFICATIONS, ACCOMMODATIONS, SUPPLEMENTARY AIDS AND SERVICES

Supplementary aids and services and/or program modifications or supports means aids, services and other supports that are provided in general education classes or other education-related settings to enable students with disabilities to be educated with nondisabled students to the maximum extent appropriate in the least restrictive environment. The IEP must specify the projected date for initiation of services and the frequency, location and duration of such services. Following are examples of supplementary aids and services, accommodations and program modifications:

- A note taker
- Instructional materials in alternative formats (e.g., Braille, large print, books on tape)
- Extra time to go between classes

- Special seating arrangements
- Highlighted work
- Books on tape
- Study guide outlines of key concepts
- Use of a study carrel for independent work
- Assignment of supplementary school personnel (i.e., teacher aide/teaching assistant)
- Behavior management/support plan
- Extra time to complete assignments

ASSISTIVE TECHNOLOGY DEVICES AND SERVICES

The IEP must describe any assistive technology devices and/or services needed for the student to benefit from education, including whether the use of a school-purchased assistive technology device is required to be used in the student's home or in other settings in order for the student to receive a free appropriate public education.

- 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.

- Assistive technology service means any service that directly assists a student with a disability in the selection, acquisition or use of an assistive technology device.

When a student needs an assistive technology device or service, the Committee needs to consider what instruction the student might require to use the assistive technology device as well as any supports and services the student and/or the student's teachers may need related to the use of the device.

SUPPORTS FOR SCHOOL PERSONNEL ON BEHALF OF THE STUDENT

Supports for school personnel are those that would help them to more effectively work with the student. This could include, for example, special training for a student's teacher to meet a unique and specific need of the student. The IEP must describe the supports for school personnel that will be provided on behalf of the student in order for the student to advance toward attaining the annual goals, to be involved in and progress in the general curriculum and to participate in extracurricular and other nonacademic activities. These supports for school personnel are those that are needed to meet the unique and specific needs of the student.

Examples of supports that may be provided for school personnel include:

- information on a specific disability and implications for instruction;
- training in use of specific positive behavioral interventions;
- training in the use of American Sign Language;
- assistance with curriculum modifications;
- behavioral consultation with school psychologist, social worker or other behavioral consultant; and/or
- transitional support services.

12-MONTH SERVICE AND/OR PROGRAM

The Committee may determine that a student requires special education services during the months of July and August in order to prevent substantial regression. Substantial regression means a student's inability to maintain developmental levels due to a loss of skill or knowledge over the summer months of such severity as to require an inordinate period of review at the beginning of the school year (e.g., eight weeks or more) in order to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year. A student's need for services during the months of July and August must be made on an individual basis.

The IEP developed for services in July and August should focus on the areas in which the student is expected to experience regression. An IEP developed for July and August may differ from the IEP developed for the school year program.

For school-age and preschool students eligible for 12-month service and/or program, the IEP must indicate the frequency, duration, location and initiation date of the recommended program/service as well as the identity of the provider of services during the months of July and August. Other than for 12 month programs/service, there is no regulatory requirement that an IEP include the name of the provider of service. In addition, for preschool students determined by the CPSE to require a

structured learning environment of 12 months duration to prevent substantial regression, a statement of the reasons for such recommendation must be included in the IEP.

Placement decisions for July/August special education programs and services must also be developed consistent with least restrictive environment regulations. Schools are not, however, required to create new programs as a means of providing extended school year services to students with disabilities in integrated settings if it does not provide services at that time for its nondisabled students. However, the Committee could recommend that a student receive his/her extended school year services in a noneducational setting (e.g., a community recreational program that has been arranged for by the parent).

Extended school year programs or services may be provided in a setting that differs from the one the student attends during the school year, provided the Committee determines that the setting is appropriate for the student to benefit from the special education services and to meet his/her IEP goals.

For further information regarding 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.

FREQUENCY, DURATION AND LOCATION

The IEP must indicate the frequency (how often), duration (how long) and location (where) each recommended service will be provided. Frequency, duration and location must be stated with sufficient clarity to be understood by all persons involved in the development and implementation of the IEP. This quantifies the school's commitment of resources to address the student's needs.

The frequency and/or duration of services must be specific enough so that the extent to which services will be provided is clear. Only in unique situations when the frequency or duration of a service may vary because of a student's unique needs may frequency or duration be indicated in the IEP as a range (e.g., 30–40 minutes per day as determined by the student's evidence of fatigue). A range may not be indicated for reasons other than to address a student's unique needs (e.g., personnel availability or administrative convenience).

FREQUENCY

Frequency is the number of sessions a service will be provided during a particular time period (e.g., 3 times per week). This must be stated in the IEP in a manner that is appropriate to the type of service being provided. Frequency can be stated, for example, as

the number of times per day, week or month that a service will be provided.

DURATION (REVISED DECEMBER 2010)

Duration is the amount of time within a time period that a service will be provided. Duration can be stated, for example, as the number of minutes per session or per week (e.g., 3 hours per week) or the duration of an activity (e.g., for all writing assignments).

To be considered a special education program or service, the Regulations require a minimum frequency and/or duration for certain special education programs and related services:

- Special Education Itinerant Teacher (SEIT) – minimum two hours per week
- Consultant teacher – minimum two hours each week (in any combination of direct and/or indirect services)*
- Resource room programs – minimum three hours per week*

* The Committee may recommend that a student with a disability who needs resource room services in addition to consultant teacher services receive a combination of such services consistent with the student's IEP for not less than three hours each week.

LOCATION

The "location" of services in the context of a student's IEP generally refers to the type of environment that is the appropriate place where a particular service, program modification or accommodation would be provided. The decision as to the location where a service will be provided should be made in consideration of the least restrictive environment provisions and in consideration of the student's overall schedule and participation in general education classes. A Committee should first consider the general education class as the location for special education services including related services rather than a separate location in order to facilitate the student's maximum participation in general education programs and in the general education curriculum. A student's IEP must indicate the general education classes in which the student will receive consultant teacher services.

The determination of location for the special education services may influence decisions about the nature and amount of these services and when they should be provided. For example, an appropriate location for the related service of occupational therapy may be the English class during which the student may have opportunities for writing activities.

- The location where services will be provided needs to be stated specifically enough so the Committee's recommendations regarding location of services is clear (e.g.,

English class; gymnasium; separate therapy room; cafeteria; playground; community; special class; general education summer school academic program).

- It is generally not sufficient to simply state "within general education classes or outside general education classes" for the location of services.
- The location of services should be more specific than simply stating the provider of services or where the student attends school (e.g., within the public school, at the BOCES Center, at the approved private school).

For preschool students, if the recommendation is for one or more related services or itinerant services, the IEP must indicate the child care location arranged by the parent or other site at which each service will be provided. The location must also indicate where, within that site, the services will be provided (e.g., speech and language therapy in the preschool class).

PROJECTED DATE OF INITIATION OF SERVICES

The IEP must indicate the projected date of the initiation of each of the services, supports, program modifications and accommodations recommended in the IEP. The Committee has discretion in documenting the end dates of service.

The following is an example of how special education services may be documented in an IEP:

	Applicable Service Delivery Recommendation	Frequency	Duration	Location	Initiation Date
Consultant Teacher Services	Direct CT services	3x/week	60 minutes per session	General education English class	9/6/11
Speech Language Therapy	Individual. Bilingual - Spanish	2x week	30 minutes per session	Therapy room	9/6/11

Quality Indicators	The recommended special education programs and services, as documented in the student's IEP: • reflect educational needs identified in present levels of performance (i.e., identifies the supports and services to be provided to the student to address each of the student's identified needs). • reflect input from parents and, when appropriate, students. • specify resources needed to accomplish goals and to ensure access to the general education curriculum (or, for preschool students, to participate in appropriate activities). • provide support while continuing to build independence. • are only as "special" as are needed by the student. • promote the student's participation in the least restrictive environment. • are age appropriate. • address transition needs and services for students age 15 and older. • facilitate active participation by the student in extracurricular and other nonacademic activities with other students, including those without disabilities. • are written in language the parents and educators can understand. • are clearly stated as to identify the district's commitment of resources to assist the student in reaching his or her goals.

TESTING ACCOMMODATIONS

REQUIREMENTS

The IEP must indicate the needed individual testing accommodations, if any, to be used consistently by the student in:

- his or her recommended education program;
- the administration of district-wide assessments of student achievement; and
- consistent with Department policy, in State assessments of student achievement that are necessary to measure the academic achievement and functional performance of the student.

WHAT INFORMATION ON TESTING ACCOMMODATIONS SHOULD BE DOCUMENTED IN A STUDENT'S IEP?

For guidance on Testing Accommodations, see the guidance document *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

Testing accommodations must be clearly stated to ensure a consistent understanding by the Committee, school principal, teacher(s), paraprofessionals, student and the student's parents. Specific testing accommodations (e.g., use of word processor) should be indicated, not generic test accommodation categories (e.g., answers recorded in any manner).

It is appropriate to indicate the conditions or types of tests that will require testing accommodations. Such conditions may include the length of the test, the purpose of the test, presentation of test items and the method of response required by the student. As examples: a student with a motor impairment may need a scribe for tests requiring extensive writing such as essay writing, but not for multiple-choice tests; a student may need breaks at certain intervals for tests longer than an hour in length but not for 40 minute classroom tests.

A particular test accommodation may also be needed due to and in conjunction with the provision of another accommodation. For example, separate setting may be needed when the student has the use of a scribe. In such instances, both accommodations must be indicated in the IEP and qualifying conditions would be indicated as appropriate.

If it is determined that the student needs a particular testing accommodation for all tests, then qualifying conditions are not indicated or would indicate "all tests."

When documenting the following accommodations, the following specifications should be included:

- extended time - specify the amount of extended time (e.g., time and a half, double time).
- breaks - specify the duration of break and at what intervals (e.g., ten-minute break every 40 minutes).
- directions read or signed or listening passages read or signed more than the standard number of times - specify the number of times (e.g., directions read two more times than the standard number of times provided for all students as per Department directions).
- separate setting - specify individual or small group.
- adaptive furniture - special lighting or acoustics, specify type (e.g., study carrel).

Qualifying terms such as "as appropriate" or "when necessary" should not be used on the IEP.

Testing accommodations should not be indicated in a test-specific manner (e.g., "calculator with fraction capability," not "calculator with fraction capability on Regents examination in mathematics").

This section of the IEP would be completed for preschool children only if there is an assessment program for nondisabled preschool children.

Example:

Testing Accommodation	Conditions	Specifications
Use of scribe	*For tests requiring essay writing*	
Separate setting	*When using a scribe*	*Individual*
Directions read	*All tests*	*2 additional times*
Breaks	*For tests longer than 30 minutes in length*	*5 min. break every 30 min.*

COORDINATED SET OF TRANSITION ACTIVITIES (SCHOOL TO POST-SCHOOL)

REQUIREMENTS

Beginning with the first IEP to be in effect when the student is age 15 (and at a younger age, if determined appropriate), and updated annually, the IEP must include a statement of needed transition services and a statement of the responsibilities of the school district and, when applicable, participating agencies for the provision of services and activities that promote movement from school to post-school opportunities, or both, before the student leaves the school setting.

TRANSITION SERVICES

Transition services means a coordinated set of activities for a student with a disability, designed within a results-oriented process, that is focused on improving the academic and functional achievement of the student with a disability to facilitate the student's movement from school to post-school activities, including, but not limited to:

- postsecondary education,
- vocational training,
- integrated employment (including supported employment),
- continuing and adult education,
- adult services, and
- independent living or community participation.

The coordinated set of activities must be based on the individual student's needs, taking into account the student's strengths, preferences and interests, and includes:

- instruction;
- related services;
- community experiences;
- the development of employment and other post-school adult living objectives; and
- when appropriate, acquisition of daily living skills and provision of a functional vocational evaluation.

Transition planning focuses attention on how the student's educational program can be planned to help the student make a successful transition to his or her goals for life after high school, including:

- providing instruction and courses of study that are meaningful to the student's future and will motivate the student to complete his or her education;
- teaching students the skills and knowledge needed in adult life (including career development and occupational skills); and
- providing contacts (linkages) with adult agencies to provide a smooth transition.

	Transition services should address identified transition needs of the student and prepare the student to achieve annual goals relating to transition to reach his or her projected postsecondary goals.
INFORMATION NEEDED TO DETERMINE TRANSITION SERVICES	To determine the transition services the student needs, the Committee should consider the student's most recent evaluation information including vocational assessments, teacher recommendations, annual reviews, student strengths, preferences, interests and goals and parent concerns.
STATEMENT OF NEEDED TRANSITION SERVICES	The statements of needed transition services, developed in consideration of the student's needs, preferences and interests, should specify the particular activity or service and the participating agency (i.e., the school district or another agency) providing the service. The beginning date for the service should be provided if the date of initiation is different than the date of initiation for the IEP.
INSTRUCTION	The IEP must identify any instruction that the student might need to prepare the student for post-school living. Instruction is a component of a transition program that the student needs to receive in specific areas to complete needed courses, succeed in the general curriculum and gain needed skills. Instruction could include the courses of study the student needs to take to reach his/her postsecondary goals (e.g., Regents classes in English, Biology and a Second Language; 2 semesters of career and technical education classes in Culinary Arts & Hospitality Technology). Instruction could be indicated as skill areas (e.g., instruction in problem solving skills, how to use public transportation, how to use a particular assistive technology device, how to balance a checkbook, to develop self-advocacy skills).
RELATED SERVICES	The IEP must identify any related services (e.g., rehabilitation counseling services; school social work; orientation and mobility services) the student may need as a transition service to support the student in attaining the projected post-school outcomes. (Related services recommended as a transition activity must also be documented under the IEP section "Special Education Program/Services").
COMMUNITY EXPERIENCES	The IEP must indicate if a student needs to participate in community-based experiences or learn to access community resources (e.g., after school jobs, use of public library, community recreational activities) to achieve his or her projected post-school outcomes.

EMPLOYMENT, OTHER POST-SCHOOL ADULT LIVING OBJECTIVES	The IEP must identify what services or activities the student needs to prepare him or her for employment and to assist the student in meeting other post-school adult living objectives (e.g., participation in a work experience program; assistance with completing college or employment applications; practice in interviewing skills; travel training).
ACTIVITIES OF DAILY LIVING	If appropriate to the needs of the student, the IEP must indicate the services or activities that will assist the student in activities of daily living skills (e.g., dressing, hygiene, self-care skills, self-medication).
FUNCTIONAL VOCATIONAL ASSESSMENT	The IEP must indicate if the student will need a functional vocational assessment as a transition service or activity. A functional vocational assessment is an assessment to determine a student's strengths, abilities and needs in an actual or simulated work setting or in real work sample experiences.
WHAT IS THE DEFINITION OF A PARTICIPATING AGENCY?	Participating agency means a State or local agency, other than the public agency responsible for a student's education, which is financially and legally responsible for providing transition services to the student. To the extent appropriate and with parental consent (or the consent of a student who is 18 years of age or older), the school district must invite a representative of any participating agency that is likely to be responsible for providing or paying for transition services to a CSE meeting where the purpose of the meeting is to consider the postsecondary goals for the student and the transition services needed to assist the student in reaching those goals. If an invited agency does not send a representative to the meeting, the district must take other steps to involve the other agency in the planning of any transition services for the student. When an agency agrees to provide a service, the IEP must include the service and the implementation date of the service if it is different than the implementation date of the IEP.
WHAT IF THE PARTICIPATING AGENCY FAILS TO PROVIDE SERVICES AS PLANNED?	If a participating agency fails to provide agreed-upon transition services contained in the student's IEP, the district responsible for the student's education must, as soon as possible, initiate a meeting to identify alternative strategies to meet the transition objectives, and if necessary, revise the student's IEP.

Quality Indicators	The recommended coordinated set of transition activities: • are based on individual student's needs and post-secondary goals. • are reasonably calculated to assist the student to reach his career and other post school goals in the areas of employment, education and community living. • are focused on improving the academic and functional achievement of the student with a disability to facilitate transition to postsecondary life. • are based on assessment information, including vocational assessment. • focus on the student's strengths, interests and abilities. • reflect involvement and connections with general and career and technical education programs as well as post-school supports and programs. • are developed with students and parents as active participants. • clearly identify the responsibilities of the school district and other agencies.

PARTICIPATION IN STATE AND DISTRICT-WIDE ASSESSMENTS

ASSESSMENT

All students with disabilities must be included in State or district-wide assessment programs. If the Committee determines that the student will participate in an alternate assessment on a particular State or district-wide assessment of student achievement, the IEP must provide a statement of why the student cannot participate in the regular assessment, and why the particular alternate assessment selected is appropriate for the student.

For example, a student with severe disabilities may meet the criteria for participation in NYSAA. The IEP for this student would indicate that the student will be assessed using NYSAA because the student has a severe cognitive disability, significant deficits in communication/language and adaptive behavior; requires a highly specialized educational program that facilitates the acquisition, application, and transfer of skills across natural environments (home, school, community, and/or workplace); and requires educational support systems including assistive technology, personal care services, health/medical services, and behavioral intervention.

This section of the IEP would be completed for preschool students only if there is an assessment program for nondisabled preschool students.

PARTICIPATION WITH STUDENTS WITHOUT DISABILITIES

PRESCHOOL STUDENT	For preschool students, the IEP must provide an explanation of the extent, if any, to which the student will not participate in appropriate activities with age-appropriate nondisabled peers and must indicate if the special education services will be provided in a setting with no regular contact with age-appropriate peers without disabilities.
SCHOOL-AGE STUDENT	Removal from the general educational environment occurs only when the nature or severity of the disability is such that even with the use of supplementary aids and services, education cannot be satisfactorily achieved.
PARTICIPATION IN GENERAL EDUCATION CLASSES	The IEP must provide an explanation of the extent, if any, to which a student will not participate in regular class and/or extracurricular and other nonacademic activities with nondisabled peers. If a student will not participate in a regular physical education program, the IEP must indicate the extent to which the student will participate in specially-designed instruction in physical education, including adapted physical education.
LANGUAGE OTHER THAN ENGLISH (LOTE) REQUIREMENTS	The IEP must indicate if a student identified as having a disability which adversely affects the ability to learn a language will be exempt from the language other than English requirement (LOTE). It is important that the CSE, parents and students carefully consider the implications that a LOTE exemption may have on students achieving their postsecondary goals when planning their courses of study. For students seeking to go on to college, courses in LOTE are often required for admission. If a student who had been receiving special education services is declassified while in grades 9 through 12, and the student's last IEP prior to declassification indicated that the student be exempted from the LOTE requirements, this exemption will continue upon declassification. For further information, refer to http://www.p12.nysed.gov/ciai/lote.html.

TRANSPORTATION

DEVELOPING RECOMMENDATIONS FOR SPECIAL TRANSPORTATION

It is the responsibility of the Committee to determine whether the student's disability prevents the student from using the same transportation provided to nondisabled students, or getting to school in the same manner as nondisabled students. The IEP must include specific transportation recommendations to address each of the student's needs, as appropriate, (such as special or adapted buses, lifts and ramps), based on his or her unique needs related to the student's disability to travel:

- to and from school (including such school-related programs as work programs and settings other than the school where the student receives education or special education services); and, as appropriate,
- in and around the school.

In developing recommendations for special transportation, the Committee should consider and document the needs of the student relating to his/her disability. For example:

- **Mobility** – e.g., nonambulatory wheelchair bound.
- **Behavior** – e.g., fearful in noisy environments; self-abusive; runs away; cries frequently.
- **Communication** – e.g., hard of hearing; nonverbal; limited understanding of questions and directions; non-English speaking.
- **Physical** – e.g., needs assistive devices to maintain a sitting position; needs assistance walking and going up and down stairs.
- **Health needs** – e.g., has seizures; fatigue – may fall asleep on bus, requires oxygen equipment; use of an inhaler.

It is not appropriate for the IEP to simply indicate, "special transportation needed," without including the nature of the special transportation. It is not necessary to include special transportation goals in the student's IEP except when instruction will be provided to enable the student to increase his or her independence or improve his or her behavior or socialization during travel.

In determining and documenting a student's special transportation needs, the Committee should consider the following:

- **Special seating.** Does the student require special seating on the bus such as seating away from the window, seating not adjacent to another student, seating in the front of the bus, etc.?
- **Vehicle and/or equipment needs.** Does the student use or require special equipment such as braces, car seat, walker, lap belt, wheelchair, stroller, assistive technology device, medical equipment, adapted buses, or lifts and ramps, etc.?
- **Adult Supervision.** Does the student require additional supervision during transportation such as a one-on-one bus

attendant for a designated purpose, nursing services, special monitoring, or interpreter, etc.?

- **Type of transportation.** Does the student require accommodations such as door-to-door pick up and drop off, a small bus with few students, or individual transportation?
- **Other Accommodations.** Does the student require other accommodations such as permission to carry personal items or to use personal electronic devices such as radios?

In addition to any special transportation needs resulting from the student's disability, some students may be recommended to receive special education programs/services at a site which requires transportation to/from that site in order for the student to receive his/her special education program/services. The IEP must indicate the need for such transportation to a site to receive services.

In developing its recommendation for a preschool student with a disability, the CPSE must identify transportation options for the student and encourage parents to transport their child at public expense where cost-effective.

Additional information on special transportation may be found at http://www.p12.nysed.gov/specialed/publications/policy/specialtrans.htm

Also 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/p/%2Croot%2Cdynamic%2CQaCorner%2C12%2C

PLACEMENT RECOMMENDATION

REQUIREMENTS

The IEP must indicate the recommended placement of the student.

HOW SHOULD PLACEMENT BE INDICATED?

For purposes of the IEP, the identification of placement needs to specify where the student's IEP will be implemented. Placement should indicate the type of setting where the student will receive special education services. For example:

- Public school district
- BOCES class
- BOCES class in public school
- Approved private school or Special Act School District – day
- Approved private school or Special Act School District – residential
- State-operated school

PLACEMENT SHOULD NOT BE CONFUSED WITH LOCATION OF SERVICES

The student's placement is the educational setting in which the student's IEP will be implemented. The location where each of the recommended services will be provided, as indicated in the section *Recommended Special Education Programs and Services*, specifies where, within that placement, the services will be provided (e.g., Placement: Public High School. Location of Services: consultant teacher services will be provided in the general education math class; individual speech and language therapy will be provided in a separate therapy room).

HOW IS PLACEMENT DETERMINED?

The IEP forms the basis for the placement recommendation. Only after consideration and development of all other components of the student's IEP, including the identification of the student's strengths, needs, goals and the services necessary to meet those goals, does the Committee determine the recommended placement that is appropriate for the individual student. Placement must be based on the student's needs and recommended services as identified in the student's IEP and determined annually.

Placement decisions must be made on an individual basis in consideration of the student's unique needs. Placement decisions cannot be based solely on:

- category of disability,
- availability of special education and related services,
- design of the service delivery system,
- availability of space, or
- administrative convenience.

Placement decisions must:

- be based on the student's strengths and needs;
- reflect consideration of whether the student could achieve any of his/her IEP goals in a general education class with the use of supplementary aids and services and/or modifications to the curriculum;
- consider the nonacademic benefits to the student that will result from interaction with nondisabled students; and
- be developed in conformity with the least restrictive environment requirements.

Least restrictive environment means that placement of students with disabilities in special classes, separate schools and other removal from the general educational environment occurs only when the nature or severity of the disability is such that, even with the use of supplementary aids and services, education cannot be satisfactorily achieved. The placement of an individual student with a disability in the least restrictive environment must:

- provide the special education needed by the student;
- provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and
- be as close as possible to the student's home and, unless the student's IEP requires some other arrangement, the student must be educated in the school he or she would have attended if not disabled.

In selecting the least restrictive environment, consideration must be given to any potential harmful effect on the student or on the quality of the services that the student needs. A student with a disability must not be removed from education in age-appropriate general education classrooms solely because of needed modifications in the general curriculum.

In addition, for **preschool students**, prior to recommending the provision of special education services in a setting which includes only preschool children with disabilities, the CPSE must first consider providing special education services in a setting where age-appropriate peers without disabilities are typically found. A CPSE may only consider provision of special education services in a setting with no regular contact with age-appropriate peers without disabilities when the nature or severity of the child's disability is such that education in a less restrictive environment with the use of supplementary aids and services cannot be achieved satisfactorily.

Quality Indicators	Placement decisions: • are based on student's individual strengths and needs, without regard to classification. • are determined by a process that first considers a general education environment in the school the student would attend if he/she did not have a disability. • reflect consideration of the full range of the student's needs and abilities (academic or educational achievement and learning characteristics, social development, physical development and management needs, including a student's transition needs). • reflect consideration of whether the student could achieve any of his/her IEP goals in a general education class, including nonacademic classes, with the use of supplementary aids and services. • are not based solely on whether the student needs modifications to the curriculum. • reflect flexible consideration of all options of the continuum of services. • consider opportunities for the student to participate with students without disabilities in all nonacademic and extracurricular activities. • consider access to course credit. • consider potential harmful effects of removal from the general education setting or on the quality of services the student needs. • consider proximity to the student's home. • are reviewed at least annually.

IEP IMPLEMENTATION

REQUIREMENTS

The IEP must be implemented as soon as possible following the meeting in which the IEP is developed. There may be no delay in the implementation of a student's IEP, including any case in which the payment source for providing or paying for special education services for the student is being determined. The school district must ensure that each student with a disability has an IEP in effect at the beginning of each school year.

PRESCHOOL STUDENT

The board of education must arrange for the preschool student with a disability to receive his or her special education programs and services as recommended in the IEP commencing with the July, September or January starting date for the approved program.

If the IEP is developed less than 30 school days before or after the appropriate starting date selected for the student, the IEP must be implemented no later than 30 school days of the date the IEP was developed (i.e., the date of the CPSE meeting at which the recommendation was developed).

SCHOOL-AGE STUDENT

The IEP of a school-age student must be implemented within 60 school days of:

- the receipt of consent to evaluate a student not previously identified as a student with a disability; or
- referral for review of the student with a disability for a student previously identified as a student with a disability; except:
- for students recommended for placement in an approved in-state or out-of-state private school, the board must arrange for such programs and services within 30 school days of the board's receipt of the recommendation of the Committee.

WHAT STEPS MUST BE TAKEN TO ENSURE IEP IMPLEMENTATION?

The school must take steps to ensure a student's IEP is implemented as recommended by the Committee, including but not limited to:

- providing copies of the student's IEP, as appropriate; and
- informing each individual of his or her IEP implementation responsibilities.

For a student who needs his/her instructional materials in an alternative format, the materials must be made available to the student at the same time that such materials are available to non-disabled students.

It is recommended that the Committee meeting include discussion and documentation of the steps necessary to ensure

implementation of the student's IEP, including, but not limited to:

- identifying staff who will be responsible to provide the recommended services, accommodations, program modifications and supports in accordance with the IEP;
- determining how and by whom the student's teachers, related service providers and other service providers will be provided copies of the student's IEP;
- designating an individual who is knowledgeable about the student's disability and program to inform staff of their IEP responsibilities;
- planning how resources and materials necessary to implement the IEP will be obtained (e.g., instructional materials in alternative formats; assistive technology devices ordered);
- arranging, as appropriate, for testing accommodations; and
- determining how coordination with other agencies, if appropriate, will occur.

Committee on Special Education
Subcommittee on Special Education
Committee on Preschool Special Education

Committee on Preschool Special Education (CPSE)

Each CPSE must include, but is not limited to:

- the parents of the preschool child;
- not less than one regular education teacher of the child whenever the child is or may be participating in the general education environment;
- not less than one special education teacher of the child, or, if appropriate, not less than one special education provider of the child;
- a representative of the school district who is qualified to provide or supervise special education and who is knowledgeable about the general education curriculum and the availability of preschool special education programs and services and other resources of the school district and the municipality. The representative of the school district shall serve as the chairperson of the committee;
- an additional parent member of a child with a disability residing in the school district or a neighboring school district and whose child is enrolled in a preschool or elementary level education program, provided that such parent is not a required member if the parent(s) of the child request that the additional parent member not participate;
- an individual who can interpret the instructional implications of evaluation results, provided that such individual may also be the individual appointed as the regular education teacher, special education teacher or special education provider, school psychologist, representative of the school district or a person having knowledge or special expertise regarding the student when such member is determined by the school district to have the knowledge and expertise to fulfill this role on the Committee;
- other persons having knowledge or special expertise regarding the child, including related services personnel as appropriate, as the school district or the parents shall designate. The determination of knowledge or special expertise of such person shall be made by the party (parents or school district) who invited the individual to be a member of the CPSE;
- for a child in transition from early intervention programs and services, at the request of the parent, the appropriate professional designated by the agency that has been charged with the responsibility for the preschool child; and
- a representative of the municipality of the preschool child's residence, provided that the attendance of the appointee of the municipality shall not be required for a quorum.

Committee on Special Education (CSE)

Each CSE must include, but is not limited to:

- the parents or persons in parental relationship to the student;
- not less than one regular education teacher of the student whenever the student is or may be participating in the regular education environment;
- not less than one special education teacher of the student, or, if appropriate, not less than one special education provider of the student;
- a school psychologist;
- a representative of the school district who is qualified to provide or supervise special education and who is knowledgeable about the general education curriculum and the availability of resources of the school district, provided that an individual who meets these qualifications may also be the same individual appointed as the special education teacher or the special education provider of the student or the school psychologist. The representative of the school district shall serve as the chairperson of the Committee;
- an individual who can interpret the instructional implications of evaluation results. Such individual may also be the individual appointed as the regular education teacher, special education teacher or special education provider, school psychologist, representative of the school district or a person having knowledge or special expertise regarding the student when such member is determined by the school district to have the knowledge and expertise to fulfill this role on the Committee;
- a school physician, if specifically requested in writing by the parent of the student or by a member of the school at least 72 hours prior to the meeting;
- an additional parent member of a student with a disability residing in the school district or a neighboring school district, provided that the additional parent member may be the parent of a student who has been declassified within a period not to exceed five years or the parent of a student who has graduated within a period not to exceed five years. Such parent is not a required member if the parents of the student request that the additional parent member not participate in the meeting;
- other persons having knowledge or special expertise regarding the student, including related services personnel as appropriate, as the school district or the parent(s) shall designate. The determination of knowledge or special expertise of such person shall be made by the party (parents or school district) who invited the individual to be a member of the Committee on special education; and
- if appropriate, the student.

Subcommittee on Special Education[3]

The membership of each Subcommittee on Special Education must include, but is not limited to:

- the parents of the student;
- not less than one regular education teacher of the student whenever the student is or may be participating in the regular education environment;
- not less than one of the student's special education teachers or, if appropriate, not less than one special education provider of the student;
- a representative of the school district who is qualified to provide, administer or supervise special education and who is knowledgeable about the general education curriculum and who is knowledgeable about the availability of resources of the school district, who may also fulfill the requirement of the special education teacher of the student or, if appropriate, the special education provider of the student or a school psychologist. The representative of the school district shall serve as the chairperson of the subcommittee;
- a school psychologist, whenever a new psychological evaluation is reviewed or a change to a program option with a more intensive staff/student ratio (e.g., change from a maximum class size of twelve students to a maximum class size of eight students, with one or more supplementary school personnel assigned to each class during periods of instruction), is considered;
- an individual who can interpret the instructional implications of evaluation results, who may be a member appointed as a regular education teacher of the student, special education teacher or special education provider of the student, representative of the school district, school psychologist or other persons having knowledge or special expertise regarding the student, including related services personnel as appropriate, as the committee or the parent shall designate;
- such other persons having knowledge or special expertise regarding the student, including related services personnel as appropriate, as the committee or the parent shall designate. The determination of knowledge or special expertise of such person shall be made by the party (parents or school district) who invited the individual to be a member of the subcommittee on special education; and
- the student, if appropriate.

A Subcommittee on Special Education may perform the functions of the CSE, <u>except</u> when a student is considered for placement for the <u>first time</u> in a:

- special class; or
- special class outside of the student's school of attendance (i.e., outside the school the student would normally attend if not disabled); or
- school primarily serving students with disabilities or a school outside of the student's district.

[3] Does not apply to CPSE

If a recommendation of a Subcommittee is not acceptable to the student's parent(s), the parent may submit a written request to refer the recommendation to the CSE for its review. Upon receipt of such written request by the parent, the CSE must meet and review the recommendation of the Subcommittee.

Each Subcommittee must report annually the status of each student with a disability within its jurisdiction to the CSE.

Procedures Relating to the Attendance of Committee Members

From section 200.3(f) of the Regulations of the Commissioner of Education:

(1) A member of a committee on special education, a committee on preschool special education or subcommittee on special education is not required to attend a meeting of the committee, in whole or in part, if the parent and the school district agree, in writing, that the attendance of the member is not necessary because the member's area of the curriculum or related services is not being modified or discussed at the meeting.

(2) A member of such committee may be excused from attending a meeting of the committee or subcommittee, in whole or in part, when the meeting involves a modification to or discussion of the member's area of the curriculum or related services if the parent to the student and the school district consent, in writing, to the excusal and the excused member submits to the parent and such committee, written input into the development of the IEP, and in particular written input with respect to their area of curriculum or related services prior to the meeting.

(3) Requests for excusal of a member of a committee as provided for in paragraphs (1) and (2) of this subdivision, and the written input as provided for in paragraph (2) of this subdivision, shall be provided not less than five days prior to the meeting date, in order to afford the parent a reasonable time to review and consider the request. Provided however, that a parent shall retain the right to request and/or agree with the school district to excuse a member of the committee or subcommittee at any time including where the member is unable to attend the meeting because of an emergency or unavoidable scheduling conflict and the school district submits the written input for review and consideration by the parent within a reasonable time prior to the meeting and prior to obtaining written consent of the parent to such excusal.

(4) Requests for excusals do not apply to the parents of the student or the appointee of the municipality in the case of a committee on preschool special education.

Consideration of Special Factors

The following information provides examples of guiding questions a Committee may use to determine whether certain students need a particular device or service (including an intervention, accommodation, or other program modification) in order for the student to receive a free appropriate public education.

Students who demonstrate behaviors which impede learning

A functional behavioral assessment (FBA) is conducted as part of an individual evaluation for each student with a disability who has behaviors that impede his or her learning or that of others. A FBA must also be conducted when disciplinary actions have resulted in the suspension or removal of the student from his or her current program for more than 10 days in a school year. FBAs provide information on why a student engages in a behavior, when the student is most likely to demonstrate the behavior and situations in which the behavior is least likely to occur. The individualized education program (IEP) of a student whose behavior impedes his or her learning or that of others must indicate the strategies, including positive behavioral interventions and supports to address a student's behavior needs. Further information on functional behavioral assessments may be found in the July 1998 memorandum entitled, *Guidance on Functional Behavioral Assessments for Students with Disabilities*.

Based on the results of the FBA, the Committee must identify strategies, including positive behavioral interventions and supports to address those behaviors. When a student's behaviors are such that they are impeding learning, the IEP must identify, as appropriate, the student's present levels and needs and annual goals, (and if required for certain students, short-term objectives and/or benchmarks), related to behaviors, and the special education and related services, supplementary aids and services to be provided to the student, or on behalf of the student, any needed program modifications, and any supports for school personnel needed to address the behavior.

In determining the supports, services, interventions or program modifications a student may need to address behaviors that impede learning, the Committee should consider the following questions:

- What behavior(s) does the student exhibit that are different from those of same-age peers?
- When is the student most likely to exhibit the problem behavior?
- What are the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it?
- What contextual factors (including cognitive and affective factors) contribute to the behavior?
- What specific events appear to be contributing to the student's problem behavior?
- What function(s) does the problem behavior serve for the student?
- What might the student be communicating through problem behavior?
- When is the student less likely to engage in the problem behavior?

- Does the student's behavior problem persist despite consistently implemented behavioral management strategies?
- Does the student's behavior place him/her or others at risk of harm or injury?
- Have the student's cultural norms been considered relative to the behavior(s) in question?
- Do health-related issues affect the behavior?
- Does the student's disability affect his/her ability to control the behavior?
- Does the student's disability affect his/her understanding of the consequences of the behavior?
- What accommodations are necessary for instruction and testing?
- Does the student need an individual behavioral intervention plan?

Students with limited English proficiency

For all students with disabilities with limited English proficiency, the Committee must consider how the student's language needs relate to the IEP. Schools must provide a student with limited English proficiency with alternative language services to enable him/her to acquire proficiency in English and to provide him/her with meaningful access to the content of the educational curriculum that is available to all students, including special education and related services. The Committee should consider the following questions:

- Has the student been assessed in English as well as his/her native language?
- Did the evaluation of the student with limited English proficiency measure the extent to which the student has a disability and needs special education rather than measure the student's English language skills?
- Does the disability impact on the student's involvement and progress in the bilingual education or English as a Second Language (ESL) program of the general curriculum?
- What language will be used for this student's instruction?
- What language or mode of communication will be used to address parents or family members of the student?
- What accommodations are necessary for instruction and testing?
- What other language services (i.e., English as a second language, bilingual education) must be provided to ensure meaningful access to general and special education and related services?

Students with visual impairments

When a student is blind or visually impaired, the Committee must provide instruction in Braille and the use of Braille unless the Committee determines, after an evaluation of the student's reading and writing skills, needs and appropriate reading and writing media, that instruction in Braille or the use of Braille is not appropriate for this student. The student's future needs for instruction in Braille or the use of Braille must also be considered. The Committee should consider the following questions:

- Does the student have a disability in addition to blindness that would make it difficult for him/her to use his or her hands?
- Does the student have residual vision?
- Does the student use or need to learn to use assistive technology for reading and writing?
- Is the student's academic progress impeded by the current method of reading?
- Does the student use Braille, large print, recordings or regular print?
- Will the student need to use Braille, large print or recordings in the future?
- Have provisions been made to obtain in Braille the printed materials used by sighted students?
- Does the student need instruction in orientation and mobility?
- Does the student have appropriate listening skills?
- Does the student have age-appropriate social skills?
- What skills does the student need to enable him or her to learn effectively?
- What accommodations are necessary for instruction and testing?
- What is the potential loss of remaining vision?
- What is the amount of reading required of the student in the general education curriculum?
- Does the student have language-related learning disabilities?

Additional information explaining the responsibilities of educational agencies for students with visual impairments may be found in the June 8, 2000 Federal Register/ Vol. 65, No. 111 *Educating Blind and Visually Impaired Students: Policy Guidance.*

For additional guidance relating to accessible instructional materials for students, see http://www.p12.nysed.gov/specialed/aim/AIMmemo1209.htm.

Students with communication needs

The Committee must consider the communication needs of the student, and in the case of a student who is deaf or hard of hearing, consider the student's language and communication needs. The Committee must consider the student's opportunities for direct interaction with peers and educational personnel in the student's own language and communication mode. Opportunities for direct interaction (without needing an interpreter) in the student's own language and communication mode must also be described. The Committee should consider the following questions:

- Does the student use American Sign Language?
- What mode of communication does the student use?
- What mode of communication does the family prefer?
- Is an interpreter or translator needed for the student to participate in and benefit from classroom instruction and/or interaction with peers and educational personnel?
- Does the student require assistive devices to facilitate the development and use of meaningful language and/or a mode of communication?

- Does the student require the use of hearing aids and assistive listening devices in order to maximize auditory training and language development in classrooms, related school activities and at home?
- What environmental modifications are necessary to address communication needs?
- Are there opportunities for the student to participate in direct communication with peers and educational personnel?
- What opportunities exist for direct instruction (without an interpreter) in the student's language and/or mode of communication?

Students who may need assistive technology devices and services

Some students may require assistive technology devices and services to benefit from a free appropriate public education (FAPE). The Committee must also consider whether the use of school-purchased assistive technology devices must be used in the student's home or in other settings in order for the student to receive FAPE. Parental input in this area is especially important. The Committee should consider the following questions:

- What can the student do now with and without assistive technology devices and services?
- What does the student need to be able to do?
- Can assistive technology devices and services facilitate student success in a less restrictive environment?
- Does the student need assistive technology devices and services to access the general curriculum or to participate in nonacademic and extracurricular activities?
- What assistive technology services would help the student participate in the general curriculum and/or classes?
- Does the student need assistive technology devices and services to benefit from educational/printed materials in alternative formats?
- Does the student need assistive technology devices and services to access auditory information?
- Does the student need assistive technology devices and services for written communication/computer access?
- Does the student need an assistive technology device or service for communication?
- Does the student need assistive technology devices to participate in State and district-wide testing?
- Will the student, staff and/or parents need training to facilitate the student's use of the assistive technology devices?
- How can assistive technology devices and services be integrated into the student's program across settings such as work placements and for homework?

Topic and Question Index
October 2010
(Updated April 2011)

QUESTIONS AND ANSWERS ON INDIVIDUALIZED EDUCATION PROGRAM (IEP) DEVELOPMENT, THE STATE'S MODEL IEP FORM AND RELATED REQUIREMENTS

October 2010
(Updated April 2011)

The following questions and answers address some of the important issues raised by requests for clarification of the federal and State requirements for IEPs. This document will periodically be updated. This guidance does not impose any requirements beyond those required under applicable law and regulations. This document supersedes any previously issued guidance on this topic.

If you have questions regarding the IEP form and related requirements, you may submit them to the following mailbox: SEFORMS@mail.nysed.gov.

A. STUDENT INFORMATION SUMMARY FORM

1. Is it appropriate to list the current medications that a student is taking on the Student Information Summary form?

A school district should consider a student's right to confidentiality of medical information before including such information on a form that would be available to school personnel. Health-related information included in a student's present levels of performance and/or on the optional Student Information Summary form should include only information school personnel would need to know to implement the student's IEP.

2. Why isn't there a place for the parent or guardian name on either the example of the optional summary form or on the IEP model form?

Section 200.4(d)(2) of the Regulations of the Commissioner of Education does not require that the parent or guardian name be in a student's IEP. However, the district may choose to include this information on the optional Student Information Summary.

3. If a district chooses to put addresses on the Student Information Summary form, and a student's address happens to change, does a new IEP have to be created? Does any change within this Summary Page constitute a new IEP? (Added 4/11)

The Student Information Summary form is not a required component of a student's IEP. As an optional form, districts have discretion to use it to supplement the information included in a student's IEP. If such a form is used, changes to information on the Student Information Summary form should be kept up to date, but would not require a new CPSE or CSE meeting or be considered an IEP amendment.

4. Can districts add additional information to the optional Student Information Summary form if they so choose? (Added 4/11)

Yes.

5. Can the Student Information Summary form be multiple pages in length if need be? (Added 4/11)

The Student Information Summary form is provided only as a model form. It may contain information that districts and parents feel to be important, but which is not required by law or regulation to be included in a student's IEP. School districts may modify the State's model Student Information Summary form to add or replace the suggested fields as they deem appropriate. In doing so, the form may extend beyond the single page model.

B. GENERAL QUESTIONS ON THE STATE-DEVELOPED FORM

1. When must the new IEP form be used?

IEPs developed for the 2011-12 school year, and thereafter, must be on the State form. The 2011-12 school year starts on July 1, 2011.

2. May a school district add 'drop-down' options in fields that are open text fields on the State's IEP form?

The IEP form developed by the State provides open text fields to allow the Committee on Special Education (CSE) and Committee on Preschool Special Education (CPSE) to enter student-specific information. The State has provided drop-down choices in the IEP only where there is State regulation or policy to guide those choices. The drop-down options provided by the Department on the State form may not be modified.

The school district could add 'drop-down' options on the IEP form for other sections of the IEP where the district is seeking consistency in the wording of recommendations provided that the choices are consistent with State policy and provided that district-added drop-down choices do not limit the CSE or CPSE from making other recommendations outside the drop-down choices in order to meet the individualized needs of the student.

Any school district wishing to add drop-down options to the IEP form should carefully review the State's guidance related to these sections of the IEP to ensure consistency with State policy. http://www.p12.nysed.gov/specialed/publications/iepguidance.htm.

3. Does the projected date of IEP implementation only need a month and a year? The example says September 2010?

The projected date an IEP is to be implemented should include the month, day and year. The example provided in Attachment 3, General Directions to Use the State's Model Individualized Education Program (IEP) Form, is 'September 7, 2010'.

4. Can the font size, margins and font style in the IEP be modified?

Yes.

5. Can we put page numbers on the IEP form?

Yes.

6. What training will be available to district staff on the use of the State's forms?

The New York State Education Department (NYSED) will be offering extensive training opportunities for school personnel on use of the State's IEP, meeting notice and prior written notice forms. Scripted PowerPoint presentations with accompanying examples, questions and answers and guidelines will be posted on NYSED's website to provide wide access to professional development from individual computers. This will provide no-cost access to information and training. In addition, each of the State's Regional Special Education Technical Assistance Support Centers (RSE-TASC) are planning multiple and comprehensive regional training sessions to address the scope of training needed for individualized education program (IEP) development and the meeting notice and prior written notice requirements.

7. Aside from being a new form, does the State IEP form create new requirements for the content of an IEP?

No.

8. Can districts include "Headers and Footers" on the IEP form? (Added 4/11)

Yes. Districts may include headers and footers in the IEP form, at local discretion.

9. Can a district put the school letterhead on the forms? (Added 4/11)

Yes.

10. **Can a district put the child's name at the bottom of each page of the IEP when using the State's IEP form? (Added 4/11)**

    Yes.

11. **Please verify the letterhead/district identifying information section of the new IEP. In our district, the CSE and CPSE are housed in two different buildings and have two different chairs. In the past, we have each had our own IEPs with our own letterhead/information on the top. My question is, is it appropriate for us to have two separate IEPs on Clear Track as long as the only difference is the letterhead, or do we need to make a combined letterhead that lists both addresses, etc., so that both the CSE and CPSE are using the exact same IEP? (The concern with this is that it might be confusing for some parents.) (Added 4/11)**

    The district may insert district-identifying information on school-age and preschool student's IEPs in the manner it deems most appropriate.

12. **Can districts bold certain sections of the IEP and/or add a little more space between items of the IEP? For instance in the Present Level Statements, the introductory statements above each area for Present Levels, Strengths and Needs - bold those? Then, where the comment would begin below that, insert an extra line space or two to make it stand out more? (Added 4/11)**

    Yes.

13. **Will the State's IEP form be translated into other languages? (Added 4/11)**

    No. There is no requirement for an IEP to be provided in the parent's native language or other mode of communication. A district must, however, take whatever action is necessary to ensure that the parent understands the proceedings at the meeting of the CSE, including arranging for an interpreter for parents with deafness or whose native language is other than English. If the district uses the IEP as part of its prior written notice to the parent, it must ensure that the entire notice, including the IEP, is provided in the native language of the parent, unless it is clearly not feasible to do so.

14. **Does SED have a sample of a Model IEP . . . not just a blank form, but an IEP that addresses a fictional student . . . this would be a great help if we could see the "whole picture" now that we have studied all the components. Are sample IEPs created for the Alternate Assessment, 12:1:1, 6:1:1, 8:1:1, 8:1 (inclusion) and 12:1:4 student available? (Added 4/11)**

    The Department has provided examples as to how different sections of an IEP are completed (Attachment 3 found at http://www.p12.nysed.gov/specialed/formsnotices/IEP/directions.htm), but they are not a composite of one student. It would be

inappropriate to have sample IEPs based on the special class size recommendations for students.

15. Will there be upcoming training on the State's IEP form? (Added 4/11)

Regional Trainers from New York State's Regional Special Education Technical Assistance Support Centers (RSE-TASC) are conducting ongoing regional information and training sessions on the use of the State's IEP form. For more information about available upcoming training dates, please contact a local RSE-TASC. (http://www.p12.nysed.gov/specialed/techassist/rsetasc/locations.htm)

In addition, on October 21, 2010, SED posted three PowerPoint presentations on the IEP form for public access as well as an extensive question and answer document on development of an IEP using the State's IEP form. These training materials may be accessed at http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/home.html.

16. In the annual goal sections of the State IEP, it is noted that the table and/or rows should be duplicated as needed. How is this done? (Added 4/11)

The State's IEP form posted on the Department's website is 'lock protected' in order for the form fields to function properly. In order to duplicate the table/rows, the form must be unlocked. To do so, go to 'Tools', 'Options' and click on 'Security' and follow the directions to unlock the form. Upon duplicating the table/rows, be sure to lock the form again to ensure proper function of the form and retention of information added to the form.

17. After reviewing the IEP forms, there is nothing resembling a "Conference Results" page where participants sign that they were at the IEP meeting. Expected participants are listed on the Meeting Notice. On the "Conference Results" page of NYC IEPs, participants sign that they were at the meeting, not necessarily agreeing with the IEP. Are signatures required on the State forms? Would this be added to the optional Student Information Summary? (Added 4/11)

Signatures of participants at IEP meetings are not required to be documented in the IEP. The district should, however, maintain a record of meeting participants who attended the meeting. This information could be documented on the optional Student Information Summary form.

18. Are meeting minutes a required part of the IEP? If so, can they be attached to the IEP? (Added 4/11)

No. Meeting minutes document discussions and decisions made at the meeting and provide a written record of the meeting. Meeting minutes should be referenced to ensure IEPs include recommendations made at the meetings and to provide

information for prior written notice, but they are not part of the IEP and may not substitute for appropriate documentation of recommendations in the IEP form itself. There is nothing that would prohibit a district from providing a copy of meeting minutes to the parent along with a copy of the IEP.

C. DISABILITY CLASSIFICATION

1. Where is a diagnosis of Asperger Syndrome documented in a student's IEP?

A 'diagnosis' such as Asperger Syndrome could be documented on the optional Student Information Summary form and/or in Present Levels of Performance.

2. The State IEP form does not reference declassification. Where should recommendations upon declassification (including, as appropriate: testing accommodations; the student's eligibility for the diploma "safety net;" the student's continued exemption from the language other than English (LOTE) requirement; and needed declassification support services to be provided to the student and/or the student's teachers during the first year after the student is declassified) be documented?

The State's model IEP form only includes information that is required by law or regulation to be included in a student's IEP. There is no requirement in law or regulation to include information related to declassification in an IEP. However, the Committee must document its recommendations made upon declassification of the student to the board of education and in prior written notice to the student's parents.

Any recommendations relating to declassification must be provided to the board of education by the CSE. The recommendation must:

- identify the declassification support services, if any, to be provided to the student and/or to the student's teachers; and
- indicate the projected date of initiation of such services, the frequency of provision of such services and the duration of such services, provided that such services shall not continue for more than one year after the student enters the full-time general education program.

Other recommendations, including those that will continue upon the student's declassification such as the student's continued eligibility for the "safety net" or LOTE exemption, should be included in the notice to the Board of Education and in prior written notice to the parent.

3. In the current question and answer document, there is a question about "where is a diagnosis of Asperger Syndrome documented in a student's IEP"? Is the answer provided limited to Asperger or can it also be applied to diagnoses such as "dyslexia," ADD or ADHD, or other diagnosed "syndromes"? (Added 4/11)

The response to question #10 in the Question and Answer document dated October 2010 can be generalized to other conditions commonly associated with a specific disability category.

D. PRESENT LEVELS OF PERFORMANCE AND INDIVIDUAL NEEDS

1. Is it allowable to leave any part of the student's present levels of performance sections of the IEP blank?

No. Section 200.4(b)(2)(i) of the Regulations of the Commissioner of Education requires that the IEP report the present levels of academic achievement and functional performance and indicate the individual needs of the student according to each of the four need areas, including how the student's disability affects involvement and progress in the general education curriculum, or for preschool students, as appropriate, how the disability affects the student's participation in appropriate activities. If there are no individual needs related to one or more of the four need areas, the IEP could indicate that the student's skills are within normal limits or that no disability-related needs were identified.

2. Examples in the *Present Levels of Performance/Evaluation Results* section and other sections of the IEP use both complete sentences and phrases. This format appears inconsistent? Is it intentional?

These are examples only intended to demonstrate that there are various ways to document information in a student's IEP. A district has local discretion as to how it documents student-specific information.

3. Should evaluation results (such as from State assessments) be kept from year to year in that section in the IEP (so that there is a running record of information)? Is standardized testing/State assessment information required to be included in the *Evaluation Results* section of IEP?

In developing the recommendations for the IEP, the Committee must consider the results of the initial or most recent individual evaluation of the student as well as the results of the student's performance on any general State or district-wide assessment programs. A district could, but is not required to, provide historical State assessment and/or individual evaluation results in a student's IEP.

4. Must the results for a student's New York State Alternate Assessment (NYSAA) be documented in the IEP?

No. Regulations do not require that alternate assessment results be included in an IEP. However, in developing recommendations for an IEP, the Committee must consider the academic, developmental and functional needs of the student, including, as appropriate, the results of the student's performance on any general State or district-wide assessment program. To the extent that the evaluation results from the

NYSAA form the basis for present level of performance statements, they should be documented in the IEP.

5. Should the IQ score be documented in the IEP?

Whether a student's IQ score and/or scores on subtests are deemed relevant assessment data that needs to be documented in the IEP is a Committee decision and should be based upon the individual student.

6. On page 4 of the directions, under *Evaluation Results* it states that, "the following section of the IEP provides space for the Committee to document the evaluation results considered." Please explain.

Documentation of each student's present levels of performance in the IEP must include consideration of the results of the initial or most recent individual evaluation of the student, as well as the results of the student's performance on any general State or district-wide assessment programs. The State's IEP form includes an *Evaluation Results* section as a place to document the results of evaluations that were conducted and considered in the development of the student's IEP. Alternately, the Committee could document its consideration of the evaluation and assessment results under the four need areas (academic achievement, functional performance and learning characteristics; social development; physical development; and management needs). There is no requirement that the specific names of the individual tests conducted to complete the initial evaluation or reevaluation of the student be indicated in the IEP.

7. Can districts put formalized/standardized evaluation or assessment results within the body of the academic, social or physical sections of the present levels of performance, or does that information have to be included in *Evaluation Results* section of the form?

A Committee may choose to document evaluation results within each of the three areas (academic, social or physical sections) rather than within the *Evaluation Results* section of the form. If the Committee chooses to do so, it is recommended that information on the form direct the reader to the academic, social and physical need sections of the IEP.

8. If a student's most current State assessment results are included in the IEP, would the IEP need to be amended when/if updated/revised State assessment results are received by the district?

A change to a student's State assessment results would not in and of itself require a review or revision to the student's IEP. Section 200.4(f)(2) of the Regulations of the Commissioner of Education requires that the IEP be reviewed and, as appropriate, revised, periodically but not less than annually to address any lack of expected progress towards the annual goals and in the general education curriculum; the

results of any reevaluation and information about the student provided to, or by, the parents; the student's anticipated needs; or other matters, including a student's need for test accommodations and/or modifications and the student's need for a particular device or service in order for the student to receive a free appropriate public education (FAPE).

9. Is the intent of the *Evaluation Results* box to contain standardized scores, a narrative description of what that means and the implications for instruction?

This section of the IEP is provided to assist the district in documenting its consideration of the evaluation results to ascertain the student's present levels of performance. A Committee may choose, but is not required, to include standardized scores in this section of the IEP. It may, as an alternative or in addition to standardized scores, provide a narrative description of the results. The Committee must ensure that all sections of the IEP are clearly understood by the reader and that the instructional implications of the evaluation results are clear.

10. In terms of best practice, should trainers be encouraging districts to separate or sort evaluation results by content/skill areas?

The manner in which a school district documents its present level of performance statements in a student's IEP is at local discretion. Examples could be provided to school districts to the extent they assist districts to organize the information in an IEP.

11. The State IEP form requires documentation of the committee's 'consideration of student needs that are of concern to the parent' in three of the *Present Levels of Performance* sections. What does this mean?

The State IEP form requires the Committee to identify the needs of the student relating to the three areas of present levels of performance, which includes consideration of the concerns of the parent for enhancing the education of their child as required by federal and State regulations. This does not mean that the IEP must document every concern expressed and/or recommendation that the parent offers. While the IEP does not necessarily require an explicit statement that a particular need area is of concern to the parent, documenting when a need area that will be addressed in the student's IEP is an area of concern expressed by the parent will assist the district in documenting that it considered the parents' concerns. If a parent had no concerns related to his/her child's disability-related needs or chose not to participate in the IEP development process, the Committee could, but is not required to, also indicate this on the IEP.

In the consideration (i.e., discussion and documentation) of a parent's concerns, the Committee may reach a consensus that the parent's expressed concerns are not appropriate to address in a student's IEP. In this case, there would be no documentation of these concerns in the IEP. However, if, in consideration of the concerns of the parent, the Committee refuses to initiate or change the identification,

evaluation, educational placement of the student or the provision of FAPE to the student, this information must be included in the prior written notice provided to the parent.

One example of how the needs of the student, including consideration of student needs that are of concern to the parent may be documented in an IEP can be found at http://www.p12.nysed.gov/specialed/formsnotices/IEP/directions.htm.

Following is another example.

ACADEMIC, DEVELOPMENTAL AND FUNCTIONAL NEEDS OF THE STUDENT, INCLUDING CONSIDERATION OF STUDENT NEEDS THAT ARE OF CONCERN TO THE PARENT:

- Reading decoding skills.
- Self-correction strategies.
- Self-regulatory skills to more appropriately handle distractions.
- Techniques for coping with frustration, particularly with homework (concern of the parent).
- Scheduling accommodations for fatigue (concern of the parent).

12. How do districts properly document concerns of the parent when:

- **discussion with parent has occurred and there are no concerns of the parent in that area; or**
- **contact with the parent has been attempted but no contact or discussion has occurred?**

Is it allowable in the above situations to leave the field blank or should something be written? If a statement should be written, can you give an example for each of the above situations?

A Committee can only consider the parents' concerns if they have been shared by the parents at the meeting, in writing or through other communications. If a parent had no concerns related to his/her child's disability-related needs or chose not to participate in the IEP development process, the Committee could indicate this in the IEP. While the example provided in guidance shows an IEP that provides an explicit statement regarding a parent's concerns as a means to document this required consideration, there is no requirement that the IEP do so.

It is not appropriate to leave the field blank since the requirement is that the Committee document the present levels of performance and needs of the student. If a student doesn't have needs to be addressed in the IEP related to one or more of the four need areas, then the form could state "not applicable" or "none."

13. What should be documented on the new IEP form regarding parent concerns if the parent is unable to be reached due to transient living situations or simply neglect of the attempted contact. Similarly, what about children who are wards

of the county/State? Is there a "blanket statement" to indicate attempts at parental contact?

As stated above, a Committee can only consider concerns if they have been shared by the parents at the meeting, in writing or through other communications. However, each school district must take steps to provide parents with a meaningful opportunity to participate in meetings for their child. For students who require a surrogate parent (see section 200.5(n) of the Regulations of the Commissioner of Education), the surrogate parent's concerns for the education of the student must be considered.

14. While including consideration of student needs that are of concern to the parent is good practice, incorporating that consideration explicitly into the IEP may create dilemmas for districts. Would a district need to transcribe the parent's wishes and then document why the wishes could not be fulfilled? Would a district have to include each particular concern raised by the parent?

Consideration of the concerns of the parents is not just a good practice; it is a requirement of federal law, federal regulations and State regulations. The identification of the needs of the student must reflect consideration of the concerns of the parents for enhancing the education of their child. This does not mean that every concern expressed and/or recommendation that the parent offers must be included in the IEP form. While prior written notice does require the district to document actions refused and the reasons for the refusal, the needs of the student to be addressed by the IEP must include consideration of concerns of the parent for enhancing the education of the student. The recommendations to be included in the students' IEP reflect the consensus of the CSE or CPSE, in consideration of many factors, including the concerns raised by the student's parent(s).

15. What if a parent insisted that her child needed an IEP goal of demonstrating mastery at, for example, riding a bicycle, using school-based physical therapy (PT) and adapted physical education (APE) as the means of achieving that goal? It may be appropriate that APE and/or PT address some related skill development essential to progress in the general education curriculum and daily living skills, but it is questionable whether learning to ride a bicycle is a required component of a FAPE that a district must provide. How would a district include in the IEP consideration of such a parental concern without assuming responsibility and liability for actually teaching the student to ride a bicycle (and for actually providing the bicycle, for that matter)?

In this case, the Committee should consider (i.e., discuss and document) the parent's concerns, which may be related to motor development, balance, and/or development of age-appropriate leisure activities. The IEP must include the needs of the student in consideration of the concerns of the parent. If the Committee reaches a consensus that using the methodology of teaching the student to ride a bicycle is not a need recommended for safety or other reasons, this should be explained to the parent in prior written notice, but would not need to be included in the IEP.

16. Should information in the management needs section of the IEP be specific or generic? Examples in the new guidance document tend to be general and based around skill development. Districts tend to provide specific information (such as Joey needs timers or Sophie needs verbal prompts). Which is correct or are both acceptable? There is some confusion as to what information goes under *Management Needs* and what information belongs in *Recommended Special Education Programs and Services*.

Each Committee must decide on a case-by-case basis the level of specificity needed to identify a student's management needs. To document management needs, the Committee must determine the nature of and degree to which environmental modifications and human or material resources are required to enable to student to benefit from instruction in consideration of the student's present levels of performance in the areas of academic achievement, functional performance and learning characteristics; social development and physical development. At this point in the IEP development process, the Committee is identifying needs, (e.g., limited audio/visual distractions, scheduled rest periods, consistency in routine, assistive technology to assist communication, assistance with transitions), not specific recommendations to address those needs.

In the section of the IEP *Recommended Special Education Programs and/or Services*, the IEP must identify the specific recommendations to address the management needs of the student, as identified under *Present Levels of Performance*. Examples include, but are not limited to, preferential seating in regular class recommended for a student who needs limited audio/visual distractions; text-to-speech and speech-to-text software for a student who needs assistive technology to assist in communication skills.

17. In the *Present Levels of Performance and Individual Needs* section, how much detail is needed to report the results of alternative assessments? (Added 4/11)

In the development of an IEP, the Committee must consider, as appropriate, the results of the student's performance on any general State or district-wide assessment programs. The determination of how much detail, based on the results of such assessments, would be appropriate to include in a student's IEP must be made by the Committee on a case-by-case basis. Evaluation and other information considered in the development of a student's IEP should provide instructionally-relevant information as to the unique needs of the student, current functioning, cognitive, physical, developmental, and behavioral factors that affect learning, and how the disability affects the student's participation and progress in the general education curriculum and in general education classes.

18. Can you please clarify whose responsibility it is to input the academic achievement, functional performance and learning characteristics, standardized test results and goals and objectives in the IEP? Is it the district's responsibility or the evaluating agencies' responsibility for preschool students? (Added 4/11)

The development of a student's IEP requires information from a variety of individuals, including a student's special education teachers and related service providers. Where the district has a contract for services for an individual student with, for example, an approved preschool program, the providers from the approved program should expect to have a role in providing information so that the Committee can develop an appropriate IEP for the student. However, ultimately, it is the district's responsibility to ensure that the Committee has developed an IEP for the student. The decision as to who and how information is entered on the form itself is best left to local discretion.

19. If a student only has one need area (e.g., spelling), would the district need to report all the other academic areas (reading, math, science, social studies, etc.) in the levels/abilities and strengths sections of the IEP, or would the IEP only require documentation of the student's present level of performance in the need area of spelling? (Added 4/11)

The present levels of performance must document the student's current level of functioning in those areas impacted by the student's disability. There is no requirement that the IEP document present levels of performance in all academic areas. However, in documenting a student's strengths, the Committee may determine that it is appropriate to document a student's performance in other academic areas as well.

20. In the Social Development or Physical Development Present Levels of Performance sections, if a student does not demonstrate a need in either area, would the district simply state "no needs" as well as indicating a basic statement for levels/abilities and the strengths parts? (Added 4/11)

Section 200.4(b)(2)(i) of the Regulations of the Commissioner of Education requires that the IEP report the present levels of academic achievement and functional performance and indicate the individual needs of the student according to each of the four need areas, including how the student's disability affects involvement and progress in the general education curriculum, or for preschool students, as appropriate, how the disability affects the student's participation in appropriate activities. The Committee must discuss and document its consideration of the student's needs in these areas. If there are no individual needs related to one or more of the four need areas, the IEP could indicate that the student's skills are within normal limits or that no disability-related needs were identified.

21. For students who are medically fragile or have severe medical issues, what can be put in the IEP with relation to medication or procedures? (Added 4/11)

The IEP must report the student's present levels of performance and indicate a student's individual needs in four areas, including the area of physical development. In the *Present Levels of Performance and Individual Needs* section, the IEP must document the degree or quality of the student's motor and sensory development, health, vitality, and physical skills or limitations that pertain to the learning process. This information could, but is not required to, include medical issues. Specific information about medication, medical procedures or other medical issues could also be included in the optional *Student Information Summary* form if a district chooses to use the form. Districts should be cognizant of the confidentiality of student information as medical needs are documented.

22. For a student with ADHD who is on medication, is it appropriate to include a statement in the student's IEP such as *"student tends to do better on medication but student isn't always on it, which affects his participation in the general education curriculum"?* (Added 4/11)

In consideration of the student's physical needs, a Committee should consider and document factors that may affect a student's performance, including as appropriate, documented inconsistencies in a student's behavior based on medical factors. However, the statement provided in the question posed ***"student tends to do better on medication, but student isn't always on it, which affects his participation in the general education curriculum"*** does not provide the specificity that may be needed to specifically identify a student's present level of performance. A more appropriate statement might be: *"student's time on task, performance on math and reading tasks and appropriate behavior during unstructured times (e.g., lunch, hall transitions) during the day is better during the days the student is taking his prescribed medications."*

E. STUDENT NEEDS RELATED TO SPECIAL FACTORS

1. Under *Student Needs Relating to Special Factors,* after the check-box for *Assistive Technology Device or Service,* there's also a check-box for whether the CSE recommended use of the device in the home. What are the criteria for determining whether an assistive technology device is necessary for home use in order to provide a free appropriate public education to the student?

The need for assistive technology is determined on a case-by-case basis, taking into consideration the unique needs of the individual student. If the CPSE or CSE determines that a particular assistive technology item is required for home use in order for a particular child to be provided FAPE, the technology must be provided to implement the IEP. In making a recommendation as to whether a student needs the use of the assistive technology device at home, the CPSE or CSE should consider such factors as whether the student needs the assistive technology device at home

to prepare homework assignments or to engage in functional skills at home or in other environments related to his/her instructional program. For additional information and resources for assistive technology, see http://www.cqcapd.state.ny.us/advocacy/assisttechtraid/asst-tech-traid.htm

2. **In the *Student Needs Relating to Special Factors* section of the form, if the answer to the question, "Does the student need a particular device or service to address his/her needs?" is "No", what are the valid responses to the subsequent question, "In the case of a student who is deaf or hard of hearing, does the student need a particular device . . . -"No", or "Not Applicable?"**

It depends. If the student is deaf or hard of hearing, but does not need a particular service or service in consideration of the student's language and communication needs, etc., then the form would indicate "no." If the student was not deaf or hard of hearing, then the form would indicate "not applicable."

If the answer to the first question for a student is "No", can the response to the second question ever be "Yes"?

No.

3. **What might be some special education services to address the language needs of a child who is limited English proficient (LEP)or English language learner (ELL)?**

For all LEP/ELL students with disabilities the Committee must consider how the student's language needs relate to the IEP. Schools must provide a student with LEP with alternative language services to enable him/her to acquire proficiency in English and to provide him/her with meaningful access to the content of the educational curriculum that is available to all students, including special education and related services. The Committee should consider the following questions:

- Has the student been assessed in English as well as his/her native language?
- Did the evaluation of the student with LEP measure the extent to which the student has a disability and needs special education rather than measure the student's English language skills?
- Does the disability impact on the student's involvement and progress in the bilingual education or English as a second language (ESL) program of the general curriculum?
- What language will be used for this student's instruction?
- What language or mode of communication will be used to address parents or family members of the student?
- What accommodations are necessary for instruction and testing?
- What other language services (i.e., ESL, bilingual education) must be provided to ensure meaningful access to general and special education and related services?

Examples of special education services needed to address the student's needs might include, but are not limited to, interpreters, bilingual speech and language therapy, bilingual counseling and bilingual special class.

4. Can a school district attach a behavioral intervention plan (BIP) to a student's IEP?

Yes. A school district may provide a copy of the student's BIP with the IEP. However, the BIP is not a required component of a student's IEP.

5. Must a student's BIP be part of the IEP?

No. There is no requirement to include a student's BIP as part of that student's IEP. However, regulations require that a student's need for a BIP be documented in the student's IEP.

6. What is expected to be entered in the text box following indication that the student needs a BIP?

If a Committee determines that a student needs a BIP, the IEP must indicate that need. In addition, other information related to a BIP is required to be included in a student's IEP, if applicable to the individual student.

- If a student's BIP will include the use of a time out room for a student, the IEP must include this recommendation as well as a recommendation as to the maximum amount of time the student will need to be in a time out room as a behavioral consequence as determined on an individual basis in consideration of the student's age and individual needs.
- In addition, if applicable, other information relating to a student's BIP as required by section 200.22(e)(9) of the Regulations of the Commissioner of Education must be identified in an IEP.

The Committee could, but is not required, to include other information related to the BIP as it deems appropriate (e.g., identify behaviors to be addressed by the BIP).

7. For students with severe needs, where do items such as harnesses and helmets belong on the new IEP forms?

If a student needs an intervention that is <u>medically necessary</u> for the treatment or protection of the student (such as a soft helmet for a student with a seizure disorder), these needs could be appropriately identified under the Present Levels of Performance section of the IEP. Devices needed to address special transportation needs of the student would be documented under the 'Special Transportation' section of the IEP. However, a Committee <u>may not</u> recommend and a school may not use movement limitation, including helmets and harnesses, to address student

behavior[1]. See http://www.p12.nysed.gov/specialed/publications/policy/BIattach-909.htm.

8. Should use of a time out room be documented in a student's IEP?

Yes. Section 200.22(c)(2) of the Regulations of the Commissioner of Education requires that a student's IEP specify when a BIP includes a recommendation for the use of a time out room for a student with a disability.

9. In the section *Consideration of Special Factors* there is a text box to add clarification in the area of behavior. There are no text boxes or extra space for clarification for the other factors. For example, if a student needs assistive technology, you check yes but there is no way to comment on what that device may be.

The specific recommended special education program or service is not identified in the *Consideration of Special Factors* chart; only that the student needs a device or service in order to receive FAPE. If the student needs an assistive technology device, the specific device and/or services would be documented under the section *Assistive Technology Devices and/or Services*. The additional text box related to behavior considerations has been added to document specific needs of the student to be addressed by the BIP (e.g., use of a time out room).

10. In the *Student Needs Relating to Special Factors* section of the IEP, if a student needs speech/language services does that go here? Does the portion of this section of the IEP having to do with communication needs apply to every student who has communication needs or only to students who are deaf and/or hearing impaired? (Added 4/11)

If any student needs a particular device or a service to address his/her communication needs, that is indicated under the *Student Needs Relating to Special Factors* section of the IEP by indicating "Yes" in the box in that section. The particular service or device needed will be recommended by the Committee during the course of the meeting and will be documented in the section of the IEP entitled *Recommended Special Education Programs and Services.*

11. Regarding the Student Needs Relating to Special Factors section---if a student is recommended for Speech Therapy (either in conjunction with a program or as a related service only), is it automatic for a district then to mark the Yes box for the Communication Needs area of this new section? (Added 4/11)

[1] As of the date of this publication, there is an exception to this prohibition only for 18 specific named students attending one out-of-State residential school pursuant to section 200.22(e) of the Regulations of the Commissioner of Education. This exception does not apply to any other NYS students attending public or private schools.

If any student needs a particular device or a service, including a related service, to address his/her communication needs, a 'Yes' must be indicated in the box in "Special Considerations" section of the IEP. The particular service or device needed would be documented in the section of the IEP entitled *Recommended Special Education Programs and Services.*

12. In the *Student Needs Relating to Special Factors* section of the IEP addressing special considerations for students with limited English proficiency, must this section be checked as "Yes" for every student with limited English proficiency? (Added 4/11)

The IEP must include documentation that the Committee considered special factors related to the language needs of students with limited English proficiency in the development of the student's IEP. If the Committee determines that a student requires a special education service to address his/her language needs as they relate to the IEP, the applicable box in this section of the IEP would be checked "Yes." The Committee must ensure that a device or service, including an intervention, accommodation or other program modification needed for the student to receive a free appropriate public education is indicated in the IEP under the applicable section of the IEP. Not all students who are limited English proficient may need a special education service to address his/her language needs as they relate to the IEP. In this case, the "No" box would be checked.

13. Why isn't "Orientation and Mobility" included in the Student Needs Related to Special Factors section of the IEP for students who are blind and visually impaired? (Added 4/11)

The State's IEP form includes in this section only those special factors a Committee must consider that are required by federal and State regulations and that are in addition to the factors that must be considered for all students (the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student).

14. If "yes" is checked on the Consideration of Special Factors section for "student needs strategies, including positive behavioral interventions," and "no" that they do not need a behavioral intervention plan (BIP), is there a way to document why a BIP is not needed? (Added 4/11)

The IEP does not need to specify why a BIP is not recommended. As applicable, consideration of a student's need for a BIP should be provided to a parent in prior written notice. However, there is a text box on the State's IEP form in this section where a district could choose to provide such an explanation.

15. If the student does have behaviors that impact his or her learning or that of others and the "yes" box is checked in the Student Needs Relating to Special Factors section of the new IEP, could there be an instance where there is not a

need for a BIP? One such scenario could be that the behaviors are controlled/managed through program accommodations and/or a class-wide positive behavior support. How would this be documented in the IEP? (Added 4/11)

In the case of a student whose behavior impedes his or her learning or that of others, the Committee must indicate on the IEP form if the student would need strategies, including positive behavioral interventions, and supports and other strategies to address that behavior. If, after considering the needs of the student, the Committee determines that strategies and supports are needed, the box must be checked "Yes."

Does the student need strategies, including positive behavioral interventions, supports and other strategies to address behaviors that impede the student's learning or that of others? ☒ Yes ☐ No

If the Committee determines that the student needs a BIP as one of the strategies/supports, the IEP form must also indicate this recommendation.

Does the student need a behavioral intervention plan? ☐ No ☒ Yes: *To address self-abusive behaviors.*

If the Committee determines the student needs strategies/supports to address the behavior, but does not need a BIP, the 'No' box is checked.

Does the student need a behavioral intervention plan? ☒ No ☐ Yes:

The other strategies/supports, including program accommodations, needed by the student to address his/her behaviors must be indicated elsewhere in the IEP form under the "Recommended Special Education Programs and Services" section of the IEP.

16. If "yes" is checked in the "Does the student need a behavioral intervention plan" box, is it appropriate to add the need for physical intervention to be used at times when the student's aggression is an imminent safety concern? (Added 4/11)

The IEP must, in the case of a student whose behavior impedes his or her learning or that of others, include strategies, including positive behavioral interventions and supports and other strategies to address that behavior. Physical intervention can only be used in emergency situations consistent with State regulations and should never be considered as a planned intervention to address the student's behavior.

F. MEASURABLE POST-SECONDARY GOALS AND TRANSITION NEEDS

1. How can the Committee assist the student to increase self-awareness and identify obtainable measurable post-secondary goals?

In NYS, the assessment process relating to transition goals and services begins with the Level 1 career assessment at age 12. This assessment is used to determine vocational skills, aptitudes and interests.

Beginning with the first IEP to be in effect when the student turns age 15, the Committee must consider age-appropriate transition assessments and the student's strengths, preferences and interests to identify the student's measurable post-secondary goals. The Committee can assist the student with identifying strengths, needs, interests, and preferences and consider these when exploring career areas and courses of study. The school should provide the student with meaningful opportunities to explore his/her career interest areas, such as job shadowing or school-to-work experiences.

In addition, each student, including each student with a disability as appropriate, must have an annual guidance review where post-secondary goals can be discussed with the student. The Career Plan is another process available to NYS students to increase self-awareness and guide the student to identify obtainable post-secondary goals (http://www.p12.nysed.gov/cte/careerplan/).

The school may also consider utilizing a person-centered planning approach. Person-centered planning is a problem-solving process designed to assist individuals in planning for their future. For more information about person-centered planning, see http://www.pacer.org/tatra/resources/personal.asp.

For technical assistance on transition planning, contact the transition specialists with the Regional Special Education Technical Assistance Support Centers (RSE-TASC) found at http://www.p12.nysed.gov/specialed/techassist/rsetasc/memo909.htm.

2. Other than the State Performance Plan (SPP) Indicator 14, is there a NYSED expectation/plan for districts to regularly measure the achievement of these measurable post-secondary goals?

No.

3. When would measurable post-secondary goals related to independent living skills <u>not</u> be appropriate?

Many students with disabilities have the skills, knowledge and supports necessary to live independently as adults. If the Committee determines that there is not a need in this area, then the IEP does not need to include a post-secondary goal for independent living. In making this determination, the Committee should consider the student's level of independent skills in such areas as shopping, managing a budget, renting an apartment, driving or taking public transportation, engaging in community-based recreational activities, etc.

4. How are a student's employment aspirations documented in his/her IEP?

A student's employment aspirations would be documented in an IEP under the heading of measurable post-secondary goals.

5. Should a student's transition assessment be documented in an IEP?

Yes. The present levels of performance of the student should include information based on results from age-appropriate transition assessments.

6. Does there need to be a statement regarding transition needs in EACH section of the *Present Levels of Performance*?

No.

7. How do we distinguish between instruction and course of study?

According to federal guidance from November 16, 2006, "Instruction is a component of a transition program that 'the student needs to receive in specific areas to complete needed courses, succeed in the general curriculum and gain needed skills' (Storms, O'Leary, & Williams, 2000, Transition Requirements: A Guide for States, Districts, Schools, Universities and Families. University of Oregon, Western Regional Resource Center, p.28). Courses of study are 'a multi-year description of coursework (necessary) to achieve the student's desired post-school goals'" (Storms, O'Leary, & Williams, 2000, Transition Requirements, p.8). For example, courses of study could include a specific CTE sequence leading to an industry credential. You can find this guidance at the NSTTAC website, in the SPP 13 Checklist FAQ document. See question 16 at http://www.nsttac.org/pdf/i13checklistqa.pdf.

G. MEASURABLE ANNUAL GOALS

1. Does a district have to include annual goals specifically for a related service? (Revised 3/11)

The Committee must make a recommendation as to the student's annual goals to address his or her needs as identified under present levels of performance. Once these goals have been identified, then the Committee must discuss and recommend special education program and services, including related services, to be provided for the student to advance appropriately toward attaining the annual goal(s).

2. Who is responsible for developing goals for a preschool child with a disability, the district, provider, or the evaluator?

The CPSE must develop an IEP which includes measurable annual goals and short-term instructional objectives and benchmarks.

3. Can a teacher/provider choose to include objectives or benchmarks in the IEP of a student who is not eligible for NYSAA or a preschool student with a disability?

If a school district chooses to include short-term instructional objectives and benchmarks in the IEPs of other students, it should do so based on an established district policy that uses consistently-applied criteria for determining which students will have short-term instructional objectives and benchmarks included in their IEPs. Such a decision should not be left to individual teachers/providers.

4. Who is responsible for implementing and monitoring progress on each goal?

Each individual teacher/provider responsible for providing instruction to assist the student to meet the goal should have responsibility for progress monitoring of that goal. Where there is a question as to who has responsibility for monitoring the student's progress toward the annual goal, it should be discussed with the Committee Chairperson to ensure that the appropriate provider(s) have a clear understanding of their responsibility in that area.

5. What happens if monitoring of progress toward goals shows that the student is not making the expected/desired progress?

If a student is not making sufficient progress to achieve his/her annual goals, the Committee must review the goals and services and, as appropriate, revise the IEP to ensure that the student is being provided with the appropriate supports and services to achieve meaningful and appropriate goals.

6. Is the schedule when you review the data collected by method or procedure or when you implement the procedure?

Evaluation schedules state the date or intervals of time when the evaluation procedures will be used to measure the student's progress toward the annual goal.

7. Do benchmarks and objectives need to have criteria/method and schedule or are these components only needed for the Annual Goal?

While each measurable annual goal must include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal, short-term instructional objectives and/or benchmarks are not required to include these components.

8. Can a district add a subheading to the *Measurable Annual Goals* section of the IEP in order to indicate the particular service type that the goal pertains to? (Added 4/11)

Goals are developed for the student, not the service provider. However, if a district wants to group annual goals by the need area (e.g., speech and language) they may do so. However, the form may not be modified to insert service type. The program and service recommendations to assist the student to meet the goals are documented in the next section of the IEP, not under the goals section.

9. Should the Committee develop goals at the IEP meeting/annual review or do it after the meeting and just send the IEP home after the fact? (Added 4/11)

Section 200.4(d)(4) of the Regulations of the Commissioner of Education requires that IEP recommendations be developed in meetings of the Committee. Pursuant to section 200.4(d)(2)(iii), IEP recommendations must include a list of measurable annual goals. Section 200.4(d)(2)(v) requires that the IEP indicate the recommended special education program and services that will be provided to the student to advance appropriately toward attaining the annual goals. Therefore, it is inappropriate and inconsistent with regulations for the Committee to develop its goals "after the meeting and just send the IEP home after the fact."

While the Committee members may bring draft recommendations for IEP goals to the meeting, the meeting must include a discussion and recommendation of the annual goals that will be included in the meeting.

10. In the GENERAL DIRECTIONS TO USE THE STATE'S MODEL IEP FORM, pages 12 and 13, the following two sample annual goals are provided:

a) Dawn will remain in class for 45/50 minute periods, requesting a 'break' from class work not more than three times per class period.
Criteria: 5 out of 7 class periods per day over 5-week period.
Method: daily charting of time in class.
Schedule: monthly.

b) Given reading passage at the 2nd grade level, Mike will orally read 100 words per minute with no more than 6 errors.
Criteria: 8 out of 10 trials over 3 consecutive weeks.
Method: reading curriculum based on oral reading fluency probes.
Schedule: every two weeks.

These two examples illustrate an issue that we are struggling with. For the first goal, is it logistically possible to measure something *monthly* to see if the student can perform it over a *5-week* period? For the second goal, is it logistically possible to measure something over a *two week period* to see if the student can perform it over *3 consecutive weeks*? It seems to us that the Schedule period would at the very least need to be the same as the period within the Criteria Measure – never shorter (otherwise it simply does not fit within that period). Moreover, unless the period within the Criteria Measure is shorter than the Schedule period, the Period When Progress Will Be Measured would be occurring continuously throughout the school year. An example that

seems consistent with our thinking would be measuring every quarter to see if a student can perform the task at the level of success desired over, say, a two week period. The time up to that two-week period would consist of instruction and not, per se, progress measurement. (Added 4/11)

The criteria, method and schedule in the *General Directions to Use the State's Model Individualized Education Program (IEP) Form* are provided as examples of each term. In the first example above, each month a review of the student's progress will occur, looking at student data for the preceding five weeks. In the second example, a review of student progress will occur every two weeks, reviewing a student's progress for the preceding three weeks. A school district could opt to measure progress on a different schedule.

H. REPORTING PROGRESS TO PARENTS

1. Where does the IEP document a student's progress, or lack of progress, toward reaching his or her annual goals?

The IEP must document when periodic reports on the progress the student is making toward the annual goals will be provided to the student's parent; however, there is no regulatory requirement for the IEP to serve as that progress report to the parent nor was it designed for this purpose. For purposes of reporting progress to the parent, however, the district could copy the annual goal section of the IEP and add a template to report progress. When the IEP is reviewed at least annually, the present levels of performance and/or evaluation results should reflect the progress made during the previous year.

2. Regarding the criteria for goals: how is the "extent of performance" different than the "criteria that the goal has been achieved?"

It is unclear from this question where the term "extent of performance" came from. Evaluative criteria are the measures used to determine if annual goals have been achieved. In reporting progress to the parents, the report should identify the extent to which the goal has been achieved in measurable terms. For example, if the annual goal is that a student independently write three-sentence paragraphs using correct sequencing of sentences, the report to the parent in March on the extent to which the student is progressing toward this goal might indicate that the student is writing two-sentence paragraphs when using a graphic organizer.

I. RECOMMENDED SPECIAL EDUCATION PROGRAMS AND SERVICES

1. Page 13 in Attachment 3: General Directions to Use the State's Model IEP, Recommended Special Education Programs and Services section, provides examples of how integrated co-teaching, CT services and resource room program could be listed. Does the example provided meet the State's

regulations for minimum level of service requirement for resource room and consultant teacher?

The example included a typographical error and has since been corrected.

2. **Why is it that "teacher of the visually impaired" and "teacher of the deaf" are not included in the drop-down option list of related services?**

   Teachers of the visually impaired and teachers of the deaf are individuals who provide specific services. There is no regulatory requirement that an IEP identify the qualifications of the individual providing services to a student.

3. **Where can additional information be found about special education services and programs included within the continuum?**

   The following is a link to the April 2008 Policy Memorandum entitled Continuum of Special Education Services for School-Age Students with Disabilities: http://www.p12.nysed.gov/specialed/publications/policy/schoolagecontinuum.html.

   For information on the preschool continuum of services, see http://www.p12.nysed.gov/specialed/publications/preschool/guide/.

4. **In the *Recommended Special Education Programs and Services* section of the State IEP form, could "Music Therapy" be an option to write in the text box that follows the list of drop-down related service options?**

   Yes, if recommended by the Committee.

5. **Do speech and language services have to be a minimum of two 30-minute sessions per week during the Extended School Year Program?**

   No. The Regulations of the Commissioner of Education were amended, effective December 8, 2010, to repeal the requirement that such services be provided for a minimum of two 30-minute sessions each week. (Revised 3/11)

6. **In the *Recommended Special Education Programs and Services* section of the IEP, the State form allows documentation of other clarifying information relating to a recommended program or service under the column *Applicable Service Delivery Recommendations*. If the CSE determines the need to indicate a specific maximum group size for a related service, for example, is that where it could be documented?**

   Yes

7. The examples under supplementary aids and services/program modifications and accommodations are quite explicit. Where can additional information regarding these requirements be found?

See question #8 in the guidance document entitled "*Continuum of Special Education Services for School-Age Students with Disabilities*," released in April 2008, http://www.p12.nysed.gov/specialed/publications/policy/schoolagecontinuum.html.

8. Where are one-to-one teacher aides and/or teaching assistants documented in a student's IEP?

A one-to-one teacher aide/teaching assistant would be documented in a student's IEP under the heading of *Supplementary Aids and Services*.

9. Where do "consults" go in the IEP?

It is unclear what is meant by the term "consults." Services such as "consultation with the school counselor on behavioral issues" would be documented in the *Supports for School Personnel on Behalf of the Student* section of the IEP. Such consultations are not a related service. Consultant teacher (CT) services would be documented in the programs and services section of the IEP.

10. The chairperson in my district documents an "access aide" in the IEP to assist kids with specific parts of their day. Is this a term that can be used? Shouldn't frequency and duration be identified in the IEP?

The term "access aide" is not a term used in Part 200 of the Regulations of the Commissioner of Education. To provide clarity on the Committee's recommendation, the IEP should indicate that a teacher aide is recommended, and the frequency, duration and location for such service must also be indicated. This recommendation would be included in the IEP as a Supplementary Aid/Service.

11. How are frequency and duration for some program modifications such as extra set of books, no penalty for spelling, visual schedule, etc., documented in an IEP?

Use of a particular program modification on a regular basis may be documented in a student's IEP as a daily frequency (e.g., daily or daily for a specified number of hours). Duration can, for example, be documented as a specified amount of time (e.g., 20 minutes), for specific assignments (e.g., writing assignments, new lessons, or new units) or for specific subjects.

12. What is meant by "location" of services which must be documented in the IEP? Does it mean the same as "placement?"

"Location" of services is not the same as "placement". The student's placement is the educational setting in which the student's IEP will be implemented (e.g., public school, neighboring school, BOCES, approved private day school, approved private residential school). "Location" in the context of a student's IEP generally refers to the type of environment that is the appropriate place where a particular service, program modification or accommodation would be provided (e.g., Placement: Public High School. Location of Services: CT services will be provided in the general education math class; individual speech and language therapy will be provided in a separate therapy room).

13. What does the least restrictive environment (LRE) mean and how does it relate to the continuum of service options?

LRE refers to the extent special education services are provided to a student in a setting with the student's non-disabled peers and as close to the student's home as possible. The continuum of services identifies different service delivery models to provide specially designed instruction to a student with a disability. Some of the services such as consultant teacher and integrated co-teaching services are directly designed to support the student in his/her general education class. Others may or may not be provided in settings with non-disabled peers, depending on the needs of the student. This is why the documentation of "location" in the IEP is important. The continuum of placement options is also directly related to LRE placement decisions.

14. Where does a recommendation for transitional support services fall within the continuum? Is it considered its own service pursuant to section 200.6(c) of the Regulations of the Commissioner of Education? Procedurally, it does not appear as a drop down on the choices for special education program services in the new IEP form. Some districts currently list it as such – are they mistaken? Are there guidelines for what is meant by "temporary" or use of this service?

Since transitional support services means temporary services provided to a general or special education teacher to aid in the provision of appropriate services to a student with a disability transferring to a regular program or to a program or service in a less restrictive environment, such services would be documented in a student's IEP under the heading of Supports for School Personnel on Behalf of the Student. The Committee's recommendation for transitional support services would include the frequency, duration, location, beginning service date and, at the discretion of the Committee, end service date.

15. What is meant by "supports for school personnel on behalf of the student"?

The IEP must describe the supports for school personnel that will be provided on behalf of the student in order for the student to advance toward attaining the annual goals, to be involved in and progress in the general curriculum and to participate in extracurricular and other nonacademic activities. Supports for school personnel are

those that would help them to more effectively work with the student. These could include, for example, special training for a student's teacher to meet a unique and specific need of the student. These supports for school personnel are those that are needed to meet the unique and specific needs of the student.

Examples of supports that may be provided for school personnel include:

- information on a specific disability and implications for instruction;
- training in use of specific positive behavioral interventions;
- training in the use of American Sign Language;
- assistance with curriculum modifications;
- behavioral consultation with school psychologist, social worker or other behavioral consultant; and/or
- transitional support services.

16. How must CT services be identified in a student's IEP? When a student is recommended to receive CT Services and the same individual is providing the service for multiple subjects, how should that be displayed in the IEP? Do you have to put "indirect" and "direct" in the IEP for CT services?

CT services would be identified in the IEP as a special education program/service. If the student's IEP indicates CT services, the IEP *must* specify the general education class(es) (including career and technical education classes, as appropriate) where the student will receive the services.

- If CT services are to be provided to an elementary student, the IEP should indicate the subject areas of instruction when the CT would be providing services to the student (e.g., during reading groups; during math instruction).
- If CT services are to be provided to a middle or secondary student, the IEP must specify the class subject(s) where CT will be provided (e.g., English, math, science, art, music).
- If indirect CT services are to be provided, the IEP must indicate the regular (or general) education class being taught by the teacher receiving the consultation.
- If the student is recommended to receive CT services for multiple subjects, they should be listed separately so that the recommendation for frequency and duration and location for the various subjects is clear. The chart below illustrates how such services could be documented on the State's model IEP form.

The IEP should specify the type of CT services the student will receive (i.e., direct and/or indirect) so that it is clear to parents and educators the extent to which such services will be provided. A recommendation for direct or indirect consultant teacher services could be documented either directly after the recommended service (e.g., Consultant Teacher – indirect) or in the section of the State IEP form *Service Delivery Recommendations.*

The location of CT services, either direct/and or indirect, must specify the general education class(es) for which CT services will be provided. For indirect consultant

teacher services, this does not mean that the indirect CT will be provided in the subject area classrooms, but rather to those teachers.

RECOMMENDED SPECIAL EDUCATION PROGRAMS AND SERVICES					
SPECIAL EDUCATION PROGRAM/SERVICES	**SERVICE DELIVERY RECOMMENDATIONS**	**FREQUENCY** HOW OFTEN PROVIDED	**DURATION** LENGTH OF SESSION	**LOCATION** WHERE SERVICE WILL BE PROVIDED	**PROJECTED BEGINNING/ SERVICE DATE(S)**
SPECIAL EDUCATION PROGRAM:					
Consultant Teacher Services	Direct and Indirect	2 days/week	40 minutes	Math class	9/7/10
Consultant Teacher Services	Direct and Indirect	2 days/week	40 minutes	English class	9/7/10

The effective implementation of CT services requires general and special education teachers to work cooperatively to address the needs of students with disabilities. Section 200.4(e)(5) of the Regulations of the Commissioner of Education requires that, following the development of an IEP in which CT services are recommended, the general education teachers of the student for whom the service will be provided must be given the opportunity to participate in the instructional planning process with the CT to discuss the objectives and to determine the methods and schedules for such services. Therefore, there is no requirement that the IEP specify separately the frequency and duration of direct versus indirect consultant teacher services.

17. Does the minimum number of hours for CT services include both direct and indirect services?

Yes. The minimum number of hours for CT services, two hours per week, applies to direct and indirect services, in any combination.

18. May school districts continue to use other terms to identify integrated co-teaching services in a student's IEP?

No. It is required that all districts use the term “integrated co-teaching”, consistent with the regulatory requirements, so that the level of services to be provided to a student is clear and consistent among school districts. To clarify for parents that a previously recommended service means the same as integrated co-teaching, terms such as collaborative team teaching (CTT), blended class or inclusion class may also be indicated in the IEP. For example:

RECOMMENDED SPECIAL EDUCATION PROGRAMS AND SERVICES					
SPECIAL EDUCATION PROGRAM /SERVICES	SERVICE DELIVERY RECOMMENDATIONS*	FREQUENCY How often provided	DURATION Length of session	LOCATION Where service will be provided	PROJECTED BEGINNING/ SERVICE DATE(S)
SPECIAL EDUCATION PROGRAM:					
Integrated Co-Teaching Services (Collaborative Team Teaching)		5 days a week	40 minute class periods	English class	

19. What specific information must be in the IEP to specify the class size?

Class size means the maximum number of students who can receive instruction together in a special class or resource room program and the number of teachers and supplementary school personnel (i.e., teaching assistants and/or teacher aides) assigned to the class. For example, the IEP could specify: 12 students to one special education teacher and one teaching assistant (12:1+1).

20. What types of services are included in the definition of related services?

Related services means developmental, corrective, and other supportive services as are required to assist a student with a disability and includes speech-language pathology, audiology services, interpreting services, psychological services, PT, OT, counseling services, including rehabilitation counseling services, orientation and mobility services, evaluative and diagnostic medical services to determine if the student has a medically related disability, parent counseling and training, school health services, school nurse services, school social work, assistive technology services, appropriate access to recreation, including therapeutic recreation, other appropriate developmental or corrective support services, and other appropriate support services and includes the early identification and assessment of disabling conditions in students. This list is not exhaustive and may include other developmental, corrective or supportive services if they are required to assist a student with a disability to benefit from special education in order for the student to receive FAPE.

21. Regarding parent training and education – what is it and where does it go in the IEP? Can parent training and education be as simple as a list of resources? Is it a related service? How would frequency, duration and location be indicated for the services?

Parent counseling and training is a related service and, if recommended for a student, should be listed in the IEP under the IEP form section *Related Services*. Parent counseling and training means assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's IEP. Examples include, but are not limited to:

- providing parents with information about cognitive and speech and language development;

- counseling the parents about how to respond at home to a student's behavior in a manner consistent with the in-school behavior management program;
- training parents to use the same mode of communication (e.g., sign language) the child would be using at school; and
- training on how to operate assistive technology devices at home.

The State's model IEP form provides a list of drop-down options for related service recommendations. Related service recommendations, including parent counseling and training, require the identification of the frequency, duration, location and projected beginning date (end dates are optional). The chart below illustrates how such service would be documented using the State's model IEP form.

RECOMMENDED SPECIAL EDUCATION PROGRAMS AND SERVICES					
SPECIAL EDUCATION PROGRAM/SERVICES	**SERVICE DELIVERY RECOMMENDATIONS**	**FREQUENCY** HOW OFTEN PROVIDED	**DURATION** LENGTH OF SESSION	**LOCATION** WHERE SERVICE WILL BE PROVIDED	**PROJECTED BEGINNING/ SERVICE DATE(S)**
RELATED SERVICES					
Parent Counseling and Training	Group instruction on sign language and use of communication boards	One day/ week for five weeks	60 minutes	School Library	10/5/10 – 11/2/10

22. Where should student-owned physical or medical equipment be listed in the IEP (such as an augmentative communication device or a wheelchair)?

If a student needs a particular assistive technology device in order for the student to receive FAPE, this recommendation should be included on the State's IEP form under *Assistive Technology Devices and/or Services*. If the district wishes to document when assistive technology devices are student-owned, it may do so under *Applicable Service Delivery Recommendations*.

23. What is a district's responsibility in the case of a student losing an assistive technology device (with multiple programs on it) between home and school (it had been determined that the student needed the device both at home and school and the district purchased only one device)?

The school district is responsible to ensure a student's IEP is implemented. If a student's IEP requires that an assistive technology device is needed at home or in other settings in order for the student to receive FAPE, the district must replace the lost device.

24. If specialized reading instruction is required and is provided by a certified reading teacher, what service or program should be listed in the IEP (is it resource room, a supplemental service)?

For a student with a disability recommended for specialized reading instruction to be provided outside of the general education class, this service could be recommended in the IEP of the student as special class, related service or resource room program. Specially-designed instruction provided to an individual student with a disability or to a group of students with disabilities by a certified special education teacher in the student's general education classroom to aid the student(s) to benefit from the general education class instruction could be recommended in the IEP of the student as direct consultant teacher services. Where the Committee recommends the focus of this service be to provide specialized reading instruction, this could be indicated in the IEP under *Applicable Service Delivery Recommendations*. For additional information on specially designed reading instruction, see http://www.p12.nysed.gov/specialed/publications/policy/readguideline.html.

25. Can the drop-down menu for assistive technology be more comprehensive as in the manual? Or, should we put this additional information in the text box?

The State IEP form does not provide drop-down options for assistive technology devices and/or services recommendations. However, the district may populate this box with a drop-down menu as long as the menu does not preclude additional options and is consistent with State policy.

26. Can a Committee indicate the name of the school the student attends in the *Special Education Programs and Services* section of the IEP and then in the *Service Delivery Recommendations* column, indicate the particular service being provided? (Added 4/11)

No. If the student needs an approved private school, this recommendation is indicated under "Placement". The particular services a student needs to assist him/her to achieve annual goals must be indicated under Special Education Programs and Services. Please note that there is no requirement, that the name of the school where the student's IEP will be implemented be indicated in an IEP, except that the provider of July/August special education services must be indicated.

27. Where in the IEP is it indicated that a service (such as audio or autism specialist) for a student in a nondistrict program is required, but that service is provided by the home district (and not the nondistrict program)? Does the nondistrict program have to indicate in the IEP that the home district is paying for this particular service? (Added 4/11)

An IEP is developed to identify a student's present levels of performance, needs, goals, recommended services and the placement where the IEP will be implemented. Information regarding fiscal responsibility for the provision of services is not included in a student's IEP (with the exception, as appropriate, for transition activities provided by participating agencies). When a student is placed in an approved private school, the approved private school is responsible to implement the student's IEP. If the

district agrees to provide particular supports and services to a student other than that to which the approved private school has State approval and responsibility, the district should document this in its agreement with the private school and/or in its prior written notice to the parent.

28. If a Committee recommends special class in multiple subject areas, how should that be documented in the IEP? Can the special education program be listed as special class, 12:1+1, and the service delivery recommendation document that the special class will be provided for English, social studies and math, or should the recommendation for each special class be listed separately? (Added 4/11)

The IEP could indicate each special class by subject area and is recommended to do so whenever the frequency or duration special classes vary by subject area, as follows:

RECOMMENDED SPECIAL EDUCATION PROGRAMS AND SERVICES					
SPECIAL EDUCATION PROGRAM/SERVICES	**SERVICE DELIVERY RECOMMENDATIONS***	**FREQUENCY** HOW OFTEN PROVIDED	**DURATION** LENGTH OF SESSION	**LOCATION** WHERE SERVICE WILL BE PROVIDED	**PROJECTED BEGINNING / SERVICE DATE(S)**
SPECIAL EDUCATION PROGRAM:					
Special Class	English	3 days/ week	40 minutes	Separate class	9/7/10
Special Class	Math	5 days/ week	40 minutes	Separate class	9/7/10
Special Class	Social Studies	2 days/ week	40 minutes	Separate class	9/7/10
* IDENTIFY (IF APPLICABLE) CLASS SIZE (MAXIMUM STUDENT-TO-STAFF RATIO), LANGUAGE IF OTHER THAN ENGLISH, GROUP OR INDIVIDUAL SERVICES, DIRECT AND/OR INDIRECT CONSULTANT TEACHER SERVICES OR OTHER SERVICE DELIVERY RECOMMENDATIONS.					

Alternatively, the IEP could include a single recommendation for special class and list the subject areas and the combined duration, as follows:

RECOMMENDED SPECIAL EDUCATION PROGRAMS AND SERVICES					
SPECIAL EDUCATION PROGRAM/SERVICES	**SERVICE DELIVERY RECOMMENDATIONS***	**FREQUENCY** HOW OFTEN PROVIDED	**DURATION** LENGTH OF SESSION	**LOCATION** WHERE SERVICE WILL BE PROVIDED	**PROJECTED BEGINNING / SERVICE DATE(S)**
SPECIAL EDUCATION PROGRAM:					
Special Class	English, Math, Social Studies	5 days/ week	120 minutes	Separate class	9/7/10
* IDENTIFY (IF APPLICABLE) CLASS SIZE (MAXIMUM STUDENT-TO-STAFF RATIO), LANGUAGE IF OTHER THAN ENGLISH, GROUP OR INDIVIDUAL SERVICES, DIRECT AND/OR INDIRECT CONSULTANT TEACHER SERVICES OR OTHER SERVICE DELIVERY RECOMMENDATIONS.					

29. For Travel Training and Adapted Physical Education, what ratio is recommended or allowable for each to be documented in the State IEP? (Added 4/11)

Travel training is a special education service that means providing instruction, as appropriate, to students with significant cognitive disabilities, and any other students with disabilities who require this instruction, to enable them to develop an awareness of the environment in which they live; and learn the skills to move effectively and safely from place to place within that environment (e.g., in school, in the home, at work and in the community).

Adapted physical education (APE) means a specially designed program of developmental activities, games, sports and rhythms suited to the interests, capacities and limitations of students with disabilities who may not safely or successfully engage in unrestricted participation in the activities of the regular physical education program.

If APE is to be provided in a regular physical education class, the IEP does not need to specify the student to staff ratio. If, however, adapted physical education is to be provided in a special class, the IEP must indicate the class size. For example:

RECOMMENDED SPECIAL EDUCATION PROGRAMS AND SERVICES					
SPECIAL EDUCATION PROGRAM/SERVICES	**SERVICE DELIVERY RECOMMENDATIONS***	**FREQUENCY** HOW OFTEN PROVIDED	**DURATION** LENGTH OF SESSION	**LOCATION** WHERE SERVICE WILL BE PROVIDED	**PROJECTED BEGINNING / SERVICE DATE(S)**
SPECIAL EDUCATION PROGRAM: Special Class	6:1+1 Adapted physical education	5 days/ week	120 minutes	Separate class	9/7/10
* IDENTIFY (IF APPLICABLE) CLASS SIZE (MAXIMUM STUDENT-TO-STAFF RATIO), LANGUAGE IF OTHER THAN ENGLISH, GROUP OR INDIVIDUAL SERVICES, DIRECT AND/OR INDIRECT CONSULTANT TEACHER SERVICES OR OTHER SERVICE DELIVERY RECOMMENDATIONS.					

Regulations do not require that class size/ratio be identified in an IEP, other than for students recommended for participation in special class. However, an IEP could, but is not required to, document such information for other special education program/service recommendations in the column entitled Service Delivery Recommendations.

30. The district has a special class for students with autism spectrum disorders. Therapists go into the class (speech, psych) and work with the class as a whole for various sessions. This exceeds the group limit of five under the description of related services. How is this written under Special Education Programs and Services? (Added 4/11)

If the Committee recommends a related service to be provided in a group setting, the maximum number of students in that group is five (except in New York City there is a variance to the maximum number of students in the group, not to exceed eight students). The IEP is not required to include the group size for the related service,

except in circumstances when the Committee determines that based on the individual student's needs, a group size of fewer than five students is required.

A related service provider's session with an entire special class that exceeds five students (e.g., 12:1+1 special class) is not an acceptable implementation of a Committee's recommendation for a related service in a group setting since the number of participants exceeds the maximum group size of five (or eight). However, a related service provider may provide a related service in a special class that includes other students, if the related service is provided only to the students whose IEPs include a recommendation for the related service and if the number of students conforms to the maximum instructional group size allowable.

31. Where on the IEP form would a CSE or CPSE indicate its recommendation for maximum instructional group size for resource room and related services? (Added 4/11)

The IEP may, but is not required to, indicate the group size for a related service or a resource room, except in circumstances when the Committee determines that, based on the individual student's needs, a group size of fewer than the regulatory maximum instructional group size is required. If the Committee chooses to include this information in a student's IEP, it may do so in the "Service Delivery Recommendations" column under "Special Education Programs/Services". Alternatively, the IEP could document class size recommendations using the text box that appears next to the drop-down option for the special education program/service.

32. When a student is recommended to receive direct and indirect consultant teacher (CT) services, is there a requirement to specify separately the frequency and duration of each service? (Added 4/11)

No. While it is recommended that the IEP specify the type of CT services the student will receive (i.e., direct and/or indirect) so that is clear to parents and educators the extent to which such services will be provided, section 200.4(e)(4) of the Regulations of the Commissioner of Education provides that "when consultant teachers services are specified in a student's IEP, the regular education teachers of the student for whom the service will be provided shall be given the opportunity to participate in the instructional planning process with the consultant teacher to discuss the objectives and to determine the methods and schedules for such services following the development of the IEP."

33. In Question #27 (Section D, #16) of the current IEP Q&A, the second paragraph lists examples of specific recommendations to address management needs of the student and how they would be under the Programs and/or Services section of the IEP. Wouldn't those examples be under the Supplementary Aides and Services/Program Modifications section of the IEP? (Added 4/11)

In the State's IEP form, Supplementary Aides and Services/Program Modifications/Accommodations are included in the section entitled, "Recommended Special Education Programs and Services."

34. Where are class size and group/individual related services documented in the IEP? (Added 4/11)

This information would be documented in the column entitled, "Service Delivery Recommendations," found in the Recommended Special Education Programs and Services section of the IEP form.

35. May a district include an end date in the IEP for all services, or is the only time an end date should be used when a program or related service is recommended for a limited time period? (Added 4/11)

Section 200.4(d)(2)(v)(b)(9) of the Regulations of the Commissioner of Education requires an IEP to identify the projected date for initiation of the recommended special education program and services. Since identification of an end date is optional, districts could, but are not required to, include end dates for all program and services recommendations.

36. Are nursing services, provided to a student one time per week for five minutes each time in order to provide medication, placed in the IEP and if so where? (Added 4/11 - rev 9/12)

Section 200.1(ss)(2) of the Regulations of the Commissioner of Education defines school nurse services as services provided by a qualified school nurse that are designed to enable a student with a disability to receive FAPE as described in the IEP of the student. School nurses regularly administer medication to all students; therefore the regular administration of medication to a student with a disability need not be documented in the student's IEP. However, the student's CSE or CPSE may determine that administering and/or dispensing medications is a school health service necessary for an individual student to receive FAPE. In this case, the IEP could include School Health Services or, as appropriate, School Nurse Services as a related service recommendation, with the recommended frequency, duration and location.

37. On the IEP form under the Recommended Special Education Programs section of the IEP, the Service Delivery Recommendations column has an asterisk (*) which references the following statement: "Identify, if applicable, class size (maximum student-to-staff ratio), language if other than English, group or individual services, direct and/or indirect consultant teacher services or other service delivery recommendations." Does that mean this information must be documented in the IEP? (Added 4/11)

This section of the IEP is used to document Committee recommendations, as required and as necessary, to provide clarity for implementation of the student's IEP. If a bilingual service is to be provided, the IEP must include the language. If consultant teacher services are to be provided, the IEP should specify the intensity of such services (i.e., group or individual). The IEP must document class size (maximum student-to-staff ratio) if the student is recommended for a special class. Additionally, if the student is recommended to receive resource room program, the IEP must document the recommended class size for that resource room if the recommendation is for less than the maximum allowed by regulation. Class size could be documented in the Service Delivery Recommendations column or be included, in the available text box, as part of the special education program recommendation in the first column of this section of the IEP.

38. How is location documented in an IEP for a preschool student with a disability? (Added 4/11)

The location of service in the context of a student's IEP generally refers to the type of environment that is the appropriate place where a particular service, program modification or accommodation would be provided.

For a preschool child recommended for a full/half-day, integrated/self-contained special class in an approved special education preschool program, location is "special class classroom."

For a preschool child recommended for a full/half-day, integrated/self-contained special class in an approved special education preschool program, and is also recommended to receive related services while participating in the special class, location as follows:

- Location for the special class recommendation is "preschool special education classroom."
- Location for related services is where, within that approved special education program, the recommended related service(s) would be provided (e.g., the preschool special education classroom, separate therapy room, on the playground).

For a preschool child recommended for related services only, Special Education Itinerant Teacher services (SEIT) only or a combination of related services and SEIT services, location is where the service will be provided. This would be the setting where the child is to receive the recommended service (e.g., early childhood program selected by the parent).

39. Is a preschool IEP required to list service coordination and, if yes, where would it go in the IEP? (Added 4/11)

Upon receipt of a recommendation of the Committee, the board of education must arrange for the preschool student with a disability to receive such programs and services. If an IEP includes two or more related services, where possible, the board

of education must designate one of the service providers to coordinate the provision of the related services. There is no requirement that the coordination of such service be identified in a student's IEP. Such recommendations may be documented on the optional Student Information Summary form, if a district chooses to use this form. The Board's recommendation for the service provider must be given to the parent pursuant to the requirements of section 200.16(f)(2) of the Regulations of the Commissioner of Education.

40. Can a Committee write an IEP that includes Supports for School Personnel and not include any Special Education Programs or Related Services? (Added 4/11)

No. A student with a disability who is determined to be eligible for special education must require special education services and programs as such term is defined in Education law section 4401. If a student needs only supports for school personnel, the student would not meet the definition of a student with a disability.

41. Does an IEP require at least one Special Education Program or Related Service to be recommended? (Added 4/11)

Yes.

42. Where in an IEP does a Committee document extended school day for a student with a disability? (Added 4/11)

A Committee recommendation for an extended school day could be documented in an IEP as a program modification (modification to the school day), under the heading of Recommended Special Education Programs and Services.

J. 12-MONTH PROGRAMS/SERVICES

1. An IEP developed for July and August may differ from the IEP developed for the school year program. Most often services in July and August focus on annual goals from the previous school year, but there are times when a new annual goal needs to be written related for the area of concern or regression but is not articulated in the previous annual goal. Where and how would they be written? Can we have goals for just for July and August?

If the Committee determines that a student needs a new annual goal to be addressed during July and August, then the Committee must revise the student's IEP accordingly. Annual goals should be documented in the IEP under the section *Measurable Annual Goals*. If the Committee has selected specific goals to be addressed during the July/August program, then the section of the IEP for *12-Month Service and/or Program* could add clarification as to the goals to be addressed through the recommended services.

12-MONTH SERVICE AND/OR PROGRAM – Student is eligible to receive special education services and/or program during July/August: ☐ No ☒ Yes

If yes:

☐ Student will receive the same special education program/services as recommended above.

OR

☒ Student will receive the following special education program/services:

SPECIAL EDUCATION PROGRAM/SERVICES	SERVICE DELIVERY RECOMMENDATIONS	FREQUENCY	DURATION	LOCATION	PROJECTED BEGINNING/ SERVICE DATE(S)
Speech and Language Therapy	To address annual goals relating to expressive language and social communication	2 times/week	30 minutes	Special class	July 3 - August 13

Name of school/agency provider of services during July and August: XYZ BOCES

For a preschool student, reason(s) the child requires services during July and August:

2. Must the IEP indicate the projected beginning service date for extended school year (ESY) services when those services remain exactly the same as for the 10 month program?

No. For a student recommended for the same special education program and/or service during July and August as the rest of the year, the beginning service date would already be documented on the *Recommended Special Education Programs and Services* chart that precedes the *12-month Service and/or Program* chart.

3. Under 12 month services/programs: "For preschool student, reason(s) the child requires services during July and August." What about school-age students? Why does the form ask for preschool students to state the reason for 12-month services?

Section 4410(5)(h) of Education Law and section 200.16(e)(4) of the Regulations of the Commissioner of Education require the IEP of a preschool student to include in its recommendation for services during the months of July and August a statement of the reasons for such recommendation. There is no comparable State law and/or regulation relating to recommendations for July/August services for a school-age student. However, the reasons for the recommendation for July/August services would need to be provided to the parent in prior written notice.

4. For parentally-placed students who qualify for ESY, there is a need for an individualized education services program (IESP) for the school year and an IEP for the ESY programming. Do we continue to do a 10-month IESP and a 6-week IEP for parentally-placed private school students? Is this still the case?

Yes.

5. Is there a difference in 12-month programming vs. ESY?

Twelve-month special service and/or program means a special education service and/or program provided on a year-round basis for students determined to be eligible in accordance with sections 200.6(k)(1) and 200.16(i)(3)(v) of the Regulations of the

Commissioner of Education whose disabilities require a structured learning environment of up to 12 months duration to prevent substantial regression. A special service and/or program must operate for at least 30 school days during the months of July and August, inclusive of legal holidays, except that a program consisting solely of related service(s) must be provided with the frequency and duration specified in the student's IEP.

The terms 'twelve-month special service and/or program' and 'extended school year (ESY)' have the same meaning.

6. When a student is in Special Class for a particular subject, how is that indicated in the IEP? For example, if the student has Special Class for Math and another Special Class for English, how would that be displayed in the IEP?

For a student who is recommended for special class for a portion of the school day and only for specific subjects, the IEP should list them separately. The chart below demonstrates how such recommendations would appear on the State's model IEP form.

RECOMMENDED SPECIAL EDUCATION PROGRAMS AND SERVICES					
SPECIAL EDUCATION PROGRAM/SERVICES	**SERVICE DELIVERY RECOMMENDATIONS**	**FREQUENCY** HOW OFTEN PROVIDED	**DURATION** LENGTH OF SESSION	**LOCATION** WHERE SERVICE WILL BE PROVIDED	**PROJECTED BEGINNING/ SERVICE DATE(S)**
SPECIAL EDUCATION PROGRAM:					
Special Class - Math	Class size: 12:1+1	5 days/week	40 minutes	Separate class	9/7/10
Special Class - English	Class Size: 12:1+1	5 days/week	40 minutes	Separate class	9/7/10

7. If a student has an amendment/program review in September or later, (after the summer services have ended), should the IEP print the ended 12-month services in the IEP? (Added 4/11)

The school year begins on July 1. For an IEP developed for a student needing July/August services that is later revised, the IEP should continue to include recommendations developed for July/August, even if those services have been completed since that is the IEP to be in effect for that school year. If the revised IEP recommends discontinuation of a student's eligibility for 12-month services for the next school year, this recommendation would be included in the IEP to be in effect for the next July and August.

8. For those districts that maintain an Anniversary Date IEP for students:

a) **If the student is newly eligible for special education services when he/she is initially classified in November 2010 and his/her IEP begins 11/22/10 and ends 11/21/11, what should the district enter for the extended school year (ESY) eligibility section? (Added 4/11)**

When developing an IEP to be in effect from November 2010 to November 2011, the Committee would need to discuss and document in the IEP the Committee's recommendations relating to the student's eligibility for July/August programs for the summer of 2011.

b) **If the student is ESY eligible, but the district cannot determine who the specific providers will be for summer 2011, what should the district enter? (Added 4/11)**

The district must identify the provider of July/August services in the student's IEP. If the provider is unknown at the time the initial IEP is developed, the IEP could indicate "to be determined" but the Committee must reconvene to make a provider recommendation prior to the initiation of the July/August program and the student's parents must receive prior written notice of the IEP recommendation.

9. **A CPSE-level child is receiving services in July and August for ESY needs, yet he/she will be transitioning to CSE in September. How should that be noted on the IEP form? Is the date of initiation for CSE services July or September? What should be the initiation date for CSE-level IEP? (Added 4/11)**

A student is considered a preschool student through the month of August of the school year in which he/she first becomes eligible to attend school. The IEP developed by the CPSE addresses the student's needs for July and August, prior to the date the child is eligible to start school in September. A preschool child receiving July and August services through the CPSE, who is eligible to attend school in September of the same year, would transition to the CSE in September. The CSE must meet to determine continued eligibility for special education services and develop a new IEP for school-age special education services for the student, if appropriate. The projected date of initiation of any school-age special education services is determined by the CSE.

10. **The IEP requires a "Yes" or "No" response to the question of eligibility for ESY. This determination is most often made at a meeting held in the spring, which allows for careful review and consideration of the student's potential for substantial regression based on performance throughout the school year. For CSE meetings held earlier in the school year (e.g., for a newly referred student or a reevaluation), it would be more appropriate to have an alternative to the "Yes/No" response indicating that the determination of ESY would be made at the next annual review meeting. Can such an option be added? (Added 4/11)**

While it is not necessary to add information to the IEP form for this purpose, prior written notice to the parent must include the Committee's recommendation to defer its determination of ESY eligibility until the annual review prior to the July/August program. However, for a newly referred student, for example, where the Committee needs additional time and student progress information to determine the student's need for 12-month special education services, it would be acceptable, as determined on a case-by-case basis, for the school district to add a text field to the State's form in this section of the IEP for clarifying statements such as the one indicated above. In this case, the projected date the Committee would meet to make the determination should be indicated in this IEP.

11. The IEP requires a notation as to whether a student who is eligible for ESY will receive the same programs/services as that provided during the school year. If so, the CSE simply checks the corresponding box and is relieved of having to specify the ESY program/services. Can it be eliminated so that the CSEs would list all ESY programs/services, whether or not they are the same as those provided during the school year? (Added 4/11)

No. The State's form may not be modified to eliminate this section.

K. TESTING ACCOMMODATIONS

1. In the NYSED Test Accommodations manual it refers to "flexible setting." Can the IEP state "flexible setting" with some criteria, for instance, flexible setting to provide access to minimal noise, or for administration in a small group? The issue is "separate setting" means "a separate room apart from the standard setting being used to administer the test," and people don't want to exclude the student from taking the test in a classroom if it can meet the needs for a setting modification.

The State's IEP form includes drop-down options on how testing accommodations should be indicated in the IEP. Testing accommodations must be clearly stated to ensure a consistent understanding by the CSE or CPSE, school principal, teacher(s), supplementary school personnel, student and the student's parents. Flexible setting is a category of testing accommodations that includes both changes in the conditions of the setting, such as special lighting or adaptive furniture; or changes in the location itself, accomplished by moving the student to a separate room. Types of setting accommodations include the following:

- Separate location/room – administer test individually
- Separate location/room – administer test in small group (3-5 students)
- Provide adaptive or special equipment/furniture (specify type, e.g., study carrel)
- Special lighting (specify type, e.g., 75-watt incandescent light on desk)
- Special acoustics (specify manner, e.g., minimal extraneous noises)
- Location with minimal distraction (specify type, e.g., minimal visual distraction)
- Preferential seating

Following is an example of how a recommendation for a flexible setting should be indicated in the IEP.

TESTING ACCOMMODATIONS (TO BE COMPLETED FOR PRESCHOOL CHILDREN ONLY IF THERE IS AN ASSESSMENT PROGRAM FOR NONDISABLED PRESCHOOL CHILDREN):
INDIVIDUAL TESTING ACCOMMODATIONS, SPECIFIC TO THE STUDENT'S DISABILITY AND NEEDS, TO BE USED CONSISTENTLY BY THE STUDENT IN THE RECOMMENDED EDUCATIONAL PROGRAM AND IN THE ADMINISTRATION OF DISTRICT-WIDE ASSESSMENTS OF STUDENT ACHIEVEMENT AND, IN ACCORDANCE WITH DEPARTMENT POLICY, STATE ASSESSMENTS OF STUDENT ACHIEVEMENT

TESTING ACCOMMODATION	CONDITIONS*	IMPLEMENTATION RECOMMENDATIONS**
☐ NONE		
Special Acoustics	All tests	Location with minimal extraneous noise

*Conditions – Test Characteristics: Describe the type, length, purpose of the test upon which the use of testing accommodations is conditioned, if applicable.
**Implementation Recommendations: Identify the amount of extended time, type of setting, etc., specific to the testing accommodations, if applicable.

For additional information on testing accommodations, see:
http://www.p12.nysed.gov/specialed/publications/policy/testaccess/policyguide.htm

2. Can a preschool student with a disability have test accommodations in his/her IEP?

Yes, if the preschool student with a disability would be participating in State or district-wide or classroom tests and the student was determined by the CPSE to need testing accommodations.

3. The State IEP form does not include Tests Read as a drop-down option. Can additional drop-down options be added to this section of the form? (Added 4/11)

The State IEP form provides a limited list of testing accommodation drop-down options. Since the list is not finite, text boxes in the State form allow entry of other testing accommodation recommendations as appropriate. "Tests read," an accommodation in the method of presentation, may be documented in a student's IEP using one of the additional text boxes in the State form or may be added to the list of drop-down options within a computerized format of the IEP. Additional testing accommodation options may also be added, consistent with State policy.

L. COORDINATED SET OF TRANSITION ACTIVITIES

1. The *Coordinated Set of Transition Activities* section seems misplaced, creating a potentially disjointed flow of topics. Can this section be moved to coincide with the post-secondary goals?

No. The IEP form has been developed to present Committee recommendations in the same sequence that the development of IEP recommendations should occur. The specific coordinated set of activities to be provided for the student to achieve his/her post-secondary goals are based on individual student's needs and post-secondary goals and, therefore, appear later in the IEP. After the Committee identifies the measurable post-secondary goals for the student, it must discuss what annual goals the student should achieve toward his/her post-secondary goals. Recommendations for special education programs and services must consider the services the student might need to reach those annual goals. The *Coordinated Set of Activities* documents these and other transition activities and makes it clear as to which agencies are responsible for providing these services.

2. The new *Guide to Quality IEP Development and Implementation* on page 51 (second paragraph from the bottom) regarding the *Coordinated Set of Activities* states "the IEP must include the service and the implementation date of the service if it is different than the implementation date of the IEP." So where would that go? There is no column to identify implementation dates for the above.

The implementation date of a recommended service to be provided by an agency may be documented in either the *Service/Activity* column or the *School District/Agency Responsible* column, following the name of the service/activity or district/agency. For example:

BEGINNING NOT LATER THAN THE FIRST IEP TO BE IN EFFECT WHEN THE STUDENT IS AGE 15 (AND AT A YOUNGER AGE, IF DETERMINED APPROPRIATE).		
COORDINATED SET OF TRANSITION ACTIVITIES		
NEEDED ACTIVITIES TO FACILITATE THE STUDENT'S MOVEMENT FROM SCHOOL TO POST-SCHOOL ACTIVITIES	SERVICE/ACTIVITY	SCHOOL DISTRICT/ AGENCY RESPONSIBLE
Instruction		
Related Services		
Community Experiences		
Development of Employment and Other Post-school Adult Living Objectives	Job coaching – October 2011	Abilities, Inc.
Acquisition of Daily Living Skills (if applicable)		
Functional Vocational Assessment (if applicable)		

3. If an agency is providing a service (like job coaching), where is this captured in the IEP and how should it be listed?

All recommended transition services and activities are documented under the heading *Coordinated Set of Transition Activities*. A service such as job coaching should be documented in the chart under the heading of *Service/Activity*. See example above.

M. PARTICIPATION WITH STUDENTS WITHOUT DISABILITIES

1. It appears that the rationale(s) for nonparticipation with students without disabilities is no longer required in the 'LRE' (*Participation with Students*

***without Disabilities*) section of the IEP, nor is it directly addressed in the *Effect of Student Needs on Involvement and Progress in the General Education Curriculum* section. Where, if at all, should that rationale(s) be denoted?**

Section 200.4(d)(2)(viii) of the Regulations of the Commissioner of Education requires a student's IEP to provide an explanation of the extent, if any, to which the student will not participate with nondisabled students in the regular class, or for preschool students, in appropriate activities with age-appropriate peers without disabilities. The Committee must document the extent to which a student's disability precludes his/her participation with students without disabilities by identifying the percent of the school day or by identifying particular activities that the student will not participate in with his/her nondisabled peers in the *Participation with Students Without Disabilities* section of the State IEP form. The IEP could, but is not required to, include a narrative explanation of the student-specific factors for recommendations to remove the student from the regular class (or for preschool students, appropriate activities with age-appropriate peers without disabilities). Options considered and reasons rejected relating to the provision of services and placement of the student in the least restrictive environment must be provided to the parent in prior written notice.

2. **If a student is placed within a special class and will not participate with the typical population during their school day, can you provide an example of a statement that should be included in the text box? (Added 4/11)**

A student's IEP must document the extent to which a student's disability precludes his/her participation with students without disabilities. This includes an explanation of the extent, if any, to which a student will not participate in general education class and/or extracurricular and nonacademic activities, or, for preschool students, in appropriate activities with age-appropriate nondisabled peers. This may be indicated as the percent of the school day or by identifying particular activities that the student will not participate in with his/her nondisabled peers (e.g., 100% of the school day, all academic and extracurricular activities, all academic classes).

3. **How is "integrated co-teaching" written in the section *Participation with Students without Disabilities*? Are the students in regular and/or special education class? What is the percentage if the special education teacher is in the class all day? (Added 4/11)**

Integrated co-teaching services, as defined in regulation, means the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students. Integrated co-teaching services are provided in a student's general education class; students are intentionally grouped together based on similarity of need for the purpose of receiving specially designed instruction in a general education class A committee's recommendation for integrated co-teaching services for a school-age student is documented in an IEP under the heading of Recommended Special Education Programs and Services,

Special Education Program, along with the recommended frequency, duration, location and projected beginning date of the services.

A recommendation for integrated co-teaching services would not be documented in an IEP in the section entitled Participation with Students without Disabilities. The Participation with Students without Disabilities section of the IEP is used to document the extent to which a student's disability precludes his/her participation with students without disabilities, including an explanation of the extent, if any, to which a student will not participate in regular class and/or extracurricular and nonacademic activities, or, for preschool students, in appropriate activities, with age-appropriate nondisabled peers (this may be indicated as the percent of the school day or by identifying particular activities that the student will not participate in with his/her nondisabled peers); the extent to which the student will participate in specially-designed physical education; and when the Committee recommends that a student be exempt from the language other than English (LOTE) requirement because the student's disability affects his/her ability to learn a language.

4. It is my understanding that no student with a disability can be exempt from the Physical Education (PE) requirement and that he/she must have some sort of specialized instruction if they cannot participate in a general physical education class. Are there instances where an exemption may be appropriate? Would it be appropriate for a district to just note "exempt" without recommending specialized or adapted PE? (Added 4/11)

Physical education is required for all students in grades K-12, as specified in section 135.4 of the Regulations of the Commissioner of Education. An IEP developed for a student with a disability must indicate, if the student is not participating in a regular physical education program, the extent to which the student will participate in specially-designed instruction in physical education, including adapted physical education.

5. As a related service, parent counseling and training differs from other related services as it is provided to parents based upon individual family need. As such, do the same regulatory guidelines regarding frequency, duration and group size that are associated with related services apply? If not, can additional clarification and guidance be provided? (Added 4/11)

For each related service, including parent counseling and training, the frequency, duration and location must be indicated. There is no requirement for group size to be indicated for a related service. A related service recommendation for parent counseling and training should specify the nature of the service. For example:

RECOMMENDED SPECIAL EDUCATION PROGRAMS AND SERVICES					
SPECIAL EDUCATION PROGRAM/SERVICES	SERVICE DELIVERY RECOMMENDATIONS*	FREQUENCY HOW OFTEN PROVIDED	DURATION LENGTH OF SESSION	LOCATION WHERE SERVICE WILL BE PROVIDED	PROJECTED BEGINNING / SERVICE DATE(S)
RELATED SERVICE:					

RECOMMENDED SPECIAL EDUCATION PROGRAMS AND SERVICES					
SPECIAL EDUCATION PROGRAM/SERVICES	**SERVICE DELIVERY RECOMMENDATIONS***	**FREQUENCY** HOW OFTEN PROVIDED	**DURATION** LENGTH OF SESSION	**LOCATION** WHERE SERVICE WILL BE PROVIDED	**PROJECTED BEGINNING / SERVICE DATE(S)**
Parent Counseling and Training	Sign language instruction for parents	3x month	60 minutes	School building	12/1/10 – 1/31/11
	Training on use of communication device	1 x week	30 minutes	Speech therapist office	2/1/11 – 2/15/11
* IDENTIFY (IF APPLICABLE) CLASS SIZE (MAXIMUM STUDENT-TO-STAFF RATIO), LANGUAGE IF OTHER THAN ENGLISH, GROUP OR INDIVIDUAL SERVICES, DIRECT AND/OR INDIRECT CONSULTANT TEACHER SERVICES OR OTHER SERVICE DELIVERY RECOMMENDATIONS.					

N. PLACEMENT RECOMMENDATION

1. What does placement recommendation mean?

Placement recommendation means the educational setting in which the student's IEP will be implemented. Placement should indicate the type of setting where the student will receive the special education programs and services (e.g., public school, BOCES, approved private school).

2. What if a student is a resident of and is receiving IEP services in his/her public school district and thus placement is the public school district, but he also goes to a Career and Technical Education (CTE) course at BOCES for culinary arts instruction as part of his Coordinated Set of Transition Activities. Would the public school district be his only "Placement" in the IEP and BOCES then be a location of service in the IEP under Coordinated Set of Transition Activities and not an additional placement?

Yes. The IEP would identify the student's placement as "Public School District". BOCES would be identified as the "school district/agency responsible" for the instruction, in the *Coordinated Set of Transition Activities* section of the IEP.

3. Where does home instruction get documented in an IEP?

A student with a disability who is home instructed ("home-schooled") pursuant to section 100.10 of the Regulations of the Commissioner of Education would have an IESP rather than an IEP. The IESP would indicate placement as "student is home-schooled". For a student with a disability who is recommended for home instruction by the CSE, the IEP would indicate placement as "home instruction."

4. Does the name of the provider of service need to be in the IEP?

For students eligible for 12-month service and/or program, the IEP must indicate the identity of the provider of services during the months of July and August. Other than

for 12-month services/programs, there is no regulatory requirement that an IEP include the name of the provider of service (e.g., a specific approved private school).

5. If a student is receiving Home Instruction, how should this information be recorded and reported in the Special Ed Programs section of the IEP?

Home and hospital instruction is a placement recommendation for a student with a disability. The special education programs and services the student will receive at home or in the hospital must be determined by the CSE in consideration of the student's unique needs and such recommendation would be indicated in the IEP under *Recommended Special Education Programs and Services*. For example:

RECOMMENDED SPECIAL EDUCATION PROGRAMS AND SERVICES					
SPECIAL EDUCATION PROGRAM/SERVICES	**SERVICE DELIVERY RECOMMENDATIONS**	**FREQUENCY** HOW OFTEN PROVIDED	**DURATION** LENGTH OF SESSION	**LOCATION** WHERE SERVICE WILL BE PROVIDED	**PROJECTED BEGINNING/ SERVICE DATE(S)**
SPECIAL EDUCATION PROGRAM: Special class	Individual home instruction	5 X week	2 hours / day	Student's home	9/7/10
RELATED SERVICES: Speech and Language Therapy	Individual	5 days/week	30 minutes per session	Student's home	9/7/10

Placement: Home Instruction

6. How is placement documented in an IEP for a preschool student with a disability? (Added 4/11)

The IEP must indicate the recommended placement of the preschool student with a disability. For purposes of the IEP, the identification of placement needs to specify where the child's IEP will be implemented. Placement should indicate the type of setting where the child will receive his/her special education services.

For a preschool child recommended for a full/half-day, integrated/self-contained special class, placement would be "approved preschool special education program." The name of the program (e.g., ABC Nursery School) is not required to be identified in the placement recommendation in an IEP.

For a preschool child recommended for a full/half-day, integrated/self-contained special class in an approved special education preschool program, who is also

recommended to receive related services while participating in the special class, there is only one placement recommendation in the IEP. It would be “approved preschool special education program."

A Committee does not recommend a placement setting where a child will receive related services only, SEIT services only or a combination of both,. Therefore, the identification in an IEP of placement for such recommendations is the name of the service itself (i.e., related services, SEIT services).

O. MISCELLANEOUS QUESTIONS

1. Can the school district bring a draft IEP to the Committee meeting? If a CPSE/CSE develops a draft IEP, must that draft IEP be sent home to the parent prior to the meeting, or can the CPSE/CSE wait and give it to the parents at the meeting?

With respect to draft IEPs, the United States Education Department opined "…we encourage public agency [school district] staff to come to an IEP Team [committee on special education (CSE)] meeting prepared to discuss evaluation findings and preliminary recommendations. Likewise, parents have the right to bring questions, concerns, and preliminary recommendations to the IEP Team [CSE] meeting as part of a full discussion of the child’s needs and the services to be provided to meet those needs. We do not encourage public agencies [school districts] to prepare a draft IEP prior to the IEP Team [CSE] meeting, particularly if doing so would inhibit a full discussion of the child’s needs. However, if a public agency [school district] develops a draft IEP prior to the IEP Team [CSE] meeting, the agency [district] should make it clear to the parents at the outset of the meeting that the services proposed by the agency [district] are preliminary recommendations for review and discussion with the parents. The public agency [school district] also should provide the parents with a copy of its draft proposals, if the agency [district] has developed them, prior to the IEP Team [CSE] meeting so as to give the parents an opportunity to review the recommendations of the public agency [school district] prior to the IEP Team [CSE] meeting, and be better able to engage in a full discussion of the proposals for the IEP. It is not permissible for an agency [district] to have the final IEP completed before an IEP Team [CSE] meeting begins." (Analysis of Comments and Change, Federal Register / Vol. 71, No. 156 / Monday, August 14, 2006 / Rules and Regulations, page 46678).

2. Does an IEP developed in November of 2010 have to be on the new IEP form if the IEP will continue to be in effect through November of 2011? What if the IEP includes ESY services (12-month service and/or program) for the summer of 2011?

A district must ensure that all IEPs in effect for the 2011-12 school year, and thereafter, be on the State form. If an IEP is developed during the 2010-11 school year using an existing district IEP form, that form may be used for the remainder of

the 2010-11 school year. However, IEPs in effect for the 2011-12 school year, which begins July 1, 2011, must be on the State form.

3. Can information from an IEP on a district's existing IEP form (not a State IEP form) be transferred onto the State's IEP form for use in the 2011-12 school year?

Yes.

4. If a district transfers information onto the State form, does the parent need to receive a copy of the IEP on the State form? If so, is this considered a newly developed or revised IEP?

If the school district is only transferring information documented in a prior IEP onto the State IEP form, this is not considered a newly developed or revised IEP and the parent would not need to receive a copy. However, to ensure the parent has the same information as school personnel, it is recommended that the parent receive a copy of the IEP on the new form.

5. What should a Committee do if when transferring information from a district IEP form onto the State's IEP form, it does not have documentation for all required sections?

The State's form includes information required by State law and regulation. Therefore, if in transferring information from a current IEP to the State form, the district does not have documentation for all required sections of the State IEP form, the Committee must meet to revise the student's IEP, using the new IEP form, to ensure a complete and appropriate IEP is in place for the student beginning with the 2011-12 school year.

6. If a district transfers information onto the State form, does the parent need to receive prior written notice for the use of the new form?

No. Prior written notice must be provided when a district proposes or refuses to initiate or change the identification, evaluation, educational placement of the student or the provision of a free appropriate public education to the student. Transferring information onto the State IEP form does not meet the requirements for prior written notice.

7. In developing an IESP for a student with a disability who is parentally placed in a nonpublic school or who is home schooled pursuant to section 100.10 of the Regulations of the Commissioner of Education, must the district of location use the State's required IEP form?

No. The State did not develop a model IESP form and does not have authority by State regulation to require that the IESP be on a form prescribed by the

Commissioner. However, State law requires that an IESP be developed in the same manner and with the same contents as an IEP is developed. A school district that chooses to use the State's form for purposes of developing an IESP could modify it to indicate it is an IESP.

8. **NYC IEPs indicate that students with disabilities can be eligible for "modified promotional criteria." If a student is eligible for a modified promotion, the IEP indicates the percentage they are required to meet for both English language arts and Math. The current NYS IEP does not require or have an area indicating that students with an IEP are eligible for a modified promotion. What is the procedure to indicate modified promotional criteria for the 2011-12 school year, starting July 1, 2011? (Added 4/11)**

   If the Committee determines that the criteria for the student to advance from grade to grade needs to be modified, the IEP would indicate this as a program modification. This information would most appropriately be indicated in the IEP in the "Supplementary Aids and Services/Program Modifications/Accommodations" section of the IEP.

9. **Is there a separate section for "follow-up recommendations for further evaluation"? (Added 4/11)**

   When a CSE or CPSE has identified that additional data are needed to determine a student's need for a special education program or related service, the Committee must then arrange for the additional tests and/or evaluations to be administered. In order to fully inform the parent about the proposed evaluation and seek written consent from the parent, the district must provide prior written notice to the parent. Once the evaluations are completed, the Committee must meet to consider the results of the evaluation(s) to determine if the student's IEP needs to be revised.

   There is no statutory or regulatory requirement that a recommendation for a reevaluation be documented in the student's IEP, except when a functional vocational evaluation is recommended as a transition services activity. A recommendation for a reevaluation is documented in prior written notice to the parent seeking the parent's consent for the evaluation.

10. **Is the name of the provider of recommended special education program or services included in an IEP and can the provider's name be listed next to sections of PLEP or goals? (Added 4/11)**

    For students eligible for 12-month service and/or program, the IEP must indicate the identity of the provider of services during the months of July and August. Identifying the provider of services is not otherwise required, nor is it recommended. The present levels of performance statements and annual goals are statements about the student, not the provider. If a provider's name is included in the IEP, any change in provider would require a change to the IEP.

11. Is an IEP for a preschool student required to indicate the name of the provider of service? Many districts indicate the county as the provider when the provider is an itinerant off the county list. (Added 4/11)

For students (preschool and school age) eligible for 12-month service and/or program, the IEP must indicate the identity of the provider of services only during the months of July and August.

While a municipality, or in the case of a city of one million or more persons, the board, maintains a list of appropriately certified or licensed professionals to deliver related services, the municipality is not the actual provider of service and should not be identified in an IEP as the provider of service. As appropriate, the IEP would identify the July/August provider of a related service by listing the professional title and stating that the professional is from the approved provider list maintained by the municipality, or board (e.g., speech therapist from the approved provider list maintained by the municipality, or board).

For a recommendation for July/August SEIT services, the name of the approved program that will provide the SEIT services is identified and for a recommendation for special class, the name of the approved preschool special education program is identified in the IEP.

12. How do we note the student's Itinerant Teacher of the Deaf services in the new State IEP? (Added 4/11)

There is no special education or related service for "itinerant teacher of the deaf services." A student's IEP must document the recommended service that a teacher of the deaf would provide. When a Committee recommends a special education program and/or service, that recommendation is documented in the Recommended Special Education Programs and Services section of the IEP under the applicable heading (i.e. special education program, related service, supplementary aids and services/program modifications/accommodation, assistive technology devices and/or services and/or supports for school personnel on behalf of the student). While an IEP must identify the special education services recommended for a student with a disability, there is no regulatory requirement that an IEP identify the qualifications or title of the individual providing such services to a student. A teacher of the deaf, for example, may be the teacher who is assigned to provide integrated co-teaching services, a special class, SEIT, a resource room program or a consultant teacher service to the student.

13. I have a student in my district who needs to be accompanied to school by a nurse for feeding and health issues. Where would I place that in the new IEP? (Added 4/11)

If nursing services are recommended by a Committee for a student, such services would be documented as a related service in the student's IEP. Section 200.1(ss)(2) of the Regulations of the Commissioner of Education defines school health services and school nurse services.

14. If you are directly training a student with an auditory processing disorder, is it listed in the IEP as a consult or a service? If you are working with a student related to care and use of equipment, is it a consult or service? (Added 4/11)

The IEP would include a measurable annual goal for the student to acquire specific skills relating to auditory processing. The special education program/service where training would be provided directly to the student to address this need area (i.e., integrated co-teaching, special class, related service, resource room) would be indicated under Special Education Programs/Services. Recommendations for supports to be provided on behalf of the student are documented under the heading of Supports for School Personnel on Behalf of the Student. If the recommendation relates to an assistive technology device and/or service, it would be indicated in the section of the IEP entitled "Assistive Technology Devices and/or Services."

15. If you are consulting, do you need to write a goal for what you are working on or is the need met in the program modification or management needs? (Added 4/11)

If consultation to school personnel is needed to assist the student to meet these goals, this recommendation would be documented under "Supports for School Personnel on Behalf of the Student." Such a recommendation is made as a result of the Committee's identification of a specific need, and corresponding goal(s), identified for the student.

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Presentation for the New York State Bar Association

Buffalo, New York

SPECIAL EDUCATION LAW UPDATE - 2013

November 1, 2013

Presentation by

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I. Hot Topics & Recent Case Law Developments in the Second Circuit

A. The United States Court of Appeals for the Second Circuit Rules that School Districts may not Provide "Retrospective Testimony" to Rebut a Parent's Claim for Tuition Reimbursement

A recent decision by the United States Court of Appeals for the Second Circuit, which has federal appellate jurisdiction in New York, has reinforced the notion that CSEs should include as much information as possible in an IEP about the student's educational program, including most notably the student's services. During impartial due process hearings, it is not uncommon for parties to litigate the appropriateness of an IEP that has never been implemented. This happens in tuition-reimbursement cases, wherein the parent has rejected the CSE's IEP and has enrolled his child in a nonpublic school. It may also occur in non-tuition-reimbursement cases, wherein the rules of pendency may prohibit the district from implementing the IEP at issue. In such cases, the parties are, in essence, arguing over whether an IEP would have been appropriate if it had been implemented, which is, to some extent, speculative. In such cases, it is not uncommon for districts to claim that they would have provided the student with some services that were not listed in the IEP. Historically, this evidence has been referred to as "retrospective testimony." In *R.E. v. New York City Department of Education*, 112 LRP 46921 (2d. Cir. Sept., 20, 2012), the Second Circuit considered whether retrospective testimony is permissible in tuition-reimbursement cases and ultimately determined that it is not. As such, the Court determined that the SRO erred by considering retrospective testimony that the district would have provided parent training because that service was not included in the student's IEP. Also, the Court ruled that since the CSE had recommended a specific teaching methodology for the student, district personnel should not have been allowed to testify that they would have implemented a different methodology for the student.

This ruling will impact future tuition reimbursement hearings in New York because school districts will no longer be able to present testimony that they would have provided services to the student that were not listed in his IEP. Notably, the Court did not adopt the rigid "four corners rule," which would prohibit any testimony that goes beyond the face or four corners of an IEP. Instead, a district may provide testimony to "explain or justify what is listed in the written IEP." But district personnel may not provide testimony supporting a modification that is "materially different from the IEP". As such, "a deficient IEP may not be effectively rehabilitated or amended after the fact through testimony regarding services that do not appear in the IEP."

Finally, although this ruling only involves tuition-reimbursement cases (it considered three such cases in one decision), the same principles appear to apply in all situations where the IEP at issue has not been implemented – which is usually the case at a hearing. As a result, going forward, school districts should continue to ensure that all of their IEPs contain all mandatory content and services

because they may be foreclosed from subsequently "curing" any substantive deficiencies at a hearing.

Note: In July 2013, the Second Circuit issued an unpublished decision, *K.L. v. New York City Department of Education*, 113 LRP 30265 (2d. Cir. July 24, 2013), clarifying that an IHO's consideration of retrospective testimony does not automatically invalidate his decision. The Court instead ruled that if an IHO considers retrospective testimony in a tuition-reimbursement case, the IHO's denial of a reimbursement claim may be upheld if there is sufficient non-retrospective testimony in the hearing record establishing that the school district offered the student a FAPE.

B. New York's Ban on Aversive Interventions Survives yet another Legal Challenge

In 2006, New York's Board of Regents promulgated a regulation that prohibited schools from using aversive interventions, which are defined as an intervention "intended to induce pain or discomfort to a student for the purpose of eliminating or maladaptive behaviors," such as the contingent application of painful, intrusive, or similar stimuli or sensitivity. *See* 8 N.Y.C.R.R. § 19.5(b)(1) and (2). The most commonly-known aversive intervention is shock therapy. Although this prohibition was generally supported by parents and educators, it was vociferously opposed by a group of individuals who have historically claimed that aversive interventions are an appropriate educational tool under certain circumstances. A majority of those supporters are either staff members in non-public schools that have historically used aversive interventions or parents whose children attend those schools. Since 2006, this prohibition has been challenged in numerous venues, based on various legal theories. To date, all of those challenges have been unsuccessful.

Most recently, a challenge was raised in the United States Court of Appeals for the Second Circuit. In *Bryant v. New York State Department of Education*, 112 LRP 41997 (2d. Cir. Aug. 20, 2012), the Court ruled that New York's general ban on aversive interventions did not violate the IDEA, Section 504 of the Rehabilitation Act or the United States Constitution.

The Court rejected the Plaintiffs' claim that the ban on aversive interventions is contrary to the IDEA's requirement that each student's program be individualized to meet his or her needs. The Court noted that the ban only prohibits the consideration of a single method of treatment, and does not foreclose any other options. (The Court also noted that the rule initially provided a three-year window of opportunity for districts to request approval from the Commissioner of Education for the use of aversive interventions on specific students.) As such, despite the prohibition against aversive interventions, the Court determined that school districts remain able to meet their students' individual needs. Moreover, the Court noted that prior to adopting the ban, SED made numerous site visits, reviewed relevant reports and considered complaints from parents and school

districts about aversive interventions. Based on this data, SED determined that aversive interventions are dangerous and that positive behavioral interventions sufficiently enable school districts to provide a FAPE to their students. Additionally, the Court rejected the Plaintiffs' claim that aversive interventions are the best or most appropriate educational approach for some students based on the well-settled legal rule that students are entitled to an appropriate educational program under the IDEA, not the best or most ideal program. The Court concluded its IDEA analysis by noting that courts should give deference to educational authorities on matters of educational policy, especially in this case based on SED's thorough research on the issues.

The Court also rejected the Plaintiffs' Section 504 and constitutional claims, but on different grounds. The Court ruled that the Plaintiffs' Section 504 claim lacked merit because there was no evidence that SED's decision to ban aversive interventions was promulgated in bad faith or the result of gross mismanagement. The Court rejected the Plaintiffs' constitutional claim on various grounds, including that there was no substantive due process right to public education and that the alleged procedural due process claims failed because SED's ban on aversive interventions easily satisfied the rational-basis test governing such claims.

C. A Federal District Court Reaffirms that Non-Custodial Parents Generally Lack the Right to Make Educational Decisions on Behalf of their Children

Previously, the New York State Court of Appeals ruled that under New York law, a non-custodial parent is not considered a "parent" during the special education process. *See Fuentes v. Bd. of Educ., et al.*, 12 N.Y.2d 309, 314 (2009). The Court therefore ruled that a non-custodial parent does not have the right to make educational decisions for his child unless he is afforded such a right in a custody order.

Based on the above state-law ruling, the Second Circuit Court of Appeals ruled that absent supporting language in a custody order, a non-custodial parent lacks standing to bring a claim under the IDEA on behalf of his child. *See Fuentes v. Bd. of Educ., et al.*, 569 F.3d 46 (2d Cir. 2009). The Court's ruling was significant because it significantly curtailed the rights of non-custodial parents during the CSE and IEP-development process.

Dissatisfied with the above rulings, the non-custodial parent in the above-referenced actions initiated another lawsuit alleging that the denial of his right to make educational decisions for his child was unconstitutional on equal protection grounds. The United States District Court for the Eastern District of New York rejected the non-custodial parent's argument and dismissed his complaint in the entirety. In *Fuentes v. New York City Dep't. of Educ.*, 112 LRP 16484 (E.D.N.Y. Mar. 30, 2012), the Court specifically ruled as follows:

- Although non-custodial parents may have a sincere interest in their children's education, they generally lack the right to challenge their children's IEP.

- To the extent that New York law defines "parent" for purposes of the IDEA as excluding non-custodial parents, such language does not deprive non-custodial parents of due process and equal protection rights under the Fourteenth Amendment. The Court explained that non-custodial parents are not considered a suspect class for purposes of constitutional analysis. As such, the court determined that the laws at issue were subject to the rational-basis standard of review, which they easily satisfied.

- Parents and school districts should continue to defer to the authority granted in custody proceedings -- "The easiest solution, where a state court has already given custody and decision-making authority to one parent, is for a school administrator or teacher to trust that the custodial parent will act on behalf of the child, and exclude the non-custodial parent from interfering with the custodial parent's decision making."

D. A Federal District Court in New York Denies a Parental Request for an Independent Educational Evaluation

The United States District Court for the Northern District of New York issued a notable decision regarding independent educational evaluations ("IEEs"). In *M.V. v. Shenendehowa Central School District*, 113 LRP 9479 (N.D.N.Y. Mar. 7, 2013), the court confirmed that school districts have the right to place reasonable limits on IEE requests, as long as parents have the right to exceed those limits under unique or extraordinary circumstances.

The parents brought this case on behalf of their son, a fourth grader classified as a student with a disability under the IDEA. The parents requested that the District pay for an independent neuropsychological evaluation by a nearby psychologist, Alison Curley, Ph.D. The district granted the request but informed the parents that under the District's IEE policy and procedures, payment could not exceed $1,800.00 unless the parents demonstrated that their child's unique circumstances justified payment beyond the standard limit. The parents reported to the district that the estimated cost of the evaluation was in excess of $1,800.00. Rather than attempting to establish that their child's circumstances were unique, they chose not to go forward with the evaluation.

The parents challenged the district's actions and IEE policy in an impartial due process hearing request. The district responded by sending the parents a list of low-cost local evaluators, several of whom could perform a neuropsychological evaluation for $1,800.00 or less. The parents continued to insist that the District pay Dr. Curley in excess of the $1,800.00 limit, so the matter proceeded to hearing. At the conclusion of the hearing, the IHO dismissed the hearing request

on two separate grounds. The IHO ruled that the parents were not entitled to an IEE because they were not challenging a district evaluation. More notably, the IHO also ruled that the district's IEE payment limit was reasonable and that the district acted reasonably and appropriately by offering to pay up to $1,800.00 for the evaluation. The parents appealed to the SRO, but were unsuccessful. They then filed an appeal in federal court.

After considering arguments by both sides, the court upheld the SRO's (and IHO's) decision and ruled that the district was not obligated to pay Dr. Curley in excess of the $1,800.00 limit for the student's independent neuropsychological evaluation. In its decision, the court relied heavily on evidence in the record that several local psychologists and neuropsychologists were willing to perform the evaluation for up to $1,800.00 but the parents never even attempted to contact them. The court also expressly noted that the district's IEE policy and procedures authorized payments in excess of $1,800.00 in the case of exceptional or unique circumstances, but that the parents never established – either before or during the hearing – that such circumstances existed here. In theory, the parents could have established that the local evaluators were not qualified to evaluate the student's unique needs – and that Dr. Curley was qualified – but they failed to submit (or even attempt to submit) such evidence.

This case reinforces the notion that the parental right to an IEE is not absolute. School districts may (and should) place reasonable limitations on IEE requests, including payment limits. However, as this case illustrates, such limits should be based on the standard rates in the district's local geographic area. Indeed, if a parent cannot obtain an IEE locally within a district's payment limits, then those limits should be raised to reflect the going rate in that area. The same holds true for any geographic boundaries set forth in a district's IEE policy and procedures (i.e., if the boundaries are too narrow, they should be expanded to include a sufficient number of qualified evaluators). Lastly, this case highlights the need for a district's IEE policy and procedures to be flexible, with applicable exceptions to criteria under unique or extraordinary circumstances. The absence of such potential exceptions opens the door for parents to argue that the district's policy and procedures fail to ensure that all students with disabilities have access to an individualized and appropriate IEE.

II. Effective Litigation Strategies

A. When to file the impartial hearing request?

There are several factors for parents to consider, including:

1. The statute of limitations, which in New York is currently two years for IDEA claims. *See* 8 N.Y.C.R.R. § 200.5(j)(1)(i).

2. Whether any of the claims will be rendered moot by a delay in filing? To illustrate, will the CSE develop a new IEP in the interim? Will the

school year end in the interim? On the other hand, claims for compensatory services are not rendered moot upon the expiration of the IEP or conclusion of the school year.

3. Will a delay in filing impact the student's pendency (i.e., stay-put) placement?

B. What should be included in the hearing request?

Under 8 N.Y.C.R.R. § 200.5(i)(1), a hearing request must include the following:

1. the name of the student;

2. the address of the student;

3. the name of the school the student is attending;

4. a description of the nature of the problem, including facts related to the problem; and

5. a proposed resolution of the problem to the extent known and available to the party at the time.

The party who receives the hearing request has 15 days to challenge the sufficiency of the complaint. *See* 8 N.Y.C.R.R. § 200.5(i)(3). If the IHO determines that the complaint is insufficient, the IHO shall identify how the complaint is insufficient so that the filing party can amend the complaint, if appropriate. *See* OSEP Memorandum 13-08: Dispute Resolution Procedures under Part B of the Individuals with Disabilities Education Act (July 23, 2013), Question C-4 (quoting 71 FR 46698 (August 14, 2006)).

C. What should be included in the response to the hearing request?

The party who receives the hearing request has 10 days to send the complaining party a response "that specifically addresses the issues raised in the [complaint] notice." 8 N.Y.C.R.R. § 200.5(i)(5). There is no apparent mechanism for the complaining party to challenge the sufficiency of the response (or even the failure to send a response).

D. What happens if the district fails to schedule the resolution session?

If the district fails to schedule the resolution session within the required timelines, the parent may ask the IHO to begin the due process hearing timeline (45 days in New York). *See* OSEP Memorandum 13-08: Dispute Resolution Procedures under Part B of the Individuals with Disabilities Education Act (July 23, 2013), Question D-13 (citing 34 CFR § 300.510(b)(5)).

E. What happens if the parent refuses to attend the resolution session?

If a parent fails or refuses to participate in the resolution session within the first 15 days of the resolution period, the district must continue to make diligent efforts throughout the remainder of the 30-day resolution period to convince the parent to participate in the resolution session. At the conclusion of the 30-day resolution period, the district may ask the IHO to dismiss the complaint if the parent fails to participate in the resolution session despite the district's reasonable and documented efforts to obtain the parent's participation. *See* OSEP Memorandum 13-08: Dispute Resolution Procedures under Part B of the Individuals with Disabilities Education Act (July 23, 2013), Question D-12 (citing 71 FR 46702 (August 14, 2006)).

F. Offer of settlement to cut-off a parent's attorney-fee claim.

It is well known that parents who prevail at impartial hearings are entitled to attorney's fees under the IDEA. Under the IDEA, however, a parent's attorney's fees may not be awarded and related costs may not be reimbursed if: (1) the school district makes a settlement offer more than ten calendar days before the start of the hearing; (2) the parent does not accept the offer within ten calendar days; and (3) the relief obtained by the parent is not more favorable than the settlement offer. *See* 20 U.S.C. § 1415(i)(3)(D)(i). This rule will not apply if the parent was "substantially justified" in rejecting the offer of settlement. *See* 34 CFR 300.517(c)(3).

Based on this rule, when parents allege multiple claims against a school district with varying degrees of merit, the district should make a timely, pre-hearing offer to resolve all of the meritorious claims. If the parent rejects the offer, the district may be able to avoid a significant award of attorney's fees at the conclusion of the proceeding.

The scope of the district's pre-hearing offer of settlement may impact the district's strategy and approach at the hearing. Under certain circumstances, it may be in the district's best interest to concede claims addressed in the offer of settlement (assuming the claims have merit) so that the hearing will focus on the remaining, presumably meritless claims.

G. The burden of proof is on the school district.

In 2007, Education Law § 4404(1) was amended to place the burden of proof on the school district in impartial hearings, even when (as is usually the case) the proceeding is initiated by a parent of a student with a disability. So when a parent alleges a violation or FAPE denial, the burden will be on the school district to prove that it satisfied its procedural and substantive obligations with respect to the student. As such, the district cannot simply sit back and see whether the parent will be able to prove his claim. Upon the parent's submission of an impartial hearing, the burden is entirely on the district to prove compliance with the law.

This is, of course, distinct from the burden-of-proof rules in most civil proceedings.

The only exception to this rule is under the burden-shifting standard for tuition reimbursement claims, which places the burden of proof on parents to demonstrate the appropriateness of the student's nonpublic school program – but the district would still have the burden to prove that the program recommended by the CSE is appropriate.

H. The two-day rule for impartial hearings.

In New York, each party shall have up to one day to present its case at a hearing unless the IHO determines that additional time is necessary for a "full, fair disclosure of the facts required to arrive at a decision[.]" 8 N.Y.C.R.R. § 200.5(j)(3)(xiii). This rule is applied inconsistently throughout the state, but in theory, impartial hearings should be litigated with a sense of efficiency and urgency.

I. The need for speed – hearings are very expensive!

Most hearing costs are placed upon the district. These costs include the district's attorney's fees, the IHO's fees and transcription (court reporter) fees. And as mentioned above, if the parent prevails at a hearing, the district will be responsible for the parent's fees, as well. So although a district's number one priority is to prevail at a hearing, the need to proceed efficiently, and in fact quickly, is a close second. The district should therefore be open to approaches to minimize the length of hearings, such as by stipulating to the admission of exhibits into evidence.

A school district may seek to recover its attorney's fees from a parent or parent's counsel if it can establish that the parent's claim was frivolous, unreasonable, without foundation or was pursued for an improper purpose such as to harass, cause unnecessary delay or needlessly increase the cost of litigation. *See* 20 U.S.C. § 1415(i)(3)(B)(i)(II). Such claims are rare, however.

J. Object to claims not raised in the complaint.

For a parent to amend a hearing request, he must either obtain the district's consent or permission from the IHO. *See* 8 N.Y.C.R.R. § 200.5(i)(7)(i). The IHO may only grant such permission more than five days before the start of the hearing. *See id.* at § 200.5(i)(7)(i)(b).

As such, once the hearing starts, the parent is foreclosed from amending the hearing request without the district's consent. This is very significant because the scope of review in an impartial hearing is limited to the issues raised in the hearing request. *See, e.g., Application of a Student with a Disability*, Appeal No. 12-054; *Application of a Student with a Disability*, Appeal No. 12-031.

Based on these rules, a school district would be within its rights to vigorously object to any attempts by a parent to raise at a hearing any claims that were not expressly included in the hearing request.

K. How good are your documents?

Many (perhaps most) of the issues at a hearing will be determined by the relevant records; and for the most part, the student's educational records will speak for themselves. Although, as explained above, the Second Circuit Court of Appeals has barred retrospective testimony in tuition-reimbursement cases (*see R.E. v. New York City Department of Education*, 112 LRP 46921 (2d. Cir. Sept. 20, 2012), this emerging line of cases will undoubtedly make it more difficult (if not impossible) to present retrospective testimony in other types of cases, including the more common FAPE-denial cases. So when assessing the merits of a claim and your likelihood of success at a hearing, the primary focus should be on the student's educational records.

L. When assessing the student's progress, consider both special education and general education data.

In many hearings, the appropriateness (or lack thereof) of the student's program is based on the student's rate of progress during the implementation of the program at issue (if it was ever implemented) or the previous implementation of similar programs. Traditionally, progress has been assessed by reviewing "special education" documents such as the Student's IEP progress reports, which measure the student's progress towards the annual goals in his IEP. But with the onset of response to intervention ("RTI"), school personnel now generate a considerable amount of "general education" data specifically designed to measure a student's progress throughout the school year. RTI approaches include: (1) benchmarking, which provides similar testing several during the school year; and (2) progress monitoring, which consists of repeated (usually weekly) assessments throughout the school year. These new forms of comparative data are usually presented in easy-to-follow charts and often serve as useful hearing exhibits to establish student progress (or the lack thereof).

M. Which witnesses should you call?

Decisions on whom to call to testify can directly impact the outcome of a hearing. Testifying at an impartial hearing can be an extremely stressful and harrowing experience. It is often difficult to predict whether an individual will be an effective witness at hearing. It is therefore crucial that all potential witnesses are interviewed to determine their knowledge of the underlying facts and ability to testify effectively and persuasively, which includes their ability to withstand cross-examination.

As a general rule, a witness should be called to testify only if he or she is absolutely necessary to prove the party's position. As the saying goes, less is more. Indeed, as the number of witness called increases, so does the likelihood of a meltdown or unanticipated testimony. Priority should therefore be given to witnesses who can address multiple topics.

N. Will the parent be considered a prevailing party?

Like most adversarial proceedings, financial considerations are prominent in the impartial-hearing process. As mentioned above, a parent who prevails at an impartial hearing is entitled to attorney's fees under the IDEA. According to the United States Supreme Court, for a plaintiff to achieve prevailing-party status, there must be some "judicially sanctioned change in the legal relationship of the parties[.]" *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 35 IDELR 160 (2001). As such, for a parent to be a prevailing party at an impartial hearing, the IHO must order the district to take specific action. As a result, violations of the IDEA, without any corresponding relief, may not support an award for attorney's fees.

The above should be considered when formulating hearing strategy. More specifically, a parent seeking prevailing-party status will need to convince the IHO that specific, tangible relief is appropriate, such as, for example, compensatory education services, evaluations or the scheduling of a CSE meeting to develop or amend an IEP.

Conversely, if the parent's allegations have merit, it may be in the school district's best interest to concede certain IDEA violations so that its primary focus at hearing will be to convince the IHO that no corrective action is necessary. This can be accomplished by demonstrating that the violation was *de minimis* or that the student still received a FAPE, despite the violation(s).

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It is not uncommon for districts to claim that they would have provided the student with some services that were not listed in the IEP.

Historically, this evidence has been referred to as "retrospective testimony."

In *R.E. v. New York City Department of Education*, 112 LRP 46921 (2d. Cir. Sept, 20, 2012), the Second Circuit considered whether retrospective testimony is permissible in tuition-reimbursement cases and ultimately determined that it is not.

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This ruling will impact future tuition reimbursement hearings in New York because school districts will no longer be able to present testimony that they would have provided services to the student that were not listed in his IEP.

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But district personnel may not provide testimony supporting a modification that is "materially different from the IEP". As such, "a deficient IEP may not be effectively rehabilitated or amended after the fact through testimony regarding services that do not appear in the IEP."

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The United States Court of Appeals for the Second Circuit Rules that School Districts may not Provide "Retrospective Testimony" to Rebut a Parent's Claim for Tuition Reimbursement (Cont'd.)

Note: in July 2013, the Second Circuit issued an unpublished decision, *K.L. v. New York City Department of Education*, 113 LRP 30265 (2d. Cir. July 24, 2013), clarifying that an IHO's consideration of retrospective testimony does not automatically invalidate his decision. The Court instead ruled that if an IHO considers retrospective testimony in a tuition-reimbursement case, the IHO's denial of a reimbursement claim may be upheld if there is sufficient non-retrospective testimony in the hearing record establishing that the school district offered the student a FAPE.

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New York's Ban on Aversive Interventions Survives yet another Legal Challenge

In *Bryant v. New York State Department of Education*, 112 LRP 41997 (2d. Cir. Aug. 20, 2012), the Second Circuit Court of Appeals ruled that New York's general ban on aversive interventions did not violate the IDEA, Section 504 of the Rehabilitation Act or the United States Constitution.

The Court rejected the Plaintiffs' claim that the ban on aversive interventions is contrary to the IDEA's requirement that each student's program be individualized to meet his or her needs. The Court noted that the ban only prohibits the consideration of a single method of treatment, and does not foreclose any other options.

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New York's Ban on Aversive Interventions Survives yet another Legal Challenge (Cont'd.)

The Court noted that prior to adopting the ban, SED made numerous site visits, reviewed relevant reports and considered complaints from parents and school districts about aversive interventions. Based on this data, SED determined that aversive interventions are dangerous and that positive behavioral interventions sufficiently enable school districts to provide a FAPE to their students.

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New York's Ban on Aversive Interventions Survives yet another Legal Challenge (Cont'd.)

The Court ruled that the Plaintiffs' Section 504 claim lacked merit because there was no evidence that SED's decision to ban aversive interventions was promulgated in bad faith or the result of gross mismanagement.

The Court rejected the Plaintiffs' constitutional claim on various grounds, including that there was no substantive due process right to public education and that the alleged procedural due process claims failed because SED's ban on aversive interventions easily satisfied the rational-basis test governing such claims.

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A Federal District Court Reaffirms that Non-Custodial Parents Generally Lack the Right to Make Educational Decisions on Behalf of their Children

In 2009, in *Fuentes v. Bd. of Educ., et al.*, 12 N.Y.2d 309, 314 (2009)., the NYS Court of Appeals ruled that under NY law, a non-custodial parent is not considered a "parent" during the special education process. The Court therefore ruled that a non-custodial parent does not have the right to make educational decisions for his child unless he is afforded such a right in a custody order.

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A Federal District Court Reaffirms that Non-Custodial Parents Generally Lack the Right to Make Educational Decisions on Behalf of their Children (Cont'd.)

Based on the above state-law ruling, the Second Circuit Court of Appeals ruled that absent supporting language in a custody order, a non-custodial parent lacks standing to bring a claim under the IDEA on behalf of his child. *See Fuentes v. Bd. of Educ., et al.*, 569 F.3d 46 (2d Cir. 2009).

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A Federal District Court Reaffirms that Non-Custodial Parents Generally Lack the Right to Make Educational Decisions on Behalf of their Children (Cont'd.)

Dissatisfied with the above rulings, the non-custodial parent in the above-referenced actions initiated another lawsuit alleging that the denial of his right to make educational decisions for his child was unconstitutional on equal protection grounds.

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A Federal District Court Reaffirms that Non-Custodial Parents Generally Lack the Right to Make Educational Decisions on Behalf of their Children (Cont'd.)

In *Fuentes v. New York City Dep't. of Educ.*, 112 LRP 16484 (E.D.N.Y. Mar. 30, 2012), the U.S. District Court for the Eastern District of NY rejected the parent's constitutional claim and ruled as follows:

A. Although non-custodial parents may have a sincere interest in their children's education, they generally lack the right to challenge their children's IEP.

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A Federal District Court Reaffirms that Non-Custodial Parents Generally Lack the Right to Make Educational Decisions on Behalf of their Children (Cont'd.)

B. To the extent that New York law defines "parent" for purposes of the IDEA as excluding non-custodial parents, such language does not deprive non-custodial parents of due process and equal protection rights under the Fourteenth Amendment. The Court explained that non-custodial parents are not considered a suspect class for purposes of constitutional analysis. As such, the court determined that the laws at issue were subject to the rational basis standard of review, which they easily satisfied.

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A Federal Court in NY Reaffirms that Non-Custodial Parents Generally Lack the Right to Make Educational Decisions on Behalf of their Children (Cont'd.)

C. Parents and school districts should continue to defer to the authority granted in custody proceedings -- "The easiest solution, where a state court has already given custody and decision-making authority to one parent, is for a school administrator or teacher to trust that the custodial parent will act on behalf of the child, and exclude the non-custodial parent from interfering with the custodial parent's decision making."

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Recent Federal Court Decision in New York Denying a Parent's Request for an Independent Educational Evaluation

In ***M.V. v. Shenendehowa Central School District***, 113 LRP 9479 (NDNY Mar. 7, 2013), the court confirmed that school districts have the right to place reasonable limits on IEE requests, as long as parents have the right to exceed those limits under unique and extraordinary circumstances.

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Recent Federal Court Decision in New York Denying a Parent's Request for an Independent Educational Evaluation (Cont'd.)

Under the district's IEE policy and procedures, payment for an IEE could not exceed $1,800.00 unless the parents demonstrated that their child's unique circumstances justified payment beyond the standard limit. The parents insisted that the district pay for a neuropsychological evaluation in excess of $1,800.00, but refused to attempt to establish that their child's circumstances were unique.

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Recent Federal Court Decision in New York Denying a Parent's Request for an Independent Educational Evaluation (Cont'd.)

- The parents initiated an impartial due process hearing.
- The IHO ruled that the parents were not entitled to an IEE because they were not challenging a district evaluation.
- The IHO also ruled that the district's IEE payment limit was reasonable and that the district acted reasonably and appropriately by offering to pay up to $1,800.00 for the evaluation.
- The parents appealed to the SRO, but were unsuccessful.

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Recent Federal Court Decision in New York Denying a Parent's Request for an Independent Educational Evaluation (Cont'd.)

- They then filed an appeal in federal court.
- The court upheld the SRO's (and IHO's) decision and ruled that the district was not obligated to pay Dr. Curley in excess of the $1,800.00 limit. The court relied heavily on evidence in the record that several local psychologists and neuropsychologists were willing to perform the evaluation for up to $1,800.00 but the parents never even attempted to contact them.

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Recent Federal Court Decision in New York Denying a Parent's Request for an Independent Educational Evaluation (Cont'd.)

- The court also expressly noted that the district's IEE policy and procedures authorized payments in excess of $1,800.00 in the case of exceptional or unique circumstances, but that the parents never established – either before or during the hearing – that such circumstances existed here.

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NEW YORK STATE BAR ASSOCIATION
SPECIAL EDUCATION UPDATE – 2013
Friday November 22, 2013
9:00 a.m. – 4:40 p.m.
New York State Bar Association
One Elk Street, Albany, N.Y. 12207

HOT TOPICS AND RECENT CASE LAW DEVELOPMENTS IN THE SECOND CIRCUIT

Presented by:

Jay Worona, Esq.
General Counsel
New York State School Boards Association

I. Selected Cases from the Second Circuit and N.Y. Federal District Courts

Reimbursement

a. Least Restrictive Environment

1. M.W. v. N.Y.C. Dep't of Educ., ___ F.3d ___, 2013 WL 3868594 (2nd Cir. 2013). The United States Court of Appeals for the Second Circuit denied tuition reimbursement to parents of an autistic child after finding that the district's recommended placement in an integrated co-teaching (ICT) classroom was appropriate and reasonable. The parents unsuccessfully argued, in part, that the district's placement violated the Individual with Disabilities Education Act's (IDEA) least restrictive environment provisions (LRE). The ICT class followed a general education curriculum and was staffed by a special education teacher and a general education teacher. The class could have included as many as 12 students with individualized education programs (IEPs) alongside general education students. The parents claimed the classroom was more like a segregated special education classroom than a regular classroom with supports.

   The Second Circuit disagreed, finding that a classroom with ICT services may be a placement that falls somewhere in between. The court noted that state regulations, the student's IEP, and the administrative decisions underlying the appeal before it characterize ICT as a service within a general education environment rather than a special education classroom. The court rejected the argument that the ICT classroom was inappropriate because the student would be learning alongside as many as 12 other IEP students, even though he had been educated exclusively with non-disabled peers and shown that he could "make it," in his parents' words, in a less restrictive setting with support. The court concluded that the evidence supported the conclusion of the State Review Officer (SRO) and court below that the placement was appropriate and reasonable. Moreover, the court concluded that the student was not entitled to a regular classroom with him as the only IEP student. Finding the parents' additional claims to also be without merit, their claim for reimbursement was denied.

2. C.L. v. Scarsdale Union Free School District, 2012 WL 983371 (S.D.N.Y. 2012). The Federal District Court of the Southern District of New York upheld a decision by the SRO denying tuition reimbursement to parents of a student with a disability on the basis that they failed to meet their burden to prove that the private school placement was appropriate. There was no dispute that the district failed to provide a free appropriate public education to the student by refusing to find the student eligible as a student with a disability under IDEA. The student had received supports and services in a regular education classroom in the district pursuant to a §504 plan.

   The central issue of the case was the appropriateness of the private school placement and the LRE standard with respect to private school placements. The

court upheld the SRO's conclusion that the record demonstrated that the student had progressed in the public school general education classroom with additional supports and services and benefitted from interacting with nondisabled peers. The court further agreed that because the private school provided no opportunity for the student to interact with nondisabled peers, it violated the LRE provisions of IDEA and was inappropriate because it did not provide occupational therapy services to meet the student's needs in the area of fine motor skills. This case is currently pending before the United States Court of Appeals for the Second Circuit. NYSSBA has submitted a brief in support of the district. USDE has submitted a brief in support of the parents.

b. Retrospective Testimony

Background

R.E. v. N.Y.C. Dep't of Educ., 694 F.3d 167 (2nd Cir. 2012).
The United States Court of Appeals for the Second Circuit ruled in a tuition reimbursement case that, with the exception of amendments made during the resolution period, an IEP must be evaluated prospectively as of the time it was created. Retrospective testimony to rehabilitate a deficient IEP with evidence that the child would have, in practice, received the missing services, is not permissible. The court noted the IDEA's 30-day resolution period once a due process complaint is filed and that the complaint must list all of the alleged deficiencies in the IEP. According to the court, [t]his rule recognizes the critical nature of the IEP as the centerpiece of the system, ensures that parents will have sufficient information on which to base a decision about unilateral placement, and puts school districts on notice that they must include all of the services they intend to provide in the written plan. If a school district makes a good faith error and omits a necessary provision, they have thirty days after the parents' complaint to remedy the error without penalty." A district may however provide testimony "that explains or justifies the services listed in the IEP."

1. K.L. v. N.Y.C. Dep't of Educ., ___ Fed. Appx. ____, 2013 WL 3814669 (2nd Cir 2013).
The United States Court of Appeals for the Second Circuit denied tuition reimbursement to parents of an autistic student. The parents claimed, in part, that the SRO "impermissibly relied on "retrospective testimony" in denying their claim for tuition reimbursement. According to the court, "[t]he question before us, however, is not whether the SRO relied on impermissible retrospective evidence, but whether sufficient *permissible* evidence, relied on by the SRO, supports the SRO's conclusion that the IEP offered K.L. a reasonable prospect of educational benefits." The court concluded that "any use of retrospective evidence does not disturb the SRO's conclusion that the IEP was adequate on its own terms." Finding the parents additional claims to also be without merit, their claim for reimbursement was denied.

2. P.K v. N.Y.C. Dep't of Educ., 2013 WL 2158587 (2nd Cir 2013) (Unpublished Slip Opinion).

The parents of an autistic student sought tuition reimbursement and claimed, in part, that the IEP was deficient because the district failed to provide appropriate speech and language therapy. The SRO relied on retrospective testimony in his conclusion that "[u]nder the circumstances, although not specifically delineated on the student's IEP, as a whole, the hearing record reflects that the student's program, including specific speechlanguage therapy and in-class instruction, were appropriate to meet the student's individual speech-language and communication needs." The court determined that "much of the evidence relied on by the SRO to support his view that the IEP was adequate was "retrospective testimony" and that the IEP was substantively inadequate because it failed to provide sufficient 1:1 instruction. Of particular concern to the court was that the IEP was in violation of then-applicable state regulations requiring that autistic children receive speech therapy "for a minimum of 30 minutes daily in groups not to exceed two, or 60 minutes daily in groups not to exceed six." [Note: Current state regulations provide that "[i]nstructional services shall be provided to meet the individual language needs of a student with autism." (8 NYCRR 200.13(a)(4))]. Moreover, the court found that the SRO failed to cite to any evidence in the record to support his conclusion that the student could progress without at least some 1:1 speech and language therapy.

3. D.C. v. N.Y.C. Dep't of Educ., ___ F.Supp.2d ___, 2013 WL 1234864 (S.D.N.Y. 2013).

The Federal District Court of the Southern District of New York granted tuition reimbursement to a parent of a student with a disability with severe allergies to seafood. The student's allergies were triggered not only by ingestion of seafood, but also by skin and smell exposure. The allergy is so severe that it causes anaphylaxis and is life threatening. The student attended a private school that the district had paid for the prior three years. The student's IEP indicated that the student had an allergy and there could be "no seafood in his environment."

The parent indicated that when she took a tour of the proposed public placement seafood was listed on the cafeteria menu; the parent coordinator informed her that the cafeteria was not seafood free, and that the school participated in the New York City lunch program, which included fish on its menu. She was further told that students were allowed to bring in lunch from home and seafood was permitted. The school nurse also confirmed to the parent that the environment was not seafood free and that the school could not control for the "airborne allergy" or the "smell trigger when the food was being cooked." The parent rejected the public school placement for a variety of reasons, including concerns as to whether the school could provide a seafood free environment as the IEP required.

At the impartial hearing, the district provided evidence that the public school placement could accommodate the seafood allergy which contradicted what the parent had been told by school staff and what she observed on her tour. Relying on this testimony, both the IHO and SRO ruled in favor of the district.

The court disagreed and ruled in favor of the parent stating "at the time D.C. was required to make her decision whether to place E.B. unilaterally in the Rebecca School, the Department failed to demonstrate that the proposed placement could provide E.B. with his IEP-required seafood free environment. Therefore, without reaching the two other procedural objections to the proposed placement, it is clear that the proposed placement at P188 did not provide E.B. with the FAPE the IDEA requires."

The court cited to R.E. v. N.Y.C. Dep't of Educ., 694 F.3d 167 (2d Cir. 2012) and concluded that "[a]lthough the issue in this case is the capability of the proposed placement to implement the IEP, not the suitability of the IEP itself, the reasoning of *R.E.* compels the same result for retrospective testimony in this context as well. Prior to making a placement decision, a parent must have sufficient information about the proposed placement school's ability to implement the IEP to make an informed decision as to the school's adequacy." The court stated that the IHO and SRO's reliance on the testimony of school staff that the school could have been made into a seafood free environment was "too little, too late." The court also found the private school placement appropriate and that the equities favored reimbursement.

Moreover, the court denied the district's motion for summary judgment under Section 504 stating "[i]n this case, a rational juror could conclude that the Department's failure to recommend an alternative placement for E.B., or at least contact D.C. and explain that P188 could potentially accommodate E.B.'s allergy, rose to the level of reckless indifference and/or gross misjudgment."

Site Visit by Judge

T.L. v. N.Y.C. Dep't of Educ., ___ F.Supp.2d ___, 2013 WL 1497306 (E.D.N.Y 2013).

The United States District Court for the Eastern District of New York remanded a case back to the SRO in a case where parents were seeking tuition reimbursement for their child who, among other things, suffers from PICA, a neurological disorder that causes her to frequently grab inedible objects and place them in her mouth. The district recommended a special class in a public school. The IHO had ruled in favor of the parents. The SRO reversed and ruled in favor of the district.

Prior to argument on the merits of the case and with the consent of the parties, Senior District Judge Weinstein conducted a site visit with the parties to the proposed public school placement as well as the private school. According to the

court, "[i]n a case such as the present one, the court would normally rely exclusively on the written state record in making a decision on the merits. In the instant proceeding, it found it "difficult to visualize the physical surroundings described in the record and the parties' briefs…" According to the court visitation order, "[T]he court will visit a classroom and other relevant facilities such as would be used, were T.L. to be taught there, in both the facility that would have been provided by [the District] and that provided by the private [school]. The visit was conducted for the purpose of assisting the court in understanding the nature of the facilities described in the state proceedings and the terminology used, such as the dangers of materials readily available in the school related to "pica by mouthing/eating inedible items," "crisis management paraprofessional," a "quiet, small bare room to address sensory needs," "and "sensory gymnasium."

The court remanded the case back to the SRO for clarification and additional fact finding, if necessary, as to how the proposed public placement would have addressed the student's disabilities. According to the court, "[i]n particular, further analysis is required for how the proposed public school placement would have provided an educational environment that ensured T.L.'s severe PICA disorder did not interfere with her classroom instruction. The administrative record is deficient in its analysis of this critical issue." The court added, "[a]side from noting the caution that would be exercised by the [public school] faculty in educating students with PICA needs, and the fact that items in the classroom were locked away, the SRO decision does not provide more detail about the school and class physical environment…But in light of T.L.'s PICA, evaluating only the educational methods *within* a given school environment without considering physical features is not sufficient to determine an appropriate placement. As the IEP recognizes, the physical environment itself must be suitable for the child." Attached as Appendix B to the decision were "Notes of Court from Site Visit." The notes indicate that the rooms in the private school placement were "relatively free of materials a child can grasp and put in her mouth. There is also a minimum of papers and other materials a child could mouth on tables and floors." By contrast, the public school placement "had many notices, drawings, and stickers on the room and corridor walls. None of the rooms or walls were as free of such materials as were those in the [private] school."

Independent Educational Evaluation

M.V. v. Shenendehowa Central School District, ___ F.Supp.2d ___, 2013 WL 936438 (N.D.N.Y. 2013) (slip opinion).

The United States District Court for the Northern District of New York ruled against the parents of a student with a disability who claimed that the district violated IDEA and New York State law and regulations by imposing a cap of $1,800 on an independent educational evaluation (IEE). In this case, the parents requested that the district pay for an IEE by a particular psychologist. The district approved the request up to the $1,800 limit it had established in district regulation. The regulation also provided parents with an opportunity to

demonstrate that a child's unique circumstances justified an IEE beyond the $1,800 cap. The parents requested a due process hearing and the district provided the parents with a list of "low-cost independent evaluators." The parents did not allege that they disagreed with the district's evaluation. The district provided evidence at the hearing of other evaluators willing to conduct an IEE for less than $1,800. The court agreed with the district that the district's cap of $1,800 was reasonable, and in any event, could be exceeded in the case of exceptional or unique circumstances (which Plaintiff never presented to the District).

Procedure

a. Cross Appeal to SRO Issue

F.B. v. N.Y.C. Dep't of Educ, ___ F.Supp.2d ___, 2013 WL 592664 (S.D.N.Y 2013).

The Federal District Court of the Southern District of New York remanded certain issues that were not addressed by the SRO in his original decision. The IHO concluded that the district's proposed placement was not appropriate and ordered tuition reimbursement to the parents. The district appealed to the SRO which overturned the IHO's decision and "held that the various claims the Parents had made in their due process complaint that the IHO did not address in his decision had not been preserved for his review by the Parents, because they had not cross-appealed the IHO's decision." The court upheld those issues addressed by the SRO, but further ruled that the SRO incorrectly excluded from the scope of his review the challenges brought by the parents that were not addressed by the IHO. According to the court, the IHO's failure to decide an issue for or against a party does not "aggrieve" that party and that "cross-appeals lie only from issues decided, not merely from silence." The court noted that the case law in this area is not uniform [see, C.F. v. N.Y.C. Dep't of Educ., 2011 WL 5130101 (S.D.N.Y. 2011). In that case, the parents prevailed at the IHO level and when the district appealed the decision to the SRO, the parents did not cross-appeal an issue they raised at the IHO level but was not addressed by the IHO. The court concluded that the failure to cross appeal the issue rendered it not proper for review by the court].

b. Mootness

N.Y.C. Dep't of Educ. v. S.A., 2012 WL 6028938 (S.D.N.Y. 2012) (Unreported).

The Federal District Court of the Southern District of New York reversed an SRO decision which dismissed as moot the district's appeal of an IHO's decision awarding tuition reimbursement to parents based on the fact that "the Parents have already received all of the relief they were seeking at the impartial hearing under pendency." The court determined that the case fit within the capable of repetition yet evading review exception.

II. Hot Topics

1. OSERS Guidance on Bullying (http://goo.gl/CVvE87).

On August 20, 2013, the United States Department of Education's Office of Special Education and Rehabilitative Services (OSERS) issued a Dear Colleague Letter in which it set out what it deems to be a school district's responsibilities under the IDEA to address bullying of students with disabilities.

Students with a disability who are eligible to receive services under IDEA are entitled to receive a free appropriate public education (FAPE) in accordance with the terms of their IEPs in the least restrictive environment. The OSERS letter states that bullying directed at a student with a disability will constitute a denial of FAPE under the IDEA if it "results in the student not receiving meaningful educational benefit."

It is irrelevant whether the bullying is related to the disabled student's disability, except that disability-based bullying also could constitute discriminatory harassment under Section 504 of the Rehabilitation Act, Title II of the Americans with Disabilities Education Act (ADA) and other laws.

As part of an appropriate response to bullying, OSERS states a school district should:

- Convene the CSE to determine whether the student's needs have changed as a result of the effects of the bullying.

- Determine the extent to which additional or different services are needed to address the student's individual needs if the IEP is no longer designed to provide meaningful educational benefit as a result of the effects of the bullying; and revise the IEP accordingly.

- Exercise caution when considering a change in the placement or the location of the services provided to the student who is the target of bullying as any such change to a more restrictive environment may constitute a violation of the IDEA's least restrictive environment requirements.

If a student with a disability engages in bullying behavior, OSERS indicates that the CSE team should review his or her IEP to determine if additional supports and services are needed to address the student's inappropriate behavior and consider examining the environment in which bullying has occurred to determine if changes are needed.

2. OCR's Guidance on Extracurricular Athletics (http://goo.gl/GRYuL).

On January 25, 2013, the United States Department of Education's Office of Civil Rights (OCR) issued a Dear Colleague Letter in which it set out what it deems a school district's

responsibilities under Section 504 of the Rehabilitation Act regarding the participation of disabled students in extracurricular athletics.

The guidance provides hypothetical scenarios accompanied with OCR analysis and legal conclusions. Here are some of the highlights of the guidance:

- Districts may not operate their extracurricular program on the basis of generalizations, assumptions, prejudices or stereotypes about disabilities. For example, it is not permissible for a coach who is aware of a student's particular disability to decide to never play the student in a game because of his or her belief that all students with that particular disability would be unable to play successfully under the time constraints and pressures of a game.

- Districts may require a level of skill or ability for participation in a competitive program or activity. However, a district may be obligated to make reasonable modifications and provide aids and services that ensure an equal opportunity to participate. Districts must conduct an individualized inquiry for each requested modification. The law does not require a district to make a modification if it would alter an essential aspect of the game or activity or give the disabled athlete an unfair advantage.

- Districts must ensure that students with disabilities participate with non-disabled peers in extracurricular activities to the maximum extent appropriate to the needs of that student with a disability. However, the guidance states that in those districts with students who cannot participate in a district's existing extracurricular athletics program – even with reasonable modifications or aids and support services – additional opportunities for those students should be created by the district, such as wheelchair basketball, by working with other entities within their community.

3. OSERS Guidance on Braille Instruction
(http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/brailledcl-6-19-13.pdf).

On June 19, 2013, the United States Department of Education's Office of Special Education and Rehabilitative Services (OSERS) issued a Dear Colleague Letter regarding the need for school districts to provide Braille instruction to blind and visually-impaired students. The letter indicates a concern that the number of students receiving instruction in Braille has decreased significantly over the past several decades.

Here are some highlights from the guidance:

- CSEs must ensure that children who are blind or who are visually impaired are provided with the Braille instruction they need in order to receive FAPE and to ensure their meaningful access to the general education curriculum

offered to nondisabled students, unless after evaluation, the CSE determines that Braille instruction is not appropriate for a particular child.

- Shortage of trained personnel to provide Braille instruction; the availability of alternative reading media (including large print materials, recorded materials, or computers with speech output); or the amount of time needed to provide a child with sufficient and regular instruction may not be used as factors to deny Braille instruction to a child.

- The evaluation must assess a child's future needs, i.e. a child with a degenerative condition. A child's current vision status should not render them ineligible for Braille instruction.

4. OSERS Guidance on Highly Mobile Students (http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/12-0392dclhighlymobile.pdf)

On July 19, 2013, the United States Department of Education's Office of Special Education and Rehabilitative Services (OSERS) issued a letter to address concerns regarding the unique educational needs of highly mobile children with disabilities under the Individuals with Disabilities Education Act (IDEA). The letters addresses issues regarding IDEA's requirements for timely evaluations, including when a response to intervention (RTI) framework is used prior to completing evaluations of highly mobile children, and the provision of comparable services, which could include extended school year services, when a child transfers into a new school district.

Here are some highlights from the guidance:

- OSERS strongly encourages school districts to complete their evaluations of highly mobile children within expedited time frames (e.g. within 30 days), consistent with each highly mobile student's individual needs, whenever possible.

- If a child transfers to a new school district during the same school year before the previous school district has completed the child's evaluation; the new school district may not delay the evaluation or extend the evaluation time frame in order to implement a response to intervention (RTI) process. While the school district may choose to provide interventions while it is in the process of completing the evaluation, it would be inconsistent with federal regulations for a school district to delay completing an initial evaluation because a child has not participated in an RTI process in the new school district.

- The Department interprets "comparable services" to mean services that are similar or equivalent to those services that were described in the child's

IEP from the previous school district, whether in the same State or in another State, as determined by the CSE. The new district generally must provide Extended School Year (ESY) services as comparable services to a transfer student whose IEP from the prior district contains those services, and may not refuse to provide ESY services to that child merely because the services would be provided over the summer. The guidance provides additional information on this issue with respect to in State and out of State transfer students.

Other Resources of Interest

a. **OSERS Suggested Model for Written Notification of Parental Rights regarding Use of Public Benefits or Insurance (http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/accmodelwrittennotification-6-11-13.pdf)**

b. **OSERS Updated Q and A on the Dispute Resolution Procedures (http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/acccombinedosersdisputeresolutionqafinalmemo-7-23-13.pdf).**

Effective Litigation Strategies
(wading through the IDEA minefield)

Gary S. Mayerson[1]

CAVEAT: Litigation strategies that may be effective in one context may be wholly ineffective or even spectacularly counterproductive in another. As a general matter, in the same way that an IEP must be "reasonably calculated," one should not devise or implement a litigation strategy without a meaningful understanding of the student's unique needs and objectives. Moreover, litigation strategies are not engraved in stone—practitioners must be prepared to change course when necessary.

The most effective "litigation strategies" often are strategies that evolve long before the litigation has commenced. What are the overarching themes of the case? Is one theme the severity of the student's disability? Is another theme "least restrictive environment?" Were there serious procedural failures? What information and documents did the parent(s) have at the time that a decision had to be made? Were there "cumulative" failures? The most effective litigation strategies often will flow from these kinds of considerations.

Proactively guiding IEP Development And Parental Cooperation—Looking ahead to the Second Circuit's "reasonably calculated" test and the prohibition against reliance on impermissible "retrospective" evidence. *R.E. v. NYCDOE*, 694 F.3d 167 (2d Cir. 2012)

(a) Attending IEPs
(b) Consenting to Evaluations
(c) Independent Evaluations (C.F.R. Sec. 300.502(b))
(d) Sharing evaluations
(e) Securing the IEP
(f) Securing any "minutes"
(g) Securing the FNR
(h) Ensuring parental cooperation
(i) Documenting the reviewable record
(j) The critical juncture—when parents must decide
(k) No need to "try out" the offered program to gain standing to sue (*Forest Grove v. T.A.*, 557 U.S. 230 (2009)

[1] Gary Mayerson is a member of the Board of Autism Speaks and is the founder of Mayerson & Associates a Manhattan law firm formed in 2000 as the very first firm in the nation dedicated to the representation of individuals with autism and related disabilities. Attorney Mayerson has testified before Congress concerning the federal IDEA statute and is the author *of How To Compromise With Your School District Without Compromising Your Child* (DRL Books 2004). Most recently, Attorney Mayerson completed the "Autism In The Courtroom" chapter to be published as part of the Fourth Edition of Fred Volkmar, M.D.'s seminal treatise, *Autism and Pervasive Developmental Disorders*.

Equitable Circumstances And The Importance of The "Ten Day Notice"

(a) threat of reduction or denial of funding (20 U.S.C. Sec. 1412(a)(10)(C)(iii))
(b) notice of rejection given at most recent IEP meeting OR
(c) notice of rejection in writing (10 business days)
(d) and stating "concerns" and intent to go private at public expense
(e) failure to make student available for a requested evaluation
(f) other circumstances warranting a finding of unreasonableness (*Bethlehem Area School District v. Zhou,* 2013 U.S. Dist. LEXIS 507011 (E.D. Pa., April 9, 2013))
(g) Serious threat or danger *exception* to prior notice

Pleading Requirements:

(a) Pleading Structure – combination punch of cumulative procedural and substantive violations (*P.K. v. NYCDOE*, 2011 U.S. Dist. LEXIS 32235 (E.D.N.Y. 2011), *aff'd* 2013 U.S. App. LEXIS 10477 (2d Cir. 2013), *R.K. v. NYCDOE,* 2011 U.S. Dist. LEXIS 32235 (E.D.N.Y. March 28, 2011) *aff'd* 694 F.3d 167 (2d Cir. 2012), *R.E., supra).*
(b) Pleading particularity (8 NYCRR Sec. 2005(i))
(c) Invoking Pendency (and converting to "comp ed" if necessary) (*Draper v. Atlanta Indep. Sch. Sys.*, 480 F. Supp. 2d 1331 (N.D. GA 2007) (*Dracut Sch. Comm. v. Bureau of Special Education Appeals of the Mass. Dep't of Elementary and Secondary Educ.*, 737 F. Supp.2d 35, (D. Mass. 2010))
(d) Pleading reimbursement and "prospective" (direct) funding claims
(e) Participating in the "resolution meeting" (*R.E. v. NYCDOE*)
(f) Pleading amendments (watch out for "5 day" trap)
(g) Amendments during trial? (make the effort even if futile)
(h) How to "open the door" (*M.H. v. NYCDOE*, 712 F. Supp. 2d 125 (S.D.N.Y. 2010), *aff'd*, 685 F.3d 217 (2d Cir. 2012)

Resolution Meeting

(a) admissibility of evidence from meeting (*Friendship Edison Public Charter Sch. v. Smith*, 561 F. Supp.2d 74 (D.D.C. 2008)
(b) requirement to attend and consequences (8 NYCRR § 200.5(j)(2)) See also *R.E. v. NYCDOE, supra).*

Hearing Officer Selection

(a) Alphabetical list selection and challenge
(b) Move to recuse/withdraw and amend?
(c) Impact on pendency
(d) "Availability" requirement

The (Permitted) Pre-Hearing Conference (8 NYCRR § 200.5(j)(3)(i) and (6) and 200.5(i)(3)(xi))

(a) Beware prejudicial oversimplification of issues and claims
(b) Discussion of length of trial and number and identity of witnesses
(c) Special considerations (interpreter, etc.)
(d) Subpoena requests by attorneys? (CPLR 2302(a))

(e) Limitation on scheduling and extensions of time

Pendency Problems (20 U.S.C. Sec. 1415(j))

(a) Consequences when school district fails and *refuses* to implement pendency (*T.M. v. Cornwall Centr. Sch. Dist*, 900 F. Supp.2d 344 (S.D.N.Y. 2010)(on appeal to Second Circuit by school district)
(b) Enforcing IHO's pendency order (federal court)
(c) Amending pendency order upon change in "last agreed" placement
(d) Absence of automatic pendency between Early Intervention and CPSE
(e) Continuation of pendency between CPSE and CSE
(f) Pendency continues until a final order, not just until end of the school year (*T.M. v. Cornwall Cent. Sch. Dist.*, supra) (20 U.S.C. § 1415(j))

Settlement Discussions

(a) Commence early if possible
(b) Finding the responsible attorney
(c) Communicate jugular points if needed
(d) Impose deadlines
(e) Mark communications as confidential and privileged
(f) The last step—securing Comptroller (or Board) approval
(g) Gag orders----let the gagging begin!
(h) The rule in *Buckhannon Board & Care Home, Inc. v. W. Va. Dep't of Health & Human Resources*, 532 U.S. 598, 600 (2001) (restricting attorneys' fees)

Burden of Proof

(a) Prong I FAPE issue at hearing on district (N.Y. Educ. Law, Sec. 4404(1)(c))
(b) Prong II issue on parent (*Frank G. v. Board of Educ. of Hyde Park*, 459 F.3d 356 (2006))
(c) Prong III issue on parent (*B.R. ex rel. K.O. v. New York City Dep't of Educ.*, 910 F.Supp.2d 670 (S.D.N.Y. 2012))
(d) The open question concerning Prong I burden at *federal* appeal level (*Schaffer v. Weast*, 546 U.S. 49 (2005)
(e) Proceeding with caution—exploring the district's Prong I evidentiary obligation at the hearing
(f) The district's obligation to prove appropriateness of "placement" as well as program (*T.Y. v. New York City Dep't of Educ.*, 584 F.3d 412 (2d Cir. 2009)) (Second Circuit refusal to give school district *carte blanche* to select inappropriate placement that cannot meet student's needs).
(g) Asking court to draw "negative inferences"/declare a failure of proof
(h) When "phone" witnesses should be "in person"
(i) "Five day" disclosure rule (normally waive unless truly prejudiced)
(j) Compare IEP disclosures and other educational records before selection at trial for admission into record
(k) Loan agreements/insurance offsets
(l) Making sure to call the right witnesses (why prior prep is crucial)
(m) Calling parent(s) at *end* to "bat cleanup"

(n) Preparing parent(s) in case district calls them on its direct case
(o) When a party seeks to examine the *student* at the hearing

Rebuttal Cases

(a) Ask for proffer?
(b) Possible objection on grounds "rebuttal" case, in actuality, is just direct case, repackaged as surprise and ambush

Trial Brief or Closing Statement on The Record?

(a) 30 page limit
(b) Anticipating appeal to SRO (20 page limit on briefs)
(c) Timeline or chronology?
(d) Eliminating unproven claims?

Appealing from IHO Decision

(a) 10 day advance notice
(b) Perfecting appeal 35 days from decision
(b) Invoking and preserving pendency
(c) Requesting "additional evidence"
(d) 30 day SRO decision timeline (don't hold your breath)
(e) the current SRO backlog
(f) further appeal to district court (4 months) 8 NYCRR § 200.5(k)(3)

Application for Attorneys' Fees As Prevailing Party (20 U.S.C. Sec. 1415(i)(3)(A)-(G))

(a) Limited to parents (except where parents' action was "frivolous" in Rule 11 sense)
(b) Judicially recognized three-year statute of limitations
(c) Application 15 days after favorable federal court ruling
(d) Attempt to resolve fees informally
(e) Expecting a "haircut" from the Court
(f) Maintaining engagement/retainer agreements and sufficient billing records

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SPECIAL EDUCATION LAW UPDATE 2013

November 1, 2013

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When to file the impartial hearing request?

There are several factors for parents to consider, including:

1. The statute of limitations.

2. Whether any of the claims will be rendered moot by a delay in filing?

3. Will a delay in filing impact the student's pendency (i.e., stay-put) placement?

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What should be included in the hearing request?

Under 8 N.Y.C.R.R. § 200.5(i)(1), a hearing request must include the following:

1. the name of the student;
2. the address of the student;
3. the name of the school the student is attending;
4. a description of the nature of the problem, including facts related to the problem; and
5. a proposed resolution of the problem to the extent known and available to the party at the time.

The party who receives the hearing request has 15 days to challenge the sufficiency of the complaint. *See* 8 N.Y.C.R.R. § 200.5(i)(3).

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What should be included in the response to the hearing request?

The party who receives the hearing request has 10 days to send the complaining party a response "that specifically addresses the issues raised in the [complaint] notice." 8 N.Y.C.R.R. § 200.5(i)(5). There is no apparent mechanism for the complaining party to challenge the sufficiency of the response (or even the failure to send a response).

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What happens if the district fails to schedule the resolution session?

If the district fails to schedule the resolution session within the required timelines, the parent may ask the IHO to begin the due process hearing timeline (45 days in New York).

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What happens if the parent refuses to attend the resolution session?

The district must continue to make diligent efforts throughout the remainder of the 30-day resolution period to convince the parent to participate in the resolution session.

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Offer of settlement to cut-off a parent's attorney-fee claim.

When parents allege multiple claims against a school district with varying degrees of merit, the district should make a timely, pre-hearing offer to resolve all of the meritorious claims.

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The burden of proof is on the school district.

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The two-day rule for impartial hearings.

In New York, each party shall have up to one day to present its case at a hearing unless the IHO determines that additional time is necessary for a "full, fair disclosure of the facts required to arrive at a decision[.]" 8 N.Y.C.R.R. § 200.5(j)(3)(xiii).

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The need for speed – hearings are very expensive!

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Object to claims not raised in the complaint.

Once the hearing starts, the parent is foreclosed from amending the hearing request without the district's consent.

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How good are your documents?

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When assessing the student's progress, consider both special education and general education data.

Traditionally, progress has been assessed by reviewing "special education" documents such as the Student's IEP progress reports, which measure the student's progress towards the annual goals in his IEP. But with the onset of response to intervention, school personnel now generate a considerable amount of "general education" data specifically designed to measure a student's progress throughout the school year. RTI approaches include: (1) benchmarking, which provides similar testing several during the school year; and (2) progress monitoring, which consists of repeated (usually weekly) assessments throughout the school year.

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Which witnesses should you call?

Decisions on whom to call to testify can directly impact the outcome of a hearing.

As a general rule, a witness should be called to testify only if he or she is absolutely necessary to prove the party's position.

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Will the parent be considered a prevailing party?

According to the United States Supreme Court, for a plaintiff to achieve prevailing-party status, there must be some "judicially sanctioned change in the legal relationship of the parties[.]" *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 35 IDELR 160 (2001).

This should be considered when formulating hearing strategy.

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Questions?

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Thank you!

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A. Free Appropriate Public Education

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)[1] tailored to meet the unique needs of children with disabilities and "prepare them for further education, employment, and independent living."[2] All services provided under the IDEA are to be at no cost to the parents or student.[3] The right to a FAPE extends to all students in the state between the ages of 3 and 21[4] 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.[5]

1. Termination of FAPE

The right to a FAPE ends when a student graduates with a regular high school diploma.[6] This provision does not apply to students who have received a certificate of attendance or a certificate of graduation that is not a regular high school diploma.[7] Graduation with a high school diploma is considered a change of placement, requiring notice and the right to an impartial hearing.[8] It does not require a reevaluation of the student.[9]

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1 20 U.S.C. § 1401(9).

2 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).

3 20 U.S.C. § 1401(9).

4 20 U.S.C. §§ 1401(9), 1412(a)(1)(A), (B), 1419(b)(2).

5 20 U.S.C. § 1412(a)(1)(B)(ii).

6 34 C.F.R. § 300.102(a)(3)(i).

7 34 C.F.R. § 300.102(a)(3)(ii), (iv).

8 34 C.F.R. § 300.102(a)(3)(iii).

9 34 C.F.R. § 300.305(e)(2).

2. Procedural Violations of FAPE

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." [10] 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.[11] Procedural violations will render an IEP invalid only if it impeded the child's right to a free appropriate public education.[12] 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.[13]

3. Standard –Substantially Appropriate

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 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*.[14]

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10 *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.

11 *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).

12 *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).

13 *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).

14 458 U.S. 176 (1982).

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."[15] Accordingly, students with disabilities are entitled to a "basic floor of opportunity"[16] 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 that instruction."[17] However, the educational benefit provided to the student must be more than "trivial".[18] Most of the courts addressing this issue have found that the IDEA requires that the educational benefit be "meaningful".[19]

Since the Supreme Court issued its decision, little has changed. The United States Court of Appeals for the Second Circuit recognizes 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."[20] Equally important, is its "strong

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15 *Id*. at 192.

16 *Id*. at 200.

17 *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.

18 *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).

19 *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).

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

preference for children with disabilities to be educated, to the maximum extent appropriate, together with their non-disabled peers."[21] 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.[22] The IDEA currently directs that students with disabilities must be prepared "for *further education*, employment and independent living."[23] Students covered by the Act are expected to meet, to the "maximum extent possible," "the challenging expectations that have been established for all children."[24]

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*

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

22 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 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.

23 20 U.S.C. §1400(d)(1)(A) (emphasis added).

24 20 U.S.C. §1400(c)(5)(A).

> *the use of supplementary aids and services* cannot be achieved satisfactorily.[25]

Students with disabilities cannot be removed from "age-appropriate regular classrooms solely because of needed modifications in the general education curriculum."[26] "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."[27] 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 system, availability of space, or administrative convenience."[28] Therefore, students must be "educated in the school [they] would attend if nondisabled," unless the IEP "requires some other arrangement."[29]

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."[30] Also, schools must ensure that supplementary services are available "to be provided in conjunction with regular class placement."[31] The statute defines supplementary aids and services[32] 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

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25 20 U.S.C. § 1412(a)(5)(A) (emphasis added).

26 34 C.F.R. § 300.116(e).

27 71 Fed. Reg. 46587.

28 71 Fed. Reg. 46588.

29 34 C.F.R. § 300.116(c).

30 34 C.F.R. § 300.115.

31 *Id*.

32 20 U.S.C. § 1401(33).

with nondisabled children to the maximum extent appropriate."[33] 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.[34]

1. LRE Requirement

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.,*[35] when determining whether a student proposed placement meets the least restrictive environment requirement.[36] 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 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.[37]

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.[38]

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33 *Id*.

34 8 N.Y.C.R.R. §§ 200.1(m), 200.6(d).

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

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

37 *Id*.

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

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.[39] 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.[40]

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.[41] The continuum must include instruction in regular classes, special classes, special school, home instruction and instruction in hospitals and institutions.[42] A state's funding mechanism must not favor placements that result in a denial of the LRE requirement.[43]

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.[44] 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 parent[45] or a person designated by a school district

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39 *Id.*

40 *Id.*

41 34 C.F.R. § 300.115(a).

42 34 C.F.R. § 300.115(b)(1); 8 N.Y.C.R.R. § 200.6.

43 34 C.F.R. § 300.114(b)(1)(i).

44 8 N.Y.C.R.R. § 200.4(a)

45 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

is permitted to make an initial referral for special education.[46] The referral must be made in writing to the administrator in charge of the Committee on Special Education (CSE),[47] "or to the building administrator [the principal] of the school where the student attends."[48]

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 18 years of age or older, or an emancipated minor.[49] 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.[50]

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. No single measure or assessment may be used as "the sole criterion for determining" an appropriate educational program for a child.[51] The purpose of the evaluation is to assess the relative contribution of cognitive, behavioral,

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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).

46 8 N.Y.C.R.R. § 200.4(a)(1).

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

48 8 N.Y.C.R.R. 200.4(a)

49 8 N.Y.C.R.R. 200.4(a)(2)(i)(1)(a)-(e).

50 8 N.Y.C.R.R. 200.4(a)(2)(iii)(a)-(c).

51 20 U.S.C. § 1414(b)(2)(B).

physical and developmental factors and to obtain information about the student's prospects for participating in the general curriculum.[52]

New York's regulations mandate specific assessments be completed for the comprehensive evaluation.[53] 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.[54] 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.[55]

The results of the evaluation are to be provided to the parents in their "native language or mode of communication."[56] An initial evaluation must be completed within 60 calendar days of receiving a parent's consent to the evaluation,[57] and procedures must be in place to expeditiously complete an evaluation for a student who moves into a school district.[58] Further, the CSE cannot delegate the evaluation to personnel at a proposed site after placement has been effected.[59]

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52 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.

53 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).

54 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).

55 8 N.Y.C.R.R. § 200.4(b)(2).

56 8 N.Y.C.R.R. § 200.4(b)(6)(i)(d)(xii).

57 8 N.Y.C.R.R. § 200.4(b)(7).

58 8 N.Y.C.R.R. § 200.4(b)(6)(i)(d)(xvii).

59 27 Educ. Dep't Rep. 456 (1988); 22 Educ. Dep't Rep. 1 (1982).

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.[60] The notice has specific requirements.[61] Federal and New York State regulations provide that a parent's consent is voluntary and may be revoked at any time.[62] 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."[63] For a student previously identified, the district must seek parental consent prior to any reevaluation.[64] 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.[65]

3. 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.[66] In New York, the CSE fulfills this function for school-age students.[67] Each school district must establish "committees and/or subcommittees on special education as necessary to ensure timely evaluation and placement of students."[68] The CSE is responsible for evaluating and

60 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).

61 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).

62 34 C.F.R. § 300.300(a)(1)(i); 8 N.Y.C.R.R. § 200.1(*l*)(3).

63 8 N.Y.C.R.R. § 200.1(*l*)(3); 34 C.F.R. § 300.300(c)(1)(i).

64 20 U.S.C. § 1414(c)(3); 8 N.Y.C.R.R. § 200.5(b)(1)(i).

65 34 C.F.R. § 300.300(c)(2); 8 N.Y.C.R.R. § 200.5(b)(1)(i)(b).

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

67 The Preschool Committee on Special Education (CPSE) is formed for children ages 3 to 5 and an Early Intervention team is created for children under the age of three.

68 Educ. Law § 4402(1)(b)(1).

recommending the classification and placement of children with disabilities residing within the district. [Committees on Special Education] shall be composed of at least the following members:

(i) the parent;[69]

(ii) one regular education teacher;[70]

(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;[71]

(viii) an additional parent member;[72]

(ix) other persons having knowledge or special expertise as the school district or the parents shall designate; and

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

70 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.

71 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).

72 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).

(x) if appropriate, the student.[73]

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.[74] 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.[75] 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.[76] 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.[77] 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 area of curriculum or related services will be modified or discussed.[78] 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.[79] All excusals must be agreed to by both the parent and the school district and must be

73 Educ. Law § 4402(1)(b)(1)(a).

74 *Id*.

75 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).

76 8 N.Y.C.R.R. § 200.4(d)(4)(i)(a).

77 8 N.Y.C.R.R. § 200.3(f).

78 8 N.Y.C.R.R. § 200.3(f)(1)-(2).

79 8 N.Y.C.R.R. § 200.3(f)(2).

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.[80] 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.[81]

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 days[82] from the date that the parent signed the consent to evaluate the student to implement the placement on the IEP.[83]

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 meeting be "at a *mutually* agreed on time and place."[84] New York State regulations require that the parent receives notice at least five days prior to the meeting.[85] 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

80 8 N.Y.C.R.R. § 200.3(f)(3).

81 8 N.Y.C.R.R. § 200.3(f)(3).

82 *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).

83 8 N.Y.C.R.R. § 200.4(d).

84 34 C.F.R. § 300.322(a) (emphasis added); 8 N.Y.C.R.R. § 200.5(d)(1) (emphasis added).

85 8 N.Y.C.R.R. § 200.5(c)(1), (c)(2)(i).

her right to be accompanied by individuals with knowledge or special expertise about the child.[86] 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.[87]

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.[88] 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,[89] 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 determine that a student needs special education services if the determinant factor is either a lack of appropriate instruction in reading;[90] lack of appropriate instruction in math; or limited English proficiency.[91] Under New York law, a student who requires only a related service still meets the IDEA's

86 8 N.Y.C.R.R. §§ 200.5(c)(2)(i)–(iii).

87 34 C.F.R. § 300.322(d); 8 N.Y.C.R.R. § 200.5(d)(3).

88 8 N.Y.C.R.R. § 200.4(c).

89 "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).

90 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.

91 8 N.Y.C.R.R. § 200.4(c)(2).

eligibility criteria and may, therefore, receive that service in conjunction with a regular education program.[92]

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.[93] The parent must be given notice of this determination.[94] 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).[95]

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).[96] According to NYS Education Department, the IEP must be developed in a particular sequence:[97]

(1) Consider evaluation information;

(2) Determine eligibility for special education services including classification;

(3) Identify present levels of performance and needs in four areas;[98]

(4) Identify measurable postsecondary goals and transition needs;[99]

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

93 8 N.Y.C.R.R. § 200.4(d)(1)(i).

94 8 N.Y.C.R.R. § 200.4(d)(1)(ii).

95 8 N.Y.C.R.R. § 200.4(d)(1)(i).

96 See CPSE.

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

98 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."

(5) Set measurable annual goals;[100]

(6) Report progress to parents;[101]

(7) Special education program and services;[102]

(8) Eligibility for twelve-month (July/August) services;[103]

(9) Testing accommodations;[104]

(10) Transition activities;[105]

(11) Participation in state and district-wide assessments;[106]

(12) Participation in general education;[107]

(13) Special transportation needs;[108]

(14) Determine placement;[109]

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99 *See infra* III.G.6., "Transition Services."

100 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.

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

102 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.

103 *See infra* Part III.G.1., "Twelve-Month Educational Services."

104 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

105 *See infra* III.G.6., "Transition Services."

106 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.

107 *See infra* III.E.2., "Least Restrictive Environment."

108 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/p/%2Croot%2Cdynamic%2CQaCorner%2C12%2C

(15) Implement the IEP;[110]

(16) Review and if appropriate revise IEP;[111]

(17) Conduct Reevaluation.[112]

Starting in 2012, all public schools must use a model IEP form created by the New York State Department of Education.[113] 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.[114] 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.[115] The parents must also be given a copy of the IEP at no charge.[116]

2. Annual Review

Federal and state regulations require that the IEP be reviewed at least annually.[117] 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.[118] When this occurs, the CSE must meet to review the IEP and implement any changes to the student's program within 60 school days.[119]

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109 *See infra* III.F., "Placement Requirements."

110 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.

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

112 8 N.Y.C.R.R. § 200.4(d)(2)(i)–(xii). *See also infra* III.a.3., "Reevaluation."

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

114 34 C.F.R. § 300.323(d)(1).

115 34 C.F.R. § 300.323(d)(2).

116 34 C.F.R. § 300.322(f).

117 34 C.F.R. § 300.343(c)(1); 8 N.Y.C.R.R. § 200.4(f).

118 8 N.Y.C.R.R. § 200.4(e)(4).

119 8 N.Y.C.R.R. § 200.4(d).

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.[120] The student must also be reevaluated before being declassified.[121]

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."[122] 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."[123] 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.'"[124]

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.[125] This notice must fully inform the parents of all their procedural rights.[126] 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

120 34 C.F.R. § 300.303 (emphasis added); *see* 20 U.S.C. § 1414(a)(2).

121 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.

122 8 N.Y.C.R.R. § 200.4(b)(4).

123 *Id*.

124 29 Educ. Dep't Rep. 163, 167 (1989).

125 20 U.S.C. § 1415(b)(3); 8 N.Y.C.R.R. § 200.5(a)(1).

126 20 U.S.C. § 1415(d)(2).

options that the IEP Team considered and the *reasons* why those options were rejected."[127] When the parent's primary language is not English, the notice must be in the dominant language spoken in the home.[128]

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.[129] 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.[130]

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 services, resource rooms, direct and indirect consultant teacher services, transition services . . . , home instruction, and . . . itinerant teachers."[131] 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.[132] In addition, districts must provide students with disabilities with free transportation to and from special classes or programs.[133]

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127 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).

128 8 N.Y.C.R.R. § 200.5(a)(4).

129 Educ. Law § 4402(2)(b)(2).

130 8 N.Y.C.R.R. § 200.4(e).

131 Educ. Law § 4401(2)(a).

132 Educ. Law § 4401(2)(a)–(n).

133 Educ. Law § 4402(2)(d)(4)(a).

A school district is responsible for securing an appropriate placement and may not delegate this responsibility to the parents or BOCES.[134] 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."[135]

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.[136] 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.[137]

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 classes, minimum hours of instruction and teacher certification.[138] All teachers and supervisors in such programs must be certified in appropriate areas of special education.[139] 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.[140]

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

135 *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).

136 20 Educ. Dep't Rep. 488 (1981).

137 18 Educ. Dep't Rep. 118 (1978); 20 Educ. Dep't Rep. 488 (1981); 22 Educ. Dep't Rep. 520 (1983).

138 8 N.Y.C.R.R. § 200.6(b).

139 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).

140 8 N.Y.C.R.R. § 175.5.

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."[141]

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."[142] The pupil's functioning level, individual needs and annual goals in each of these four areas must be included on the IEP.[143] 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;

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141 *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.

142 8 N.Y.C.R.R. § 200.6(f)(4), (h)(2).

143 8 N.Y.C.R.R. § 200.4(d)(2)(i), (iii).

> (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].[144]

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 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.

144 8 N.Y.C.R.R. § 200.1(ww)(3)(i) (emphasis added).

> (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.[145]

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.[146] The district must provide evidence regarding the nature of the disability and functioning levels of the other children in the proposed class.[147] 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.[148]

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.[149]

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145 8 N.Y.C.R.R. § 200.6(a)(3).

146 22 Educ. Dep't Rep. 520 (1983).

147 *Id*.; 22 Educ. Dep't Rep. 463 (1983).

148 26 Educ. Dep't Rep. 183 (1986); 26 Educ. Dep't Rep. 269 (1987).

149 8 N.Y.C.R.R. §§ 200.1(m), 200.6(d).

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.[150] 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.[151] "The composition of the instructional groups . . . [must] be based on the similarity of the individual needs of the students" in the resource room.[152] Students may also receive both consultant teacher and resource room services.[153]

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 schools[154] operating on a period basis, the maximum cannot exceed 25.[155] A district may apply to the commissioner for a variance from the maximum sizes of the instructional groups.[156]

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).[157] For students whose management needs interfere with the instructional process and therefore require an

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150 8 N.Y.C.R.R. § 200.6(f)(1), (2).

151 8 N.Y.C.R.R. § 200.6(f)(3).

152 8 N.Y.C.R.R. § 200.6(f)(4).

153 8 N.Y.C.R.R. § 200.6(d)(2).

154 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).

155 8 N.Y.C.R.R. § 200.6(f)(5).

156 8 N.Y.C.R.R. § 200.6(f)(6).

157 8 N.Y.C.R.R. § 200.6(h)(4).

extra adult in the classroom, the maximum is 12 students with one teacher and at least one aide (12:1+1).[158] "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).[159] 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).[160] 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.[161]

The chronological age range in self-contained classes for students under 16 years of age cannot exceed 36 months.[162] 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).[163] A district may receive a variance from the commissioner of education for both the class size and age limitations upon "documented educational justification."[164]

Children in self-contained special classes must be placed on the basis of similar individual needs.[165] 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

158 8 N.Y.C.R.R. § 200.6(h)(4)(i).

159 8 N.Y.C.R.R. § 200.6(h)(4)(ii)(b).

160 8 N.Y.C.R.R. § 200.6(h)(4)(ii)(a).

161 8 N.Y.C.R.R. § 200.6(h)(4)(iii).

162 8 N.Y.C.R.R. § 200.6(h)(5).

163 *Id*.

164 8 N.Y.C.R.R. § 200.6(h)(6).

165 8 N.Y.C.R.R. § 200.6(h)(2).

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.[166]

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.[167]

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."[168] The New York State Department of Education maintains a register (an "approved list") of private in-state and out-of-state schools qualified to contract for the education of New York's students with disabilities.[169]

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 days[170]) current evaluations (completed within the prior six months) and detailed documentation of the need for the placement.[171] 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."[172] The

166 8 N.Y.C.R.R. § 200.6(h)(7).

167 8 N.Y.C.R.R. § 200.6(g).

168 22 Educ. Dep't Rep. 87 (1982).

169 *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).

170 8 N.Y.C.R.R. § 200.6(j)(3)(i).

171 8 N.Y.C.R.R. § 200.6(j)(1)(i)–(iv).

172 8 N.Y.C.R.R. § 200.6(j)(2)(i)–(iii).

SED must notify the board of education of its decision within 15 business days,[173] 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.[174] 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.[175]

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.[176]

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.[177] The student is first evaluated at a school designated by the Commissioner.[178] 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.[179] For state-supported schools, the results are forwarded to the CSE in the district in which the parents reside, which makes the

173 8 N.Y.C.R.R. § 200.6(j)(3)(ii).

174 8 N.Y.C.R.R. § 200.6(j)(3)(iii), (iv).

175 8 N.Y.C.R.R. § 200.6(j)(4).

176 8 N.Y.C.R.R. § 200.6(j)(5).

177 8 N.Y.C.R.R. § 200.7(d)(1).

178 *Id*.

179 8 N.Y.C.R.R. § 200.7(d)(1)(i).

recommendation as to whether the student should be appointed.[180] The parents may appeal the recommendations of the school[181] or CSE[182] or the decision of the Commissioner.[183]

6. Transition Services

The IDEA requires that school districts plan for students' transition from school to adulthood.[184] 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."[185] 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.[186]

In New York, commencing when a student is age 15 (or younger, if appropriate), the district must conduct comprehensive transition planning.[187] *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

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180 8 N.Y.C.R.R. § 200.7(d)(1)(ii).

181 8 N.Y.C.R.R. § 200.7(d)(1)(i)(f).

182 8 N.Y.C.R.R. § 200.7(d)(1)(iii).

183 8 N.Y.C.R.R. § 200.7(d)(4).

184 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).

185 8 N.Y.C.R.R. § 200.4(b)(6)(viii).

186 20 U.S.C. § 1401(34).

187 8 N.Y.C.R.R. § 200.4(d)(2)(ix).

post-school adult living objectives, and, if appropriate, acquisition of daily living skills and functional vocational adult evaluation."[188]

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.[189]

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.[190]

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.[191] Finally, if the participating 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.[192]

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

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

189 Educ. Law § 4401(2)(n).

190 8 N.Y.C.R.R. § 200.4(d)(2)(ix)(e).

191 8 N.Y.C.R.R. § 200.4(d)(4)(i)(c).

192 8 N.Y.C.R.R. § 200.4(e)(6).

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."[193] "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."[194]

The IEP must identity 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."[195] 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."[196] 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 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."[197] 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.

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193 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.

194 *Id.*

195 *Id*. at 36.

196 *Id*.

197 *Id*. at 37.

H. Special Education Services for Children From Birth Through five years[198]

1. Early Intervention Services

All Infants and toddlers with disabilities,[199] from birth age through two years, are eligible for early intervention services under part C of IDEA.[200] Disabled toddlers and infants are entitled to a wide range of services[201] from qualified personnel[202] 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.[203] The individualized family service plan is required to have specific content[204] such as the child's current levels of development,[205] and a statement of goals the child is expected to achieve.[206] The plan is evaluated once per year, and the family is provided with a review at least every six months.[207] Parental consent is needed before the implementation of any early intervention service.[208] 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.[209]

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

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

199 20 U.S.C. § 1432(5).

200 20 U.S.C. § 1434(1).

201 20 U.S.C. § 1432(E).

202 20 U.S.C. § 1432(F).

203 20 U.S.C. § 1436(a).

204 20 U.S.C. § 1436(d).

205 20 U.S.C. § 1436(d)(1).

206 20 U.S.C. § 1436(d)(3).

207 20 U.S.C. § 1436(b).

208 20 U.S.C. § 1436(e).

209 20 U.S.C. § 1432(g).

administrative decision in state or federal court.[210] 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.[211]

In New York, early intervention services for infants and toddlers with disabilities, from birth through two years, are administered by the Department of Health.[212]

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.[213] A child is eligible to receive preschool special education services on or before his or her third birthday.[214] The process begins with a written referral to the administrator in charge of special education services.[215] Upon receipt of the referral, the school district must contact the parent[216] to obtain consent to evaluate the student.[217] After receiving consent, the school district is required to provide the parent with a list of approved evaluators within their geographic region.[218] Following the parents' selection, the district has to arrange for the evaluation to take place.[219] 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

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210 20 U.S.C. § 1439(A).

211 20 U.S.C. § 1439(B).

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

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

214 8 N.Y.C.R.R. § 200.1(mm)(2).

215 8 N.Y.C.R.R. § 200.16(b)(1)(i).

216 *See supra* note 99.

217 8 N.Y.C.R.R. § 200.16(b)(1)(iv).

218 Educ. Law § 4410(4)(b).

219 8 N.Y.C.R.R. § 200.16(b)(1)(iv).

special education services to the board of education.[220] Parents are entitled to receive a copy of the evaluation[221] and the recommendation.[222] If the parents disagree with the evaluation, they may seek an independent educational evaluation (IEE) at the public's expense.[223]

The IEP is developed at a meeting of the CPSE,[224] and any services provided to the child in the IEP have to be administered in the LRE.[225] 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.[226] 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.[227] The IEP has to be reviewed no less than once a year.[228]

220 8 N.Y.C.R.R. § 200.16(e)(1).

221 8 N.Y.C.R.R. § 200.16(d)(2).

222 8 N.Y.C.R.R. § 200.16(e)(2).

223 8 N.Y.C.R.R. § 200.16(d)(3) *see supra* III.E.3.e.7., "Independent Evaluation at District Expense."

224 8 N.Y.C.R.R. § 200.16(e)(4).

225 8 N.Y.C.R.R. § 200.16(e)(3)(i).

226 8 N.Y.C.R.R. § 200.16(f)(1). II.E.2., "Least Restrictive Environment."

227 8 N.Y.C.R.R. § 200.16(f).

228 8 N.Y.C.R.R. § 200.16(g).

NEW YORK STATE BAR ASSOCIATION

SPECIAL EDUCATION LAW UPDATE - 2013

November 6, 2013
Long Island, New York

Evaluating a Case for FAPE Deprivation: Procedurally & Substantively

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I. WHAT IS A FAPE?

- For a student with a disability, a school district is required to offer a free and appropriate public education ("FAPE"), delivered through an Individual Education Plan ("IEP"). This IEP is considered the "centerpiece" of the IDEIA.
  Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 297 F.3d 195, 197 (2d Cir. 2002).

- The Committee on Special Education ("CSE") must develop each student's IEP at least annually.
  20 U.S.C. § 1414[d][4][A][i].

- An appropriate IEP:
  (a) accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; *Tarlowe v. Dep't of Educ.*, 2008 WL 2736027 (S.D.N.Y. July 3, 2008));
  (b) establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]); and
  (c) provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; *see Application of the Dep't of Educ.*, Appeal No. 07-018; *Application of a Child with a Disability*, Appeal No. 06-059; *Application of the Dep't of Educ.*, Appeal No. 06-029; *Application of a Child with a Disability*, Appeal No. 04-046; *Application of a Child with a Disability*, Appeal No. 02-014; *Application of a Child with a Disability*, Appeal No. 01-095; *Application of a Child Suspected of Having a Disability*, Appeal No. 93-9).

- In developing an IEP, a CSE must consider:
  (a) a student's strengths;
  (b) his or her parents' concerns;
  (c) results of the student's most recent evaluations; and
  (d) the student's academic, developmental, and functional needs
  20 U.S.C. §1414[d][3][A].

II. WAS A FAPE OFFERED?

- To determine whether a FAPE was offered, the court will examine:
  (a) whether the school district complied with the IDEIA's procedural requirements; and
  (b) whether the IEP was "reasonably calculated to enable the child to receive educational benefits."
  See, e.g., Walczak v. Florida Union Free School District, 142 F.3d 119, 129 (2d Cir. 1998), *quoting Board of Educ. v. Rowley*, 458 U.S. 176, 206-207

(1982). *See also, e.g., Cerra v. Pawling Cent. Sch. Dist.*, 427 F.3d 186, 192 (2d Cir. 2005).

WAS THE IEP PROCEDURALLY PROPER?

I. INTRODUCTION

- While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA. *See, e.g., A.C. v. Bd. of Educ.*, 553 F.3d 165, 172 (2d Cir. 2009); *Grim v. Rhinebeck Cent. Sch. Dist.*, 346 F.3d 377, 381 (2d Cir. 2003); *Perricelli v. Carmel Cent. Sch. Dist.*, 2007 WL 465211, at *10 (S.D.N.Y. Feb. 9, 2007)).

II. HOW DO WE KNOW?

- Under the IDEIA, a procedural violation results in a denial of a FAPE when such violation:
  - (a) impedes the student's right to receive a FAPE;
  - (b) significantly impedes the student's parents' right to participate in decision-making concerning the development of an IEP and placement; or
  - (c) causes a deprivation of the student's educational benefits.
- 20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 N.Y.C.R.R. § 200.5[j][4][ii]. *See also, e.g., Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 525-26 (2007); *A.H. v. Dep't. of Educ.*, 2010 WL 3242234, at *2 (2d Cir. Aug. 16, 2010); *D.J. and W.J. v. New York City Dep't of Educ.*, 2013 WL 4400689 (S.D.N.Y. Aug. 15, 2013); *E.H. v. Bd. of Educ.*, 2008 WL 3930028, at *7 (N.D.N.Y. Aug. 21, 2008); *Matrejek v. Brewster Cent. Sch. Dist.*, 471 F. Supp. 2d 415, 419 (S.D.N.Y. 2007), *aff'd*, 2008 WL 3852180 (2d Cir. Aug. 19, 2008)).

- In other words, "parents must articulate how a procedural violation resulted in the IEP's substantive inadequacy or affected the decision-making process," in order to establish a FAPE denial.
  M.W. ex rel. S.W. v. New York City Dept. of Educ., 2013 WL 3868594 at *5 (2d Cir. 2013).

- Essentially, the court looks to "whether the state has complied with the procedures set forth in the IDEA."
  Cerra v. Pawling Cent. School Dist., 427 F.3d 186, 192 (2d Cir. 2005).

III. HOW MUCH DO PROCEDURAL VIOLATIONS MATTER IN DETERMINING WHETHER A FAPE WAS OFFERED?

- "Both Congress and the Supreme Court place great importance on the procedural provisions incorporated into [the IDEA]."
  Evans v. Board of Educ. of Rhinebeck Cent. School Dist., 930 F.Supp. 83, 94 (S.D.N.Y. 1996).

- "…the importance Congress attached to these procedural safeguards cannot be gainsaid."

Board of Educ. v. Rowley, 458 U.S. 176, 205 (1982).

- The Second Circuit has stressed that the IDEA's procedural inquiry is "no mere formality."
  Walczack v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 (2d Cir. 1998).

- "Multiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not."
  R.E. v. New York City Dept. of Educ., 694 F.3d 167, 197 (2012), *referencing Werner v. Clarkstown Cent. Sch. Dist.*, 363 F.Supp.2d 656, 659 (S.D.N.Y. 2005).

- *But see F.B. v. New York City Dep't of Educ.,* 2013 WL 592664, at *13 (S.D.N.Y. Feb. 14, 2013)(the lack of parental counseling, in addition to the lack of a Functional Behavioral Assessment and Behavior Intervention Plan along with other procedural errors, did not "cumulatively" result in the denial of a FAPE since the errors were "more formal than substantive").

IV. EXAMPLE OF PROCEDURAL VIOLATIONS

A. FAILURE TO CONDUCT A FUNCTIONAL BEHAVIORAL ASSESSMENT ("FBA") AND DEVELOP A BEHAVIOR INTERVENTION PLAN ("BIP")

- Pursuant to the Commissioner's Regulations, a school district must conduct an FBA where the student has "behavior [which] impedes his or her learning or that of others."
  8 N.Y.C.R.R. § 200.4(b)(1)(v).

- An FBA is required "as necessary to ascertain the physical, mental, behavioral and emotional factors which contribute to [a] suspected disability[y]."
  8 N.Y.C.R.R. § 200.4(b)(1)(v).

- An FBA includes (but is not limited to):
  (a) identification of the student's problem behavior;
  (b) definition of the student's behavior, using concrete terms;
  (c) identification of contextual factors contributing to the student's behavior (including cognitive and affective factors); and
  (d) an hypothesis regarding the general conditions under which the student engages in the problem behavior, and probable consequences that maintain the behavior
  8 N.Y.C.R.R. § 200.1[r].

- If based on the FBA, it is determined that a student's behavior impedes his learning, then a BIP should be developed, "with strategies to deal with the problem behavior(s)."
  R.E. v. New York City Dept. of Educ., 694 F.3d 167, 190 (2d Cir. 2012); 8 N.Y.C.R.R. § 200.22[b].

- "The failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all…. [S]uch a failure seriously impairs substantive review of the IEP because courts cannot determine what information an FBA would have yielded and whether that information would be consistent with the student's IEP. The entire purpose of an FBA is to ensure that the IEP's drafters have sufficient information about the student's behaviors to craft a plan that will appropriately address those behaviors."
  R.E. v. New York City Dept. of Educ., 694 F.3d 167, 190 (2012), *referencing Harris v. District of Columbia*, 561 F.Supp.2d 63, 68 (D.D.C. 2008)("The FBA is essential to addressing a child's behavioral difficulties, and, as such, it plays an integral role in the development of an IEP.")

- Nevertheless, "[The f]ailure to conduct an FBA… does not render an IEP legally inadequate under the IDEA so long as the IEP adequately identifies a student's behavioral impediments and implements strategies to address that behavior."
- *M.W. ex rel. S.W. v. New York City Dept. of Educ.*, 2013 WL 3868594 at *6 (2d Cir. 2013); *see also, e.g., D.J. and W.J. v. New York City Dep't of Educ.*, 2013 WL 4400689 (S.D.N.Y. Aug. 15, 2013); *M.N. v. New York City Dept. of Educ.*, 700 F.Supp.2d 356, 366 (S.D.N.Y.2010).

- The Second Circuit also has noted that "when an FBA is not conducted, the court must take particular care to ensure that the IEP adequately addresses the child's problem behaviors" in determining whether a FAPE was offered.
  R.E. v. New York City Dept. of Educ., 694 F.3d 167, 190-91 (2012), *referencing A.C. ex rel. M.C. v. Board of Educ. of The Chappaqua Central School Dist.*, 553 F.3d 165, 172 (2d Cir. 2009)(finding an IEP included appropriate strategies for addressing the student's problem behaviors, and that the school district's failure to conduct an FBA did not equal a procedural violation).

- Finally, the Second Circuit has cautioned: "Our precedents have considered the efficacy of IEPs' treatment of behaviors in particular cases; they should not be read as approving the practice of routinely omitting an FBA. New York regulations do not permit this shortcut."
  R.E. v. New York City Dept. of Educ., 694 F.3d 167, 191 (2012).

B. FAILURE TO INCLUDE PARENT COUNSELING AND TRAINING ON AN IEP OF A STUDENT WITH AUTISM

- The Commissioner's Regulations require a school district to offer parent counseling and training to parents of a student with Autism, on the student's IEP.
  8 N.Y.C.R.R. § 200.13[d].

- Parent counseling and training is defined as:
  (a) assisting parents in understanding their child's special education needs;
  (b) providing parents with information regarding child development' and

(c) helping parents acquire necessary skills that will enable them to support implementation of their child's IEP.

8 N.Y.C.R.R. § 200.1(kk).

- "The regulations contemplate parental counseling for the educational benefit of the disabled student by ensuring that the parents are equipped with the skills and knowledge necessary to continue and implement the student's IEP at home." *M.W. ex rel. S.W. v. New York City Dept. of Educ.*, 2013 WL 3868594 at *7 (2d Cir. 2013).

- The Second Circuit has held that while the failure to include parent counseling and training on a student's IEP violates the Commissioner's Regulations, this is a "less serious" procedural failure than failing to conduct an FBA. "Whereas the FBA must be conducted in advance to ensure that the IEP is based on adequate information, the presence or absence of a parent counseling provision does not necessarily have a direct effect on the substantive adequacy of the plan."
  R.E. v. New York City Dept. of Educ., 694 F.3d 167, 191 (2012), *referencing K.E. ex rel. K.E. v. Independent School Dist. No. 15*, 647 F.3d 795, 811 (8th Cir. 2011).

- The Second Circuit also noted that the Commissioner's Regulations require school districts to provide this parent counseling and training, and as such, "remain accountable for their failure to do so no matter the contents of the IEP."
  R.E. v. New York City Dept. of Educ., 694 F.3d 167, 191 (2012). *See also, M.W. ex rel. S.W. v. New York City Dept. of Educ.*, 2013 WL 3868594 at *6 (2d Cir. July 29, 2013).

- Courts have noted that "[e]specially where the recommended placement actually offers parent training and counseling, the failure to specifically note the availability of such training on a child's IEP does not constitute denial of a FAPE." *N.K. and L.W. v. New York City Dep't of Educ.*, 2013 WL 4436528 (S.D.N.Y. Aug. 13, 2013), *referencing R.E.*, 694 F.3d at 195.

- "Though the failure to include parent counseling in the IEP may, in some cases (particularly when aggregated with other violations), result in a denial of FAPE, in the ordinary case that failure, standing alone, is not sufficient to warrant [tuition reimbursement in a *Burlington/Carter* case]."
  R.E. v. New York City Dept. of Educ., 694 F.3d 167, 191 (2012). *See also M.W. ex rel S.W. v. New York City Dept. of Educ.*, 2013 WL 3868594, at *7 (2d Cir. July 29, 2013)("failure to provide counseling ordinarily does not result in a FAPE denial or warrant tuition reimbursement.")

C. FAILURE TO IDENTIFY A SPECIFIC PLACEMENT ON AN IEP

- In New York City, the CSE often includes a class type and ratio on a student's IEP, but not a specific placement. This is acceptable; an IEP need not specify the specific school site recommended for the student. Rather, what must be includes is "the general type of educational program in which a child is placed."

R.E. v. New York City Dept. of Educ., 694 F.3d 167, 191-192 (2012), *citing T.Y. v. New York City Dept. of Educ.*, 584 F.3d 412, 419 (2d Cir. 2009), *in turn quoting Concerned Parents v. N.Y.C. Bd. of Educ.*, 629 F.2d 751, 756 (2d Cir. 1980).

- Although the NYC Department of Education ("NYCDOE") bears the burden of proving the appropriateness of a proposed IEP, it must only demonstrate that the IEP itself is adequate. The NYCDOE need not specify the school or classroom in which it will be implemented. The "educational placement," the adequacy of which the NYCDOE must demonstrate, "refers only to the general type of educational program in which the child is placed." *R.E.*, 694 F.3d at 191 . It "does not refer to a specific location or program." *K.L.A. v. Windham Se. Supervisory Union*, 371 Fed. App'x. 151, 154 (2d Cir.2010)

- However, designing an appropriate IEP in accordance with the procedural and substantive requirements of the IDEA is only the first step. "[The Department] must also implement the IEP, which includes offering placement in a school that can fulfill the requirements set forth in the IEP." *D.C. ex rel. E.B. v. New York City Dep't of Educ.*, 2013 WL 1234864, at *12 (S.D.N.Y. Mar. 26, 2013), *citing O.O. v. District of Columbia*, 573 F.Supp.2d 41, 53 (D.D.C.2008)("The term [FAPE] means special education and related services that ... are provided in conformity with the [IEP]."). *See also J.S. v. Scarsdale Union Free Sch. Dist.*, 826 F.Supp.2d 635, 668 (S.D.N.Y.2011)("When an IEP's services are to be implemented at an outside placement, the recommended placement must not be wholly incapable of providing the services the IEP requires.")

D. FAILURE TO INCLUDE PROPER GOALS AND OBJECTIVES

- An IEP must include "a statement of measurable annual goals" with benchmarks or short-term objectives, including academic and functional goals designed to meet the student's needs that result from the student's disability, to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability.
  20 U.S.C. § 1414[d][1][A][i][II]; 8 N.Y.C.R.R. § 200.4[d][2][iii][b].

- Each annual goal shall include evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee.
  20 U.S.C. § 1414[d][1][A][i][III]; 8 N.Y.C.R.R. § 200.4[d][2][iii].

- "[E]ven where certain goals are overly broad, courts have found an IEP to be satisfactory where short-term objectives" are sufficiently detailed.
  C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *10 (S.D.N.Y. Sept. 22, 2011); *see also D.A.B. v. New York City Dep't of Educ.*, 2013 WL 5016408 (S.D.N.Y. Sept. 14, 2013) ("When an IEP contains a significant number of specific short-term objectives to supplement otherwise broad annual goals, the vagueness of the annual goals alone will not rise to the level of the denial of a FAPE."); *M.Z. v. New York City Dep't of Educ.*, 2013 WL 1314992, at *6 (S.D.N.Y. Mar. 21, 2013)("An IEP is not necessarily defective

solely because the annual goals are stated in general terms, as long as those goals are supported with detailed short-term objectives.").

E. FAILURE TO TREAT PARENTS AS FULL AND EQUAL IEP TEAM MEMEBERS (A.K.A. DENIAL OF MEANINGFUL PARTICIPATION)

- Parents have the right to participate in all meetings with respect to identifying, evaluating, and placing the child. They may examine all of the child's educational records, and should have the opportunity to obtain an independent evaluation.
  20 U.S.C. § 1415[a].

- A CSE's predetermination of a child's IEP can amount to a procedural violation of the IDEA if it deprives the parent of meaningful participation in the IEP process.
  J.G. ex rel. N.G. v. Kiryas Joel Union Free Sch. Dist., 2011 WL 1346845, at *30 (S.D.N.Y 2011), *citing Nack ex rel. Nack v. Orange City Sch. Dist.*, 454 F.3d 604, 610 (6th Cir.2006).

- The IDEA permits parents to play a "significant role" in the development of their child's IEP, which is accomplished by listening to parental concerns and revising an IEP when appropriate.
  Winkelman ex rel. Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 524 (2007)

- "The core of the statute is that the development of the IEP be a cooperative process between the parents and the district, and predetermination by a district of a child's IEP undermines the IDEIA's fundamental goal to give parents a voice in the educational upbringing of their children."
  D.D.-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *10 (E.D.N.Y. Sept. 2, 2011); *see also Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 524 (2007)("parental participation in the development of an IEP is the cornerstone of the IDEA").

- Parental "[p]articipation must be more than a mere form; it must be *meaningful.*"
  Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 858 (6th Cir.2004))(emphasis in original).

- Prior written notice must be given before a school district proposes or refuses to initiate or change, the identification, evaluation, or educational placement of the student, or a provision of FAPE to the student.
  20 U.S.C. § 1415[b][3].

F. FAILURE TO EVALUATE A STUDENT

- A School District must conduct an evaluation of a student receiving special education or related services at least once every three years, unless the parents and the district agree otherwise.
  20 U.S.C. § 1414[a][2][b]; 8 N.Y.C.R.R. § 200.4[b][4].

- In developing an IEP, a CSE is directed to "review existing evaluation data on the child, including
  (i) evaluations and information provided by the parents of the child;
  (ii) current classroom-based, local, or State assessments, and classroombased observations; and
  (iii) observations by teachers and related services providers."
  20 U.S.C. § 1414[c][1][A].

- "[O]n the basis of that review," a CSE then must "identify what additional data, if any, are needed to determine," among other things, "the present levels of academic achievement" of a student.
  20 U.S.C. § 1414[c][1][B].

- The CSE Team is only required to "review existing evaluation data".
  20 U.S.C. § 1414[c][1].

- Any additional assessments need only be conducted if found necessary to fill in gaps in the initial review of existing evaluation data.
  20 U.S.C. § 1414[c][2]; *S.F. v. New York City Dept. of Educ.*, 2011 WL 5419847, *10 (S.D.N.Y. Nov.9, 2011).

- The IDEA "does not compel a school district to perform every sort of test that would arguably be helpful before devising an IEP," particularly where the student already had been subject to relevant evaluations.
  Mackey v. Bd. of Educ. for Arlington Cent. Sch. Dist., 373 F.Supp.2d 292, 299 (S.D.N.Y.2005).

G. FAILURE TO PROPERLY COMPOSE THE CSE

- CSEs are comprised of members appointed by the local school district's board of education, and must include the student's parent(s), a regular or special education teacher, a school board representative, a parent representative, and others."
  R.E., 694 F.3d 167, 175 (2d Cir. 2012), *citing* N.Y. Educ. Law § 4402[1][b][1][a].

- New York state regulations used to require that a CSE include "an additional parent member," unless the parent's declined participation of an additional parent member. As of January 2, 2013, the Commissioner's Regulations were amended to require an additional parent member only if requested in writing by the parent, student, or member of the committee.
  8 N.Y.C.R.R. § 200.3[a][1][viii].

- Court generally have held that improper CSE composition will not rise to the level of FAPE denial.

    - *C.T. v. Croton–Harmon Union Free Sch. Dist.*, 812 F.Supp.2d 420, 430–31 (S.D.N.Y. 2011)("Courts in this Circuit have upheld the validity of an IEP even

where a special education teacher is absent from the CSE meeting. Courts finding that such an error did not deny a student a FAPE considered whether the participants in the meeting had the requisite expertise to ensure that a student's special education options were properly considered.")

- *A.D. v. New York City Dep't of Educ.*, 2013 WL 1155570, at *7 (S.D.N.Y. Mar. 19, 2013)(declining to find a FAPE denied where the member was qualified and the parents had provided no evidence that the member was not qualified to fulfill the position);

- *J.G. ex rel. N.G. v. Kiryas Joel Union Free Sch. Dist.*, 777 F.Supp.2d 606, 646–47 (S.D.N.Y.2011)(finding that a FAPE was not denied despite the fact that a "specially designated special education instructor" was not present at the meeting, because parents' opportunity to participate was not impeded and child was not deprived of educational benefits.)

WAS THE IEP SUBSTANTIVELY PROPER?

I. INTRODUCTION

- A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction"
  Board of Educ. of Hendrick Hudson Central School Dist. v. Rowley, 458 U.S. 176, 203 (1982).

II. GUIDING PRINCIPLES

- The "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP."
  Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 (2d Cir. 1998); *see also Board of Educ. of Hendrick Hudson Central School Dist. v. Rowley*, 458 U.S. 176, 189 (1982).

- The IDEA ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents."
  Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 132 (2d Cir. 1998), *quoting Tucker v. Bay Shore Union Free Sch. Dist.*, 873 F.2d 563, 567 (2d Cir. 1989).

- Additionally, school districts are not required to "maximize" the potential of students with disabilities.
  Board of Educ. of Hendrick Hudson Central School Dist. v. Rowley, 458 U.S. 176, 189, 199 (1982); *Grim v. Rhinebeck Central School Dist.*, 346 F.3d 377, 379 (2d Cir. 2003); *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 132 (2d Cir. 1998).

- A school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement.'"
  Cerra v. Pawling Cent. School Dist., 427 F.3d 186, 195 (2d Cir. 2005), *quoting v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998)(citations omitted); *see also P. v. Newington Bd. of Educ.*, 546 F.3d 111, 118-19 (2d Cir. 2008); *Perricelli v. Carmel Cent. School Dist.*, 2007 WL 465211, at *15 (S.D.N.Y. Feb. 9, 2007).

- The IEP must be "reasonably calculated to provide some 'meaningful' benefit."
  Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 (2d Cir. 1997); *see Board of Educ. of Hendrick Hudson Central School Dist. v. Rowley*, 458 U.S. 176, 192 (1982).

- The student's recommended program must also be provided in the least restrictive environment (LRE).
  20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 N.Y.C.R.R. 200.1[cc], 200.6[a][1]; *P. v. Newington Bd. of Educ.*, 546 F.3d 111, 114 (2d Cir. 2008); *Gagliardo v. Arlington Cent. Sch. Dist.*, 489 F.3d 105 (2d Cir. 2007);

Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119 (2d Cir. 1998); *E.G. v. City Sch. Dist. of New Rochelle*, 606 F. Supp. 2d 364 (S.D.N.Y. 2009); *Patskin v. Bd. of Educ. of Webster Cent. School Dist.*, 583 F. Supp. 2d 422 (W.D.N.Y. 2008).

III. COMMON AREAS WHERE SUBSTANTIVE ISSUES OF A FAPE DEPRIVATION ARISE

A. IMPLEMENTATION

- A district must have an IEP in effect at the beginning of each school year for each student with a disability in its jurisdiction.
  34 C.F.R. § 300.323[a]; 8 NYCRR 200.4[e][1][ii].

- *Cerra v. Pawling Cent. School Dist.*, 427 F.3d 186, 194 (2d Cir. 2005): Although the family might have preferred to receive the IEP sooner, and the Court was sympathetic to the frustration they undoubtedly felt in not receiving it sooner despite repeated requests, the District fulfilled its legal obligations by providing the IEP before the first day of school.

- *Tarlowe v. New York City Bd. of Educ.*, 2008 WL 2736027 (S.D.N.Y. July 3, 2008): An education department's delay does not violate the IDEA so long as the department "still ha[s] time to find an appropriate placement ... for the beginning of the school year in September."

- *Application of a Student with a Disability*, Appeal No. 08-157: Recommendation of an 8:1:1 class that already possessed 8 students was not a denial of FAPE where District had time to request variance or hire additional aide.

- *Application of a Student with a Disability*, Appeal No. 08-088: District's offer of a 12:1+1 special class at a community school within the district, where no space was available for the student at the beginning of the school year, and no time to secure a variance, impeded the student's right to a FAPE and caused a deprivation of educational benefits as afforded under the IDEA.

  The failure to implement must be material. Upon review of a claim that a school district has failed to implement a student's IEP, there is no denial of FAPE unless the aspects of the IEP that were not followed were substantial or, in other words, "material". A party must establish more than a *de minimus* failure to implement all elements of the IEP, and instead must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP.

- *A.P. v. Woodstock Bd. of Educ.*, 2010 WL 1049297 (2d Cir. Mar. 23, 2010): No denial of FAPE for absence of classroom aide where delay was short term and evidence demonstrates that student made progress.;

- *Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811 (9th Cir. 2007): A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled student and the services required by the student's IEP.

- *Catalan v. Dist. of Columbia*, 478 F. Supp. 2d 73 (D.D.C. 2007): Where IEP specified that three speech services be provided on three separate days, district did not deny FAPE when it providing three sessions of speech two days per week.;

- *Fisher v. Stafford Township Bd. of Educ.*, 2008 WL 3523992 (3d Cir. 2008): School board's inability to provide student with autism with classroom aide having specific training called for in student's individual education plan (IEP) for total of 10 days over five-week period was de minimis occurrence, and did not deprive student of FAPE.

- *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1027, n.3 (8th Cir. 2003(10-013): FAPE denied where witnesses testified that behavioral management plan was never adopted in spite of the fact that student's behavior problem was the major concern at every IEP meeting.

B. IEP WON'T BE IMPLEMENTED

- If it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement it.

- *Grim v. Rhinebeck Central School Dist.*, 346 F.3d 377, 381-82 (2d Cir. 2003): The district was not liable for a denial of a FAPE where the challenged IEP was determined appropriate, but the parents chose not to avail themselves of the public school program.

- *Application of a Student with a Disability*, Appeal No. 11-032: A delay in implementing an otherwise appropriate IEP may form a basis for a denial of FAPE only where the student is actually being educated under the plan.

- *Application of Student with a Disability*, Appeal No. 11-055: The district did not have the opportunity to implement the student's IEP as a result of the parent's decision not to enroll the student in the district's school. "Therefore, in this case it would be speculative to determine the degree to which the student may or may not have made educational progress relating to the implementation of the recommended assistive technology had he attended the district's school, even if, assuming for the sake of argument, the district staff would have deviated from the student's IEP". Citing Appeal No. 11-005.

C. EVALUATIONS

- Students must be assessed in all areas of suspected disability, including, "if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities"
  20 U.S.C. § 1414[b][3][B]; 34 C.F.R. § 300.304[c][4]; 8 N.Y.C.R.R. § 200.4[b][6][vii].

- The evaluation must be "sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified"
  34 C.F.R. § 300.304[c][6]; 8 NYCRR 200.4[b][6][ix].

- Moreover, as part of an initial evaluation, the CSE must, as appropriate, "review existing evaluation data on the child" including "evaluations and information provided by the parents of the child"
  20 U.S.C. § 1414[c][1][A][i]; 34 C.F.R. § 300.305[a][1][i]; 8 NYCRR 200.4[b][5][i].

- *Babb v. Knox County Sch. Sys.*, 18 IDELR 1030, 965 F.2d 104 (6th Cir. 1992): The failure to appropriately evaluate student constitutes a denial of a free appropriate public education.

- *Watson v. Kingston City Sch. Dist.*, 43 IDELR 244, 2005 WL 1791553 (2d Cir. 2005): The district is not required to implement the recommendations of the parents private experts and courts will not choose between views of conflicting experts on a controversial issue of educational policy.

- *Application of a Student with a Disability*, Appeal No. 11-041: IEP was not appropriate where the CSE lacked reports from the student's private school concerning the student's social emotional needs and academic performance and representative from the school did not participate in the CSE meeting.

- *Application of the XXXX, Appeal No. 11-040*: There was no denial of FAPE where CSE considered the report from private evaluator but ultimately disagreed with the program recommendation.

- *Z.D. v. Niskayuna*, 2009 WL 1748794 [N.D.N.Y. 2009]: Deference is frequently given to the school district over the opinion of outside professionals as the judgment of those having primary responsibility for formulating an IEP is given considerable weight.

D. ELIGIBILITY

- Eligibility is based upon a two prong test. The student must:
  (a) have a qualifying disability (Autism, Deafness, Deaf-Blindness, Emotional Disturbance, Hearing Impairment, Learning disability, Intellectual Disability, Multiple Disabilities, Orthopedic Impairment, Other Health Impairment, Speech or Language Impairment, Traumatic Brain Injury, or Visual Impairment)
  8 NYCRR 200.1[zz]; *see also J.A. v. East Ramapo School District*, 603 F. Supp 2d 684 (SDNY 2009)(misclassification was not a denial of FAPE where the recommended program and services are otherwise appropriate)
  (b) and require special services and programs approved by the department. The IDEA requires that the disability adversely impact educational performance.

- According to the U.S. Department of Education's Office of Special Education Programs, "the term 'educational performance' as used in the IDEA and its implementing regulations is not limited to academic performance" and whether an impairment adversely affects educational performance "must be determined on a case-by-case basis, depending on the unique needs of a particular child and not based only on discrepancies in age or grade performance in academic subject areas."
  Letter to Clarke, 48 IDELR 77.

- *Corchado v. Bd. of Educ. Rochester City Sch. Dist.*, 86 F. Supp. 2d 168, 176 (W.D.N.Y. 2000): Each child is different and the effect of each child's particular impairment on his or her educational performance is different.

- *Application of the Dep't of Ed.*, Appeal No. 09-136: No adverse impact where CSE acknowledged the student's diagnoses of a conduct disorder, a major depressive disorder, and an oppositional defiant disorder, but determined that these diagnoses were not negatively affecting the student's educational performance as he was performing well academically and socially and the CSE determined that Student's behavioral difficulties stemmed from his disregard for social standards and from his chemical abuse.

- *Application of a Student Suspected of Having a Disability*, Appeal No. 09-117: Academically, the student performed well with grades falling in the B to C range and no adverse impact existed where school psychologist recommended interventions to reduce the student's frustration and strategies for avoiding conflict cycles but testified that the student did not require special education services.

- *Application of the Bd. of Educ.*, Appeal No. 09-087; was not eligible for special education services because there was no discrepancy between his cognitive abilities and educational achievement the student was "cooperative" and functioned independently within the classroom.

- *Muller ex rel. Muller v. Committee on Special Educ. of East Islip Union Free School Dist.*, 145 F.3d 95, 103 (2d Cir. 1998): Student who was required to repeat a grade, needed remedial reading services and failed multiple subjects during successive school years.

- *Application of the Dep't of Educ.*, Appeal No. 08-128: The alleged adverse educational impact on the student of lower grades in one or two classes for a semester did not constitute an adverse impact as the impact was less significant and short lived.

- *Application of the Dep't of Ed.*, Appeal No. 08-112: Denial of FAPE where district did not sufficiently demonstrate that the student's depression and the student's withdrawal from school and inability to complete the 2006-07 school year did not meet the "adversely affects the student's educational performance" requirement for eligibility.

- *Application of the Dep't of Ed.*, Appeal No. 08-099: SRO determined that the hearing record reflects that the student's erratic grades and failure to succeed at school are better attributed to her truancy, drug and alcohol use, and delinquent behavior rather than to any emotional disturbance.

- *Application of a Student Suspected of Having a Disability*, Appeal No. 08-100: No adverse impact where student followed teacher directions, asked questions, listened attentively and took notes, and frequently raised his hand to respond to teacher questions and answered correctly.

- *Application of the Dep't of Educ.*, Appeal No. 08-042: No adverse impact where the student's teachers reported that the student was doing well in class, receiving good grades, demonstrating good effort, working hard and the assessment of the student when he was no longer engaging in substance abuse, indicated that the student was performing well academically, socially and behaviorally.

- *N.C. v. Bedford Cent. Sch. Dist.*, 473 F. Supp. 2d 532, 543 (S.D.N.Y. 2007), *aff'd*, 2008 WL 4874535 (2d Cir. Nov. 12, 2008): Student who had been sexually abused and experienced slight decline in academic performance concomitant with increasing drug use was not a "child with a disability" under federal or New York regulations because it was not clear he suffered from inability to learn over long period of time or to marked degree despite highly traumatic experience he suffered; he did not have difficulty building or maintaining satisfactory interpersonal relationships with peers and teachers, though his heightened aggression and worsening substance abuse problem did not represent behavior that could be considered appropriate under normal circumstances they were not enough, without more, to qualify him for classification as emotionally disturbed.

- *New Paltz Cent. School Dist. v. St. Pierre ex rel. M.S.*, 307 F. Supp. 2d 394 (N.D.N.Y. 2004): After the parents' divorce, student demonstrated 18 point decline in academic performance, failing grades, inappropriate, defiant and disobedient behavior at home and in school, inappropriate behavior and feelings under normal circumstances, pervasive mood of unhappiness and depression and suicide attempts constituted an adverse impact.

- *M.H. v. Monroe-Woodbury Cent. Sch. Dist.*, 2008 WL 4507592 (2d Cir. Oct. 7, 2008): None of several psychological reports suggested that, in order to advance academically, the child needed a residential program to deal with her emotional problems.

- *C.B. v. Department of Education*, 322 F. Appx 20, (2d Cir. 2009): No adverse impact where student's grades and test results demonstrated that she performed well in school before she was diagnosed and at private school thereafter, and psychoeducational assessment and a psychological evaluation determined that student tested above grade-level.

- *A.J. v. Board of Education*, 679 F. Supp 2d 299, (E.D.N.Y. 2010): Although disorder caused student to be impulsive, to require frequent redirection, and to exhibit inappropriate social behaviors and peer interactions, where student was performing at

average to above average levels in the classroom and was progressing well academically, and there was no evidence that student's behavioral problems were preventing him from reaching his full academic potential.

- *Maus v. Wappingers Central School District*, 688 F. Supp 2d 282, (S.D.N.Y. 2010): Adverse effect on "educational performance," as prerequisite for eligibility for special education services under Individuals With Disabilities Education Act (IDEA), must be determined by reference to academic performance.

E. ANNUAL GOALS

- An IEP must include a statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability.
  20 U.S.C. § 1414[d][1][A][i][II]; 34 C.F.R. § 300.320[a][2][i]; 8 N.Y.C.R.R. § 200.4[d][2][iii].

- Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee.
  8 N.Y.C.R.R. §200.4[d][2][iii][b]; *see* 20 U.S.C. § 1414[d][1][A][i][III]; 34 C.F.R. § 300.320[a][3].

- *Application of a Student with a Disability*, Appeal No. 11-008: Although the student's IEP failed to include specific annual goals to address attentional difficulties, organization and staying on task, the CSE recommended academic and social emotional management strategies to address those needs.

- *Application of the XXXX*, Appeal No. 11-025: The absence of a goal for auditory processing was not a denial of FAPE where the IEP included recommendations for graphic organizers, visual aids, class notes, breaks, check-ins and redirection; failure to identify a goal as intended to address expressive or receptive language weaknesses where goals were recommended to address vocabulary, inferencing, sequencing, recall and ability to answer "wh-" questions.

F. CLASS SIZE/GROUPING

- Determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to:
  (a) levels of academic or educational achievement and learning characteristics;
  (b) levels of social development;
  (c) levels of physical development; and

(d) the management needs of the students in the classroom.
8 N.Y.C.R.R. § 200.6[h][2]; *see* 8 N.Y.C.R.R. § 200.1[ww][3][i][a]-[d].

- The social and physical levels of development of the individual students shall be considered to ensure beneficial growth to each student, although neither should be a sole basis for determining placement.
8 N.Y.C.R.R. § 200.6[a][3][ii], [iii].

- Further, the management needs of students may vary and the modifications, adaptations and other resources are to be provided to students so that they do not detract from the opportunities of the other students in the class.
8 N.Y.C.R.R. § 200.6[a][3][iv].

- A "district operating a special class wherein the range of achievement levels in reading and mathematics exceeds three years shall, . . . , provide the [CSE] and the parents and teacher of students in such class a description of the range of achievement in reading and mathematics, . . . , in the class, by November 1st of each year"
8 N.Y.C.R.R. § 200.6[g][7].

- State regulations provide that the chronological age range of students under the age of 16 years of age shall not exceed 36 months for students in special classes (8 N.Y.C.R.R. § 200.6[h][5]). However, the chronological age range of the students is not necessarily determinative of whether a FAPE was offered. In prior decisions, a range outside of 36 months has been found not to rise to the level of a denial of a FAPE if the students are appropriately grouped within the class for instructional purposes.
See Application of the Dep't of Educ., Appeal No. 08-034; *Application of the Dep't of Educ.*, Appeal No. 08-018; *Application of the Bd. of Educ.*, Appeal No. 06-023; *Application of a Child with a Disability*, Appeal No. 06-019; *Application of the Bd. of Educ.*, Appeal No. 06-010); *Application of a Child with a Disability*, Appeal No. 05-102; *Application of a Child with a Disability*, Appeal No. 00-065; *see also Application of a Child with a Disability*, Appeal No. 98-21.

- *Walczak v. Florida Union Free School Dist.*, 142 F.3d 119, 133 (2d Cir. 1998): No denial of FAPE where IEP placed a student in a classroom with students of different intellectual, social, and behavioral needs, as sufficient similarities existed.

- *Application of a Student with a Disability*, Appeal No. 09-082: The age range of the students in the classroom ranged from eleven to fourteen years old and the functional levels of the students in her class ranged from two years below grade level to one year above grade level, supporting a conclusion that based upon the student's classification, age, speech-language needs and the academic and social/emotional functional levels, the recommended classroom would have been appropriate to meet the student's needs.

- *Application of the Dep't of Educ.*, Appeal No. 08-095: Class profiles and the testimony of the special education teacher in the proposed class demonstrated that the student would

have been functionally grouped with other similarly-aged students who had sufficiently similar instructional needs and abilities in both reading and math.

- *Application of the Dep't of Educ.*, Appeal No. 08-018; Although the student was not grouped in accordance with the age-related guidelines as prescribed by State regulations, the hearing record demonstrates that the district's failure to do so did not constitute a denial of a FAPE to the student as the students were grouped appropriately in terms of functional needs (*Application of the Bd. Of Educ.*, Appeal No. 06-023; *Application of the Bd. of Educ.*, Appeal No. 06-010).

G. BEHAVIOR INTERVENTION PLAN

- When a student exhibits behaviors that impede his or her learning or that of others, the Committee must consider appropriate strategies, including positive behavioral interventions, supports, and other strategies to address the behavior. 8 N.Y.C.R.R. § 200.22.

- The District shall consider the development of a Behavioral intervention Plan when
  (a) behaviors are "persistent" despite consistently implemented classroom wide interventions;
  (b) the student's behavior places the student or others at risk of injury;
  (c) the CSE/CPSE is considering more restrictive programs due to behavior; or
  (d) the student's objectionable conduct was determined to be a manifestation of the student disability at a manifestation review meeting.

  Application of Board of Education, Appeal No. 02-039: Denial of FAPE where FBA failed to indicate whether or not behaviors occurred with same frequency, intensity and duration, and FBA and BIP did not sufficiently identify behaviors or interventions.

- *Application of Student with a Disability*, Appeal No. 11-032: Conducting an FBA and preparing a BIP while the student was placed at a private school "would have diminished value" as the CSE had no authority to recommend the private school placement; testimony that FBA and BIP would be prepared upon return to public school was sufficient.

H. PARENT TRAINING

- Provision shall be made for parent counseling and training for the purposes of enabling parents of students with autism to perform appropriate follow-up intervention activities at home.
  8 N.Y.C.R.R. § 200.13[d].

- For parents of students placed in certain special classes, provision shall be made for parent counseling and training for the purposes of enabling parents to perform appropriate follow-up intervention activities at home. 8 N.Y.C.R.R. § 200.6[h][8].

- *M.N. v. NYC Dept of Ed.*, 700 F. Supp. 2d 356, 368 (S.D.N.Y. 2010): The failure to specify parent counseling and training on the student's IEP did not result in a denial of a FAPE where IHO found that School provides a "comprehensive parent training component" through a variety of outreach opportunities to parents including monthly clinic meetings at the school, monthly home visits by the teacher to provide the parents with training, and weekly notes sent home to the parents.

- *M.M. v. New York City Dep't of Educ. Region 9 (Dist. 2)*, 583 F. Supp. 2d 498, 509 (S.D.N.Y. 2008): Record did not reflect that the district was unwilling to provide such services, because it was agreed at the CPSE meeting that home services could be requested at a later date parents received extensive parent training in the past and were actively involved in their child's education, communicating regularly with her teachers and service providers.

- *R.K. v. New York City Dep't of Educ.*, 2011 WL 1131492, at *21 (E.D.N.Y. Jan. 21, 2011), *adopted at* 2011 WL 1131522 (E.D.N.Y. Mar. 28, 2011): Subsequent testimony that parent training would have been provided does not redeem an IEP's failure to include it where there was no evidence that the school district provided the Parents with information about parent counseling and training options. *See also Appeal No. 00–016.*

I. TRANSITION BETWEEN SCHOOLS

- *Appeal of a Student with a Disability*, Appeal No. 11-032: Although the IDEA does not require a "transition plan" as part of a student's IEP when a student moves from one school to another,a review of the hearing record reflects that had the student attended the district placement, the district would nevertheless have offered the student specialized services to assist him in transitioning to the district recommended class.

- *E.Z-L. ex rel. R.L. v. New York City Dept. of Educ.*, 763 F. Supp. 2d 584 (S.D.N.Y. 2011): The Court agrees with the SRO's determination that the DOE was not required to create a "transition plan" for Z.-L. and that the DOE's failure to identify services in E.Z.-L.'s IEP related to her transition from the Rebecca School to the Children's Workshop did not result in the denial of a FAPE.

J. TRANSITION TO POSTSECONDARY LIFE

- The purposes of transition planning is to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 34 CFR §300.1

- Under the regulations, transition services means a coordinated set of activities for a child with a disability that:

> (1) Is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a

disability to facilitate the child's movement from school to post-school activities, including postsecondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;

(2) Is based on the individual child's needs, taking into account the child's strengths, preferences, and interests.

- Beginning not later than the first IEP to be in effect when the child turns 16 (15 in New York), or younger if determined appropriate, and updated annually, the IEP must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills. 8 NYCRR 200.4(d)(2)(ix)

- The District must invite the child with a disability to attend the child's IEP Team meeting if a purpose of the meeting will be the consideration of the postsecondary goals for the child and the transition services needed to assist the child in reaching those goals under Sec. 300.320(b). If the child does not attend the IEP Team meeting, the public agency must take other steps to ensure that the child's preferences and interests are considered. 34 CFR §300.321

- To the extent appropriate, with the consent of the parents or a child who has reached the age of majority, in implementing the requirements of paragraph (b)(1) of this section, the public agency must invite a representative of any participating agency that is likely to be responsible for providing or paying for transition services.

- *High v. Exeter Township School District*, 110 LRP 7642 (E.D.Pa. 2010): No denial of FAPE where IEP goals contemplated student would be reading at 6th grade level and transition goal included attendance at college.

- *Rosinsky v. Green Bay Area School District*, 53 IDELR 193 (E.D.Wis. 2009): No denial of FAPE where district failed to invite public agencies and plan failed to address transition services as parent invited agencies and agency participation was provided.

- *J.L. v. Mercer Island School District*, 109 LRP 48649 (9th Cir. 2009): School district is not required to ensure the student attains postsecondary goals to receive FAPE.

- *K.C. b/n/f M.S. and W.C. v. Mansfield Independent School District*, 618 F. Supp. 2d 568 (N.D. Tex. 2009): The court thus held that the district had no obligation to pay for the student's placement in a music academy for students with cognitive disabilities; transition plan sufficiently accounted for students skills and interests.

- *Lessard v. Wilton-Lyndeborough Cooperative School District*, 518 F.3d 18 (1st Cir. 2008): The absence of a stand-alone transition plan does not constitute a denial of FAPE; various services identified throughout the IEP was sufficient.

- *Board of Education of Township High School District No. 211 v. Ross*, 486F.3d 267 (7th Cir. 2007): No denial of FAPE for absence of transition plan where student was not in a position to benefit from an elaborate transition plan including advanced vocational or educational skills.

- *Marple Newtown School Dist. v. Rafael N*.**,** 2007 WL 2458076: (E.D.Pa. 2007) FAPE denied where IEP stated generic goals that remained static from year to year, there were no vocational or independent learning outcomes in the community component of the IEP, there was no component to prepare the student for medical self-monitoring, and the IEPs did not "take into account Student's strengths or preferences

K. LEAST RESTRICTIVE ENVIRONMENT ("LRE")

- The Second Circuit adopted a two-pronged test for determining whether an IEP places a student in the LRE, considering:

  (a) whether education in the general classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given student, and, if not,
  (b) whether the school has mainstreamed the student to the maximum extent appropriate.
  P. v. Newington Bd. of Ed., 546 F.3d 111, 119-20 (2d Cir. 2008); *see J.S. v. North Colonie Cent. School Dist.*, 586 F. Supp. 2d 74, 82 (N.D.N.Y. 2008); *Patskin v. Board of Educ. of Webster Cent. School Dist.*, 583 F. Supp. 2d 422, 430 (W.D.N.Y. 2008); *see also Oberti v. Board of Educ. of Borough of Clementon School Dist.*, 995 F.2d 1204, 1217-18 (3rd Cir. 1993); *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1048-50 (5th Cir. 1989).

- A determination regarding the first prong, (whether a student with a disability can be educated satisfactorily in a general education class with supplemental aids and services), is made through an examination of a non-exhaustive list of factors, including, but not limited to:

  (a) whether the school district has made reasonable efforts to accommodate the child in a regular classroom;
  (b) 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
  (c) the possible negative effects of the inclusion of the child on the education of the other students in the class."

  P. v. Newington Bd. of Ed., 546 F.3d 111, 120 (2d Cir. 2008); *see also J.S. v. North Colonie Cent. School Dist.*, 586 F. Supp. 2d 74, 82 (N.D.N.Y. 2008); *Patskin v. Board of Educ. of Webster Cent. School Dist.*, 583 F. Supp. 2d 422, 430 (W.D.N.Y. 2008); *see also Oberti v. Board of Educ. of Borough of Clementon School Dist.*, 995 F.2d 1204, 1217-18 (3rd Cir. 1993); *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1048-50 (5th Cir. 1989).

- The Court explained that the inquiry is individualized and fact specific, taking into account the nature of the student's condition and the school's particular efforts to accommodate it.
  P. v. Newington Bd. of Ed., 546 F.3d 111, 120 (2d Cir. 2008).

- If, after examining the factors under the first prong, it is determined that the district was justified in removing the student from the general education classroom and placing the student in a special class, the second prong requires consideration of whether the district has included the student in school programs with nondisabled students to the maximum extent appropriate.
  P. v. Newington Bd. of Ed., 546 F.3d 111, 120 (2d Cir. 2008).

L. EXTENDED SCHOOL YEAR (ESY) SERVICES

- The IDEA regulations specifically provide for the annual consideration of the provision of ESY services to all children with disabilities. 34 C.F.R. § 300.106.

- NYSED guidance states the substantial regression is indicated by a student's inability to maintain developmental levels due to loss of skill competencies or knowledge during the months of July and August.

- The District must consider twelve-month services to prevent substantial regression for students whose management needs are determined to be highly intensive.

- The typical period for of review or reteaching ranges between 20 and 40 school days. As a guideline for determining eligibility for an extended school year program, a review period of eight weeks or more would indicate that substantial regression has occurred.

Evaluating a Case for FAPE Deprivation Procedurally & Substantively

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What is a FAPE?

- F = Free
- A = Appropriate
- P = Public
- E = Education

What is a FAPE?

- 20 USC §1412(a)(1)
  - (1) **Free appropriate public education**
    - (A) **In general**

      A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.

What is a FAPE?

1. Did the school district comply with the procedural requirements of IDEA; and
2. Was the student's IEP "reasonably calculated to enable the child to receive educational benefits." Board of Educ. v. Rowley, 458 U.S. 176 at 206-07, 102 S.Ct. at 3051

Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119,129 (2d Cir.1998); See also Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 191(2d Cir.2005)

Procedural areas of FAPE

- Child Find
- Notice
- Opportunity to be heard
  - CSE or CPSE composition
  - Mediation and hearing rights
  - Appeals
- Consent
  - Evaluations
  - Initial placement

Substantive areas of FAPE

- Child find
- Consent
- Evaluation in all areas of educational need
- IEP
  - Development
  - Implementation
  - Review
- Behavioral intervention
  - Positive
  - BIP

What is a FAPE?

Procedural

(ii) Procedural issues In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies— (I) impeded the child's right to a free appropriate public education;

(II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or

(III) caused a deprivation of educational benefits.

20 USC §1415(f)(3)(E)(ii)

Procedural areas of FAPE

- Notice
  - Before:
    - Any action
    - Any meeting – 5 days before
    - Any change
  - Content
    - Specifics of action, meeting or change
    - Supporting facts
    - Procedural safeguards – when required

20 USC §1414(d)(1)(B & C) and §1414(f); 34 CFR §300.321; NYS Education Law §4402(1)(b)(1)(b-3); 8 NYCRR §200.5(a & c)

Procedural areas of FAPE

- Child find
  - Board of Education undertakes census & register
    - Locate
    - Identify
    - Evaluate
    - Provide FAPE or explain why not

20 USC §1412(a)(3); 34 CFR §300.111; NYS Education Law §4402(1); 8 NYCRR §200.2(a)

Procedural areas of FAPE

- Consent
  - When
    - Evaluations
    - Initial placement
    - Placement in other
  - Informed
    - Form includes specifics of reason for consent
    - Voluntary

20 USC §1414(a)(1)(D), §1414(d)(3)(C); 34 CFR §300.9 & §300.300; NYS Education Law §4402(1); 8 NYCRR §200.5(b)

Procedural areas of FAPE

- Opportunity to be heard
  - CSE or CPSE composition
  - Missing or excused member
    - Notice 5 days before
    - Agreement
  - Request for school physician and now for parent member
    - New York defined members
    - Request 72 hours before, in writing
  - Mutually convenient time & place

20 USC §1414(d)(1)(B & C) and §1414(f); 34 CFR §300.321; NYS Education Law §4402(1)(b)(1)(b-3) & §4410; 8 NYCRR §200.1(j & k) & §200.3

Procedural areas of FAPE

- Mediation
- Impartial hearing – 45 days from end of resolution period
  - Extensions
  - Testimony
  - Timely decision
  - Attorney's fees
- Appeals
  - State Review Officer
    - Timely decision
  - State (Article 78) or Federal Court
- State complaint
  - Systemic violation

20 USC §1415; 34 CFR §300.506 - §300.518, §300.140; NYS Education Law §4404; 8 NYCRR §200.5(h - m) and §200.5(l)

Procedural areas of FAPE

- Statute of limitations
  - Impartial hearing– 2 years
  - Appeal to the SRO
    - Parent – 25 days from decision for notice of review served on Board of Education, and 35 days for petition
    - School district - 35 days for petition served on parent
  - Court – 90 days from SRO decision

20 USC §1415(f)(3)(C) & §1415 (i)(2)(B); 34 CFR §300.511(e) and §300.516(b); §4404(1)(a); 8 NYCRR §200.5(j)(1)(i) and § 279.2

Substantive areas of FAPE

- Child find
  - Board of Education undertakes census & register
    - Locate
    - Identify
    - Evaluate
    - Provide FAPE or explain why not

20 USC §1412(a)(3); 34 CFR §300.111; NYS Education Law §4402(1); 8 NYCRR §200.2(a)

What is a FAPE?

Substantive

Does the School district “provide[s] 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." Walczak, 142 F.3d at 130 (quotations omitted).”

Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186 at 194(2d Cir.2005)

Substantive areas of FAPE

- Evaluation in all areas of educational need
  - New York requires:
    - Physical
    - Psychological
    - Social History
    - Observation
    - **… “and any other appropriate assessments or evaluations”**
  - Revaluations
    - Parent or teacher request
    - Every three years
    - transition

20 USC §1414(a-c); 34 CFR §300.301 - §300.305; NYS Education Law §4401-a(4) and §4402(1); 8 NYCRR §200.4(b)

Substantive areas of FAPE

- IEP
  - Development
    - Consideration of
      - Present levels of performance
      - Individual needs
      - Special considerations
  - Change outside CSE
    - Administrator, teacher and parental agreement
  - Review
    - Annually
    - If change needed – meets goals, lack of progress, change of needs

20 USC §1414(d); 34 CFR §300.22 ; §300.320 & §300.324; NYS Education Law §4401-A (5) & §4402(3)(b)(i) and (ii); 8 NYCRR §200.4(d), (f), and (g)

Substantive areas of FAPE

- Individualized?
  - Reflects the student's individual needs
  - Use of goal banks
- Measurable goals?
  - Specific
  - Quantifiable
- Measurable progress?
  - Independence
  - Greater access to general curriculum
  - Test results

Substantive areas of FAPE

- Program Implementation – per IEP
  - Services provided
    - Lack of continuum
    - Wait lists
  - Times per day and week
  - Start and end dates
    - Loss of time in September and June
  - Consideration of employee absence
    - Leaves
    - Contracting for outside staff

20 USC §1414(d)(2); 34 CFR §300.323; NYS Education Law §4401-a(5); 8 NYCRR §200.4(e)

Substantive areas of FAPE

- Behavioral intervention
  - Functional Behavioral Assessment (FBA)
    - Description of problem behavior
    - Context where behavior occurs
    - Hypothesis as to cause

- 8 NYCRR §200.1(r); see also 20 USC §1415(k)(1)(d)(2); 34 CFR §300.530(d)(ii); NYS Education Law §4402(1)(i) and (j)

Substantive areas of FAPE

- Behavioral intervention plan(BIP)
  - Based on FBA
  - Specific description of problem behavior
  - Global and specific hypotheses of why behavior occurs
  - Services
    - Positive behavioral supports
    - Positive intervention strategies

8 NYCRR §200.1(mmm); see also 20 USC §1415(k)(1)(d)(2); 34 CFR §300.530(d)(ii); NYS Education Law §4402(1)(i) and (j)

NYSBA
SPECIAL EDUCATION LAW UPDATE – 2013
PREPARING A CASE FOR APPEAL

November 6, 2013

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PREPARING A CASE FOR APPEAL

I. INTRODUCTION:

The Individuals with Disabilities Education Act ("IDEA") provides for due process procedures to promptly resolve disputes that arise between parents and school districts, so that children will receive appropriate special education services. *B.C. v. Pine Plains Cent. Sch. Dist.,* 2013 U.S. Dist. LEXIS 127554 at *5 (S.D.N.Y. 2013) citing 20 U.S.C. § 1415(b)(6)-(7). New York State has implemented a two-tiered system of administrative review for disputes regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability...or the provision of a [FAPE] to such a student." *Id.* citing *Id*.; 8 NYCRR § 200.5(i)(1). First, "[p]arents may challenge the adequacy of their child's IEP in an 'impartial due process hearing' before an [Impartial Hearing Officer ("IHO")] appointed by the local board of education." *Id.* citing *E.A.M. ex rel. E.M.*, 2012 U.S. Dist. LEXIS 143266 at *2 (quoting *Gagliardo,* 489 F.3d at 109). Either party may then appeal the IHO's decision to a State Review Officer ("SRO"), an officer of the New York State Education Department, who conducts an impartial review of these proceedings. *Id.*; 34 C.F.R. 300.514(b)(2); 8 NYCRR § 279.1(d).

To initiate an appeal from the IHO's decision to the SRO, state regulations require the petitioning party to effectuate timely personal service of a verified petition upon the respondent. *Id.* at *5-6 citing 8 NYCRR §§ 279.2(b), 279.7, 279.13. If the parent is the party seeking review, the regulations also require the parent to personally serve a notice of intention to seek review upon the school district, "not less than ten days before the service of a copy of the petition upon such school district, and within 25 days from the date of the IHO's decision sought to be reviewed." *Id.* at *6 citing 8 NYCRR § 279.2(b). Petitions for review to the SRO must be served "within 35 days from the date of the decision sought to be reviewed," and, "[i]f the decision has been served by mail upon the petitioner, the date of mailing and the four days thereafter shall be excluded in computing the 25- or 35-day period." *Id.* citing 8 NYCRR § 279.2(b); 8 NYCRR § 279.13. If a petitioner fails to timely initiate an appeal to the SRO, the reasons for failure to timely seek review must be set forth in the petition, and "[t]he SRO, in his or her sole discretion, may excuse a failure to timely serve or file a petition for review...for good cause shown." *Id.* citing 8 NYCRR § 279.13.

Normally such appeal is decided on the papers submitted by the parties (e.g. petition, answer, etc.). However, in the event that an SRO determines oral argument is necessary, it shall direct that such argument be heard at a time and

place which is reasonably convenient to the parties. 8 NYCRR § 279.10. Moreover, the Office of State Review may schedule and direct the attorneys for the parties and any unrepresented party to participate in a pre-review telephone conference with staff counsel. 8 NYCRR § 279.14. The purpose of such conference would be to consider the possibilities of settlement, simplify the issues, resolve procedural problems, or discuss any matters which may aid any expeditious disposition of the appeal. *Id.* In the absence of good cause, the failure of petitioners' attorney, or if unrepresented, petitioner, to attend and participate in such pre-review conference will result in dismissal of the petition by the SRO. *Id.*

Only after exhaustion of these administrative procedures, can an aggrieved party seek independent judicial review in either federal or state court. *Id.* at *6-7 citing *Cave v. E. Meadow Union Free Sch. Dist*., 514 F.3d 240, 245 (2d Cir. 2008) (citing 20 U.S.C. § 1415(i)(2)(A)). A district court may "receive the records of the administrative proceedings" and, if requested by the parties, hear additional evidence. *Id.* citing 20 U.S.C. § 1415(i)(2)(C). The district court then "grant[s] such relief as the court determines is appropriate," based on the preponderance of the evidence. *Id*. Under the statute, "appropriate" relief may include reimbursement for the cost of a private school placement. *Id.* citing *E.A.M. ex rel. E.M*., supra at *2.

II. REQUIRED DOCUMENTATION AND TIMELINES:

A. Notice of Intention to Seek Review (8 NYCRR § 279.2)

1. When It Is Required:

The parent or person in parental relationship to a student with a disability who intends to seek review by the SRO of an IHO's decision must personally serve upon the school district a Notice of Intention to Seek Review in the form set forth in 8 NYCRR § 279.2.

A Notice of Intention to Seek Review shall not be required when the Board of Education initiates an appeal. *Id.*

2. Timeline:

The Notice of Intention to Seek Review must be personally served upon the school district not less than ten (10) days before a copy of the petition is

served, and within twenty-five (25) days from the date of the decision sought to be reviewed. *Id.*

The Petition for Review must be personally served upon the school district within thirty-five (35) days from the date of the decision sought to be reviewed. If the decision has been served by mail upon petitioner, the date of mailing and the four (4) days subsequent thereto shall be excluded in computing the twenty-five (25) or thirty-five (35) day period. *Id.*

B. Notice with Petition (8 NYCRR § 279.3)

Each petition must contain the following Notice set forth in 8 NYCRR § 279.3:

> You are hereby required to appear in this review and to answer the allegations contained in this petition. Your answer must conform with the provisions of the regulations of the Commissioner of Education relating to reviews of this nature, copies of which are available from the Office of State Review of the New York State Education Department, 80 Wolf Road, Suite 203, Albany, NY 12205.
>
> Please take notice that such regulations require that an answer to the petition must be served upon the petitioner, or if petitioner is represented by counsel, upon such counsel, within 10 days after the service of the petition for review, and that a copy of such answer must, within two days after such service, be filed with the Office of State Review of the New York State Education Department, 80 Wolf Road, Suite 203, Albany, NY 12205.
>
> The decision of the State Review Officer shall be based solely on the record before the State Review Officer and shall be final, unless an aggrieved party seeks judicial review.

C. Petition (8 NYCRR § 279.4):

1. Timeline:

The petitioner must file with the Office of State Review the Petition for Review and the Notice of Intention to Seek Review where required, together with proof of service upon the other party to the hearing, within three (3) days after service is complete. *Id.* Filing by facsimile or electronic transmission is not permitted. *Id.* The Petition for Review must "clearly indicate the reasons for challenging the impartial hearing officer's decision, identifying the findings, conclusions and orders to which exceptions are taken, and shall indicate what relief should be granted by the State Review Officer to the petitioner". *Id.*

D. Affidavit of Service (8 NYCRR §275.9):

Within five days after the service of any pleading or paper, the original, together with the affidavit of verification and an affidavit of service, proving the service of a copy such pleading or paper on the other party, must be transmitted to the Office of Counsel, New York State Education Department, State Education Building, Albany, NY 12234. The affidavit of service must be in substantially the form set forth in 8 NYCRR §275.9, and indicate the name and official character of the person upon whom service was made.

The Affidavit of Personal Service, must be signed in the presence of a Notary Public or a Commissioner of Deeds by the person who delivered the Petition, Answer, Reply, etc. The original of the Affidavit should be attached to each pleading.

E. Cross Appeals (8 NYCRR § 279.4):

A respondent who wishes to seek review of an IHO's decision may cross-appeal from all or a part thereof by setting forth a cross-appeal in respondent's answer. A cross-appeal is timely if it is included in the answer, which is served within the time permitted by section 279.5 of the Commissioner's Regulations. The petitioner must answer respondent's cross-appeal within ten (10) days after service of a copy of the answer and cross-appeal and file the answer to the cross-appeal, together with proof of service, with the Office of State Review within two (2) days after service is complete. *Id.* No filing by facsimile or electronic transmission is permitted. *Id.*

F. Answer (8 NYCRR § 279.5):

Respondent shall, within ten (10) days after the date of service of a copy of the petition, answer by either concurring in a statement of facts with petitioner or by service of an answer, with any written argument, memorandum of law, and additional documentary evidence. *Id.* Such answer or agreed statement of facts, together with proof of service of a copy of such documents upon the petitioner, shall be filed with the Office of State Review within two (2) days after such service. *Id.* No filing by facsimile or electronic transmission shall be permitted. *Id.*

G. Additional Pleadings (8 NYCRR §279.6):

No pleading, other than a petition or answer, will be accepted or considered by the SRO, except a reply by petitioner to any procedural defenses interposed by respondent and to any additional documentary evidence served with the answer. *Id.* Such reply must be served upon the opposing party within three (3) days after service of the answer and thereafter shall be filed, along with proof of service, with the Office of State Review within two (2) days after service of the reply is complete. *Id.* No filing by facsimile or electronic transmission is permitted. *Id.*

H. Verification of Pleadings (8 NYCRR § 279.7):

All pleadings must be verified. The petition must be verified by the oath of at least one of the petitioners, except that when the appeal is by a Board of Education, it will be verified by any person who is familiar with the facts underlying the appeal, pursuant to a resolution of such Board authorizing the commencement of such appeal on behalf of such trustees or Board (e.g. superintendent). *Id.*

When the appeal is brought from the action of a school district, verification of the answer must be made by any person who is familiar with the facts underlying the appeal. If two or more respondents are united in interest, verification of the answer must be made by at least one of them, who is familiar with the facts. *Id.*

A reply must be verified in the manner set forth for the verification of an answer. *Id.*

I. Pleadings and Memorandum of Law (8 NYCRR § 279.8):

1. Form:

Documents that do not comply with the requirements listed below may be rejected by the SRO. All pleadings and memoranda of law shall be in the following form:

a. On 8 ½ by 11 inch white paper of good quality, with erasures or interlineations materially defacing the pleadings;

b. Typewritten in black ink, single sided, and text double-spaced (block quotation and footnotes may be single spaced). All text with the exception of page numbering, shall appear on pages containing margins of at least 1 inch. Text shall appear as minimum 12-point type and the Times New Roman font (footnotes may appear as minimum 10-point type and the Times New Roman font). Compacted or other compressed printing features are prohibited;

c. Pleadings shall set forth the allegation of the parties in numbered paragraphs;

d. Pages shall be consecutively numbered and fastened together; and

e. Petition, answer, or memorandum of law shall not exceed twenty (20) pages in length and a Reply shall not exceed ten (10) pages in length. A party shall not circumvent page limitation through incorporation by reference e.g. memorandum of law submitted as a closing statement for impartial hearing. Extensive footnotes may not be used to circumvent page limitations.

2. Citations:

A memorandum of law shall contain a table of contents. *Id.*

3. Petition Answer, Reply and Memorandum of Law

These documents must cite the record on appeal, identify the relevant page number(s) in the hearing decision, transcript, exhibit number, or letter, and if the exhibit consists of multiple pages, the exhibit page number. *Id.*

J. Record (8 NYCRR § 279.9):

1. Introduction:

Whether the Board of Education is the petitioner or the respondent, it must file with the Office of State Review, a copy of the IHO's decision, a bound copy of the transcript from the impartial hearing including a word index for the transcript, an electronic copy of the transcript, copies of pre-hearing conference summaries or transcripts, a copy of the original exhibits accepted into evidence at the hearing, and an index to the exhibits. *Id*.

2. Certification:

The Board of Education must submit a signed certification with the record stating that the record submitted is a true and complete copy of the hearing record before the IHO. *Id*. Where petitioner is a party other than the Board of Education, the Board of Education must file the completed and certified record with the Office of State Review within ten (10) days after service of the notice of the intention to seek review. Where the Board of Education is the petitioner, it must file the record before the IHO together with the petition for review. *Id*.

A SRO may dismiss an appeal by the Board of Education when a complete and certified hearing record is not filed with the petition for review. *Id*. An SRO's dismissal of an appeal from an IHO's decision, when based on procedural grounds, will not be overturned unless it is arbitrary and capricious. *B.C. v. Pine Plains Cent. Sch. Dist.*, 2013 U.S. Dist. LEXIS 127554 at *19-20 citing *R.S.*, 899 F. Supp. 2d at 290-91 (citations omitted); *Kelly*, 2009 WL 3163146 at *5; *Grenon v. Taconic Hills Cent. Sch. Dist*., No. 05 Civ. 1109 (LEK) (RFT), 2006 WL 3751450, at *5 (N.D.N.Y. Dec. 19, 2006). The "arbitrary and capricious" inquiry requires the Court to determine whether the SRO's decision was supported by a consideration of the relevant factors and whether a clear error of judgment occurred. *R.S.*, 899 F. Supp. 2d at 290-91 (citation omitted). "The law of arbitrary and capricious administrative behavior...requires consistency in agencies' application of law," and "ultimately...is a rule of reasonableness" that safeguards against unpredictability. *Id.* citing *Id*. at 291.

K. Additional evidence (8 NYCRR § 279.10(b)):

In the event the SRO determines that additional evidence is necessary, it may seek additional oral testimony or documentary evidence. *Id*. The SRO may conduct hearings for the purpose of taking additional evidence at a time and place which is reasonably convenient to the parties. The procedures for such hearing shall be consistent with the requirements of 8 NYCRR § 200.5(j)(3). (8 NYCRR § 200.5(j)(3) sets forth the school district's responsibilities upon its receipt of a parent's due process complaint or the filing of a school district's due process complaint notice and the rules associated with conducting an impartial hearing).

L. Interim Determinations (8 NYCRR § 279.10(d)):

With the exception of a pendency determination, it is not permissible to appeal an IHO's ruling, decision, or refusal to decide an issue *during a hearing*. *Id*. However, either party may appeal any interim ruling, decision, or refusal to decide an issue to the SRO from a *final determination* of an IHO. *Id*.

M. Extensions of Time to Answer a Reply (8 NYCRR § 279.10(e)):

No party shall be granted an extension of time to answer the petition for review, interpose a cross-appeal, or reply to an answer by the SRO unless timely application is made, upon written notice to all parties. *Id*. Such application shall be in writing, addressed to the Office of State Review, postmarked no later than the date on which the time to answer a reply expires, set forth the reasons for the request, and briefly state whether the other party consents or opposes the application for extension. *Id*. The time to respond to a pleading may not be extended solely by stipulation of the parties or their counsel. *Id*.

N. Computation of days within which service must be made (8 NYCRR § 279.11):

When computing the ten (10) day period in which service of an answer and cross-appeal must be made, the date upon which personal service of the petition was made upon respondent is excluded. *Id*. If the answer was served by mail upon petitioner or petitioner's counsel, the date of mailing and the two (2) days subsequent thereto shall be excluded in the computation of the three (3) day period in which a reply to procedural defenses or a response to additional documentary evidence served with the answer may be served and filed by petitioner. *Id*. If the last day for service of a notice of intention to seek review, a

petition for review, an answer, or response to an answer falls on a Saturday or Sunday, service may be made on the following Monday; if the last day for such service falls on a legal holiday, service may be made on the following business day. *Id.*

O. Decision of SRO (8 NYCRR § 279.12):

The SRO's decision must be based solely upon the record, and is final, unless an aggrieved party seeks judicial review. *Id.* The decision of the SRO must be mailed by the Office of State Review to counsel for petitioner and respondent, parties appearing *pro se* and the Superintendent or Superintendent's designee of the school district involved as a party in the appeal. *Id.* The Superintendent, or the Superintendent's designee, must forward a copy of the decision as soon as practicable to the Principal and Chairperson of the Committee on Special Education of the school involved in developing the most recent Individualized Education Program ("IEP") that was in contention in the appeal. *Id.*

P. Dismissal by SRO (8 NYCRR § 279.13):

An SRO may dismiss *sua sponte* a late petition for review. *Id.* However, an SRO may excuse a failure to timely serve or file a petition for review within the time specified for good cause shown. *Id.* The reasons for such failure shall be set forth in the petition for review. *Id.*

Q. Appeal of SRO Decision:

The Decision of the SRO is final unless either party seeks review, in either State Supreme Court or Federal District Court, within four (4) months from the date of the SRO's decision. *N.Y. Educ. Law § 4404(3)(a).*

III. PENDENCY

During any hearing and appeal, the student will remain in his or her current educational placement. In other words, such placement is considered to be the student's pendency or "stay put" placement. If either party appeals the decision of the SRO to a Court, pendency is as follows:

1. If an SRO issues a placement decision that agrees with the parents, pendency during any subsequent appeal to a Court is the placement decision by the SRO.

2. If the SRO issues a placement decision that agrees with the school district, pendency during the subsequent appeal to a Court is the student's current educational placement.
3. Unless the school district and the parents or persons in parental relationship otherwise agree, the student shall remain in his or her then current educational placement during the pendency of an appeal of an SRO decision to either State or Federal Court, or, if applying for initial admission to a public school, shall be placed in the public school program until all such proceedings have been completed. *N.Y. Educ. Law § 4404(4)(b).*

IV. RECENT COURT AND SRO DECISIONS:

A. B.C. v. Pine Plains Cent. Sch. Dist., 2013 U.S. Dist. LEXIS 127554, supra:

The Court granted, defendant, school district's motion to dismiss, and thus declined to review the merits of Plaintiff's claim because of Plaintiff's failure to timely and properly initiate her appeal to the SRO, and therefore failure to exhaust her administrative remedies under the IDEA. The Court explained in relevant part:

> This Court is bound by the rule established by the Second Circuit in *Cave* and *Polera*, that a plaintiff's failure to satisfy the IDEA's exhaustion requirement deprives the Court of subject matter jurisdiction, and the Court finds no reason to deviate from the line of precedent in this Circuit holding that a plaintiff's procedural errors, such as failure to timely serve or file a petition for SRO review, will be deemed a failure to exhaust administrative remedies. *See, e.g., R.S.*, 899 F. Supp. 2d at 291; *Kelly*, 2009 U.S. Dist. LEXIS 88412, 2009 WL 3163146, at *5; *T.W.*, 891 F. Supp. 2d at 440-41.
>
> There is no dispute that Plaintiff failed to seek review of the IHO's decision in compliance with the practice requirements of Part 279 of the New York State regulations. Plaintiff was represented by experienced counsel, who not only appeared before the Office of State Review ("OSR") on at least nine

> prior occasions, but also received a specific warning from the SRO in this case regarding the importance of compliance with state procedural regulations after the SRO rejected Plaintiff's first attempted petition submission on February 22, 2013. *See* Rushfield Aff., Ex. E (SRO Letter); Rushfield Aff. Ex. B (SRO Decision at 6). Notwithstanding counsel's experience and the SRO's warning, on February 27, 2013, counsel filed a second procedurally defective petition.[3] Most significantly, Plaintiff concedes that she only served the Second Petition upon the District's counsel, but never personally served the District. Pl. Opp. 8. Plaintiff also failed to file or serve a notice of intention to seek review ten days prior to filing the Second Petition. While the SRO had the authority to excuse Plaintiff's untimely service upon a showing of good cause, he declined to do so, and as a result, the IHO's decision became final.

Id. at 20-22.

B. R.S. and M.S., individually and on behalf of their minor child, O.S. v. Bedford Cent. Sch. Dist., 899 F. Supp. 2d 285 (S.D.N.Y. 2012):

Plaintiffs appealed an SRO decision dismissing their appeal as untimely. In dismissing Plaintiffs' appeal, the SRO relied on 8 NYCRR §§ 279.2(b) and 279.13 which provide that "the petition for review shall be personally served upon the school district" within 35 days, *id*. at 279.2(b); and that the SRO, "in his or her sole discretion, may excuse a failure to timely serve or file a petition for review within the time specified for good cause shown," *id*. at 279.13.

In this case Plaintiffs did not dispute that service on the school district was a day late, or show cause for their lateness. The Court granted defendant, school district's motion for summary judgment and denied as moot Plaintiffs' previous motion for an extension of time to file their notice of appeal because Plaintiffs were unable to circumvent the IDEA's exhaustion requirement.

The Court explained:

The Plaintiffs do not assert that the state policy setting a deadline for appeal is "contrary to law" on its face—nor could they. The IDEA grants each state the authority to promulgate its own regulations about administrative procedure. 20 U.S.C. § 1415(a). Filing deadlines are universally conceded to be an appropriate expression of "a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within *a specified period of time* and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Levy v. Aaron Faber, Inc.*, 148 F.R.D. 114, 118 (S.D.N.Y. 1993) (emphasis added), quoting *United States v. Kubrick*, 444 U.S. 111, 117, 100 S. Ct. 352, 62 L. Ed. 2d 259 (1979). Although the Plaintiffs' claim had hardly staled, they do not, and cannot, argue that the deadline is unfairly tight as a matter of due process.

This analysis notwithstanding, applicable New York administrative law allows for an SRO's decision to be overturned if "made in violation of lawful procedure[,] affected by an error of law[,] arbitrary and capricious[,] or an abuse of discretion." N.Y. CPLR § 7803(3); *see also Metro. Assocs. Ltd. P'ship v. N.Y. State Div. of Hous. & Comm'y Renewal*, 206 A.D.2d 251, 614 N.Y.S.2d 502, 502 (N.Y. App. Div. 1994) ("[I]nterpretations [by a state agency] of statutes which it administers are entitled to deference if not unreasonable or irrational.") (internal citation omitted). Under this standard, this Court may not substitute its judgment for that of the SRO's, but must instead determine whether that decision "was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *State of New York Dep't of Soc. Servs. v. Shalala* 21 F.3d 485, 493 (2d Cir. 1994), (internal quotation marks omitted). The SRO's decision, though perhaps overly technical, is not such error. *See Kelly*, 2009 U.S. Dist. LEXIS 88412, 2009 WL 3163146 at *5 (finding that an SRO's dismissal of an appeal for being three days later was neither arbitrary nor capricious).

The law of arbitrary and capricious administrative behavior is well established. It requires consistency in agencies'

> application of law, so that parties in identical circumstances are treated identically. *NLRB v. Washington Star Co*., 732 F.2d 974, 977, 235 U.S. App. D.C. 372 (D.C. Cir. 1984) (invalidating a "sometimes-yes, sometimes-no, sometimes-maybe policy of due dates" for filings). Since parties' circumstances are almost never totally identical, ultimately the rule is a rule of reasonableness. *See Cappadora v. Celebrezze*, 356 F.2d 1, 6 (2d Cir. 1966) (Friendly, J.) ("[O]nce appropriate rules have been established, the discretion conferred in day to day administration cannot have been assumed to extend to unreasonable deviation from such rules on an ad hoc basis at the whim of the Administration."). That is the rule for applications of law from case to case; in statements interpreting the law, arbitrariness and caprice are found when an agency is inconsistent. *Greenstein by Horowitz v. Bane*, 833 F. Supp. 1054, 1071 (S.D.N.Y. 1993) ("Courts owe less deference to an agency interpretation of a regulation that is inconsistent with earlier and later pronouncements it has made . . . .").
>
> The Plaintiffs cite only two instances in which late petition services were excused by the SRO under the "sole discretion" granted to him by the regulations. But they cite no case in which a party was identically situated, including representation by a lawyer who (like theirs) had appeared before the SRO previously. Most notably, they cite no case in which a late service was excused without any showing of good cause whatsoever—a showing the statute explicitly requires. 8 NYCRR § 279.13. Without more, this Court cannot identify an applicable exception to the IDEA's exhaustion requirement. The Court lacks subject-matter jurisdiction and must dismiss the case. Further, finding that the claims are unexhausted also prohibits this Court from granting the Plaintiffs' motion for attorneys' fees. *See Cave*, 514 F.3d at 246-47 (applying the IDEA's exhaustion requirement to a request for attorneys' fees).

Id. at 10-14 (emphasis added).

C. T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438 (W.D.N.Y. 2012):

The Court granted defendant, school district's motion to dismiss, stating in part, "I conclude that plaintiffs have failed to exhaust their administrative remedies, or to plausibly allege that such exhaustion would have been futile, and have failed to state a claim upon which relief can be granted. The defendants' motions to dismiss the complaint pursuant to Fed. R. Civ. Proc. 12(b)(6) (Dkt. #11, #12) are granted, and the complaint is dismissed in its entirety, with prejudice." *Id.* at 13.

The Court explained in relevant part:

> It is well settled that the "IDEA requires an aggrieved party to exhaust all administrative remedies before bringing a civil action in federal [court] . . ." *J.S. v. Attica Central Schools*, 386 F.3d 107, 112 (2d Cir. 2004) (citing 20 U.S.C. §1415(i)(2)). In order to exhaust their administrative remedies, plaintiffs are required to first seek review by an IHO, and then appeal the IHO's decision to the SRO. *See* 8 N.Y.C.R.R. §200.5; *Kelly v. Saratoga Springs City Sch. Dist*., 2009 U.S. Dist. LEXIS 88412 at *8 (S.D.N.Y. 2009). A party's failure to bring a timely appeal renders the IHO's decision final. *Id*. at *10.
>
> No statutory means is provided by which appellants may seek or be granted an extension of time by the SRO to serve a petition outside of the 35-day limitation period. However, the SRO may, in his discretion, choose to excuse the untimeliness of a late-filed appeal, upon a showing of good cause. *See* 8. N.Y.C.R.R. §§ 179.2(b), 279.13. A party whose appeal is dismissed as untimely will be deemed to have failed to exhaust the available administrative remedies, and the courts will be deprived of subject matter jurisdiction over the matter. *See Polera v. Bd. of Educ. of the Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 483 (2d Cir. 2002).
>
> As such, the Court's review of this matter is initially confined to whether the SRO's dismissal of

plaintiffs' untimely appeal was proper. Where an appeal to the SRO has been dismissed as untimely, the SRO's decision must be upheld unless it is arbitrary and capricious. *See Kelly*, 2009 U.S. Dist. LEXIS 88412 at *11-*12; *Grenon v. Taconic Hills Cent. Sch. Dist*., 2006 U.S. Dist. LEXIS 91450 at *13 (N.D.N.Y. 2006). In considering whether the decision was arbitrary and capricious, the Court "must determine whether the agency's decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *State of New York Dep't of Soc. Serv. v. Shalala*, 21 F.3d 485, 492 (2d Cir. 1994).

Here, plaintiffs do not dispute that their appeal to the SRO was filed 66 days after the deadline to do so, or that at 67 pages in length, their petition exceeded the applicable 20-page limit. Nonetheless, plaintiffs contend that the SRO's refusal to accept their petition was "arbitrary and capricious," because the SRO failed to explain in detail why the plaintiffs' proffered reasons did not constitute good cause, and/or because the SRO is generally biased in favor of school districts and against parents with respect to the acceptance of late filings.

Upon review of the pleadings and submissions on this motion, I find that plaintiffs have failed to show that the SRO acted improperly in exercising his discretion to deny plaintiffs' request to excuse the untimeliness of their petition, *sua sponte*. Generally, "[g]ood cause for late filing would be something like postal service error, or in other words, an event that the filing party had no control over." *Grenon*, 2006 U.S. Dist. LEXIS 91450 at *15-*16. Here, the SRO set forth relevant case law wherein good cause was not found (e.g., attorney error or computer difficulties do not comprise good cause), and concluded that the events alleged to have precipitated the plaintiffs' untimely filing — the temporary closure of plaintiffs' counsel's office for

the holidays and/or for a contemporaneous relocation to her home, which commenced mid-way through the limitations period — did not satisfy the good cause standard. While the plaintiffs are correct that the SRO did not provide an in-depth discussion of why conflicting obligations largely within the scheduling control of their counsel did not comprise "good cause" for their untimely filing, the SRO's decision appears to have considered the pertinent factors and cited appropriate law with regard to them. His finding that "a scheduled vacation and other commitments" (Dkt. #1-2) did not constitute good cause for plaintiffs' 66-days-overdue appeal did not require a more detailed explanation, and I find no error of law or fact in his determination.

* * *

In light of these circumstances, the SRO's determination that plaintiffs had failed to demonstrate "good cause" for their substantial delay in appealing the IHO's decision, and in the alternative, that plaintiffs' 67-page submission was properly rejected as failing to comply with the applicable 20-page limit, cannot be said to be arbitrary or capricious. *See generally* 8 N.Y.C.R.R. §279.8(a)(petition shall not exceed 20 pages in length, and non-compliant petitions "may be rejected in the sole discretion of the State Review Officer"); 8 N.Y.C.R.R. §279.13 (SRO may dismiss a late petition *sua sponte*, of may, in his sole discretion, excuse a failure to timely serve or file a petition for good cause shown).

Having concluded that the SRO's dismissal of plaintiffs' appeal was not arbitrary and capricious, the Court lacks subject matter jurisdiction over the plaintiffs' IDEA claims, as well as plaintiffs' claims under other federal statutes — all of which I find could have been remedied through resolution of

> their IDEA claims — and those claims are dismissed. (Citations omitted.)

Id. at 5-10.

D. Appeal No. 12-120 (2013):

Petitioner, school district, appealed the decision of an IHO which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the McCarton School and home-based services for the 2011-2012 school year. The parents cross-appealed and sought modifications to the IHO decision. The SRO dismissed the appeal, finding that the school district failed to properly initiate the appeal, in that the District failed to serve the notice of appeal on a timely basis.

The SRO explained that an appeal from an IHO's decision to an SRO is initiated by timely personal service of a verified petition and other supporting documents upon a respondent (8 NYCRR 279.2(b), (c)). A petition must be personally served within thirty-five (35) days from the date of the IHO's decision to be reviewed (8 NCRR 279.2(b)). Moreover, if the IHO's decision is served by mail upon the petitioner, the date of mailing and four (4) days subsequent thereto shall be excluded in computing the period within which to timely serve the petition. Exceptions to the general rule requiring personal service include the following: (1) if a respondent cannot be found upon diligent search, a petitioner may effectuate service by delivering and leaving the petition and supporting papers at respondent's residence with a person of suitable age and discretion between the hours of six o'clock in the morning and nine o'clock in the evening (8 NYCRR 275.8[a]); (2) the parties agree to waive personal service; or (3) permission is obtained from an SRO to use an alternate method of service (8 NYCRR 275.8[a]). The failure to comply with the personal service requirements of State regulations may result in the dismissal of a petition by an SRO.

In this case, the IHO's decision took place on May 1, 2012, but the decision was distributed by e-mail on May 2, 2012. The district served a notice of petition and petition on the parents by personally delivering and leaving the documents with the doorman of the building where the parents resided and by certified and first class mail on June 6, 2012. The district argued that the thirty-five (35) days should be calculated from the date of distribution, but the SRO ruled that it was proper to count from the date of the IHO's decision and thus, the district missed the June 5, 2012 deadline. While an SRO, in his or her sole discretion, may excuse a failure to timely seek review within the time specified

for good cause shown (8 NYCRR 279.13), the SRO found that the district did not set forth good cause for untimely service and dismissed the appeal.

E. Appeal No. 12-100 (2013):

In this case Petitioner, the school district, appealed from the IHO's decision which denied its motion to dismiss and found the district denied the student a FAPE for the 2011-2012 school year. The SRO dismissed the appeal, before reaching the merits of the case, because the district failed to properly initiate the appeal.

In this case, the district's affidavit of service indicated that the petition was served on parents' counsel, instead of serving the parents personally, which is not permitted by State regulations (see 8 NYCRR 275.8(a); 279.2(b)). Moreover, the parents did not agree to waive service by personal delivery. Accordingly, the SRO dismissed the appeal, finding that while the district filed a reply to the parents' procedural defense, the reply did not assert any reason why the district failed to serve the parents on a timely basis, and there was no record of any attempt to personally serve the parents.

F. Appeal of a Student with a Disability, Appeal No. 12-077 (2012):

Petitioner (the parent) appealed from the decision of an IHO which denied her request to be reimbursed for her son's tuition costs at the Gow School for the 2011-2012 school year.

Here, the parent's affidavits of service indicated that the petition for review was served on the district by mail and on counsel for the district by private overnight delivery service, which is not permitted by state regulations, and the district did not agree to waive service by personal delivery. The parent also did not file a reply responding to the district's procedural defense, or assert in the petition any reason why she could not timely personally serve the district or that the district agreed to waive personal service. There was also no indication in the record that the parent attempted to effectuate personal service of the petition on the district prior to mailing or made a request to an SRO to effectuate service by alternative means. Accordingly, the SRO dismissed the appeal.

G. Appeal of a Student with a Disability, Appeal No. 12-065 (2012):

Petitioners (the parents) appealed from an interim decision of an IHO which ordered the appointment of a *guardian ad litem* for the student. The

impartial hearing began on June 1, 2011, continued for additional hearing dates, but at the time of the appeal had not yet concluded. The IHO ordered the appointment of a *guardian ad litem* in an interim decision. The SRO found that the parents' appeal was premature and dismissed the appeal since the "authority of an SRO in direct appeals from interim decisions of IHOs is limited to pendency placement determinations." The SRO's decision was based upon 8 NYCRR §279.10(d), which states:

> Interim determinations. Appeals from an impartial hearing officer's ruling, decision or refusal to decide an issue prior to or during a hearing shall not be permitted, with the exception of a pendency determination made pursuant to subdivision 4 of section 4404 of the Education Law. However, in an appeal to the State Review Officer from a final determination of an impartial hearing officer, a party may seek review of any interim ruling, decision or refusal to decide an issue.

H. Appeal No. 12-059 (2012):

Petitioner (the district) appealed from the decision of an IHO which ordered it to reimburse respondents (the parents) for a portion of their son's tuition costs at the Norman Howard School for the 2011-2012 school year. The parents cross-appealed, from the IHO's determination which denied their request for full tuition reimbursement.

In this case, the IHO's decision was dated February 4, 2012, but was mailed on February 3, 2012. The date of the mailing and the four days subsequent were excluded in calculating the 35-day period within which the petition needed to be timely served. Therefore, the petition was required to be served personally on the parents no later than March 13, 2012. However, the district personally served the petition upon the parents on or before March 22, 2012, which was nine days late. The district requested the delay be excused, explaining that they failed to serve the petition on a timely basis, because of their belief that the parents were going to serve the district with an appeal. The SRO dismissed the appeal, finding that their reason didn't constitute good cause.

The SRO also noted that even if the district's late petition had been accepted, it would still have been dismissed because while 8 NYCRR 275.8 states that respondents must be served between 6:00 a.m. and 9:00 p.m., the parents here

were served at approximately 9:10 p.m. Therefore, the appeal was dismissed on this ground as well.

I. Application of a Student with a Disability, Appeal No. 12-042 (2012):

Petitioner (the parent) appealed from the decision of an IHO which denied her request to be reimbursed for her son's tuition costs at the Kildonan School for the 2011-2012 school year. The SRO dismissed the appeal holding, "Based upon the aforementioned nonconformities with State regulations including the parent's failure to initiate the appeal in a timely manner with proper service, I will exercise my discretion and dismiss the petition without determination of the merits of the parent's claims (8 NYCRR 279.13; see 8 NYCRR 1279.2(b), (c), 279.11 . . .)"

Specifically, in this appeal personal service of the second petition[1] upon the district did not occur, nor did service occur pursuant to any of the enumerated exceptions to personal service requirement. In this regard the parent's affidavit of service was not filed, as required to show that the second petition was served upon the district, and the district alleged that it was never served with the petition. In the petition, the parent did not offer any explanation for her failure to personally serve the petition. Given that the original petition was rejected by the Office of State Review, and in the absence of any showing that the parent personally served the district with the second petition, obtained an agreed upon waiver of personal service, or obtained permission from an SRO for service by means other than personal service, the SRO found that the parent did not effectuate proper service pursuant to 8 NYCRR 279.2.

Moreover, the SRO found that the appeal had not been initiated in a timely manner with proper service and the cause alleged in the petition was not sufficient to excuse the untimeliness of the parent's appeal. In the instant case, the IHO's decision was dated January 19, 2012. Accordingly, personal service on the district was required no later than February 28, 2012, after excluding the date of mailing and the four days subsequent thereto in calculating the 35-days within which the petition would have been timely served pursuant to 8 NYCRR 279.2(b). The parent failed to set forth any reasons in the petition to explain why she could not personally serve the petition within the requisite time period, and did not file a reply to the procedural defenses interposed by the district in its answer. Moreover, the parent was represented by "experienced counsel who ha[d] previously appeared before the Office of State Review". "Under the circumstances of this case, I find that the petition was not properly served upon the district prior to the

[1] The first petition was rejected by the SRO because it exceeded 20 pages in length and thus failed to comply with 8 NYCRR 279.8(a)(5).

expiration of the parent's time to initiate an appeal (8 NYCRR 279.13; see 8 NYCRR 279.2[b])."

In addition, the SRO held that the parent did not personally serve a notice of intention to seek review upon the district, which resulted in the delay of the hearing record being submitted to the Office of State Review. The SRO also noted that the parent's memorandum of law failed to comply with the regulations as it did not include a table of contents as required by 279.8(a)(6) of the Commissioner's regulations. Finally since the verification appeared to be a copy of the original verification from the rejected petition which was then affixed to the second petition, the SRO held that he could not conclude that the second petition was verified as required by 279.2 of the Commissioner's regulations.

INTRODUCTION

- The Individuals with Disabilities Education Act ("IDEA") provides for due process procedures to promptly resolve disputes that arise between parents and school districts, so that children will receive appropriate special education services. *B.C. v. Pine Plains Cent. Sch. Dist.,* 2013 U.S. Dist. LEXIS 127554 at *5 (S.D.N.Y. 2013) citing 20 U.S.C. § 1415(b)(6)-(7).
- New York State has implemented a two-tiered system of administrative review for disputes regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability...or the provision of a [FAPE] to such a student." *Id.* citing *Id*.; 8 NYCRR § 200.5(i)(1).

INTRODUCTION (Cont'd)

- First, "[p]arents may challenge the adequacy of their child's IEP in an 'impartial due process hearing' before an [Impartial Hearing Officer ("IHO")] appointed by the local board of education." *Id.* citing *E.A.M. ex rel. E.M.*, 2012 U.S. Dist. LEXIS 143266 at *2 (quoting *Gagliardo*, 489 F.3d at 109).
- Either party may then appeal the IHO's decision to a State Review Officer ("SRO"), an officer of the New York State Education Department, who conducts an impartial review of these proceedings. *Id.*; 34 C.F.R. 300.514(b)(2); 8 NYCRR § 279.1(d).

Notice of Intention to Seek Review

When It Is Required:

- The parent or person in parental relationship to a student with a disability who intends to seek review by the SRO of an IHO's decision must personally serve upon the school district a Notice of Intention to Seek Review in the form set forth in 8 NYCRR § 279.2.

Notice of Intention to Seek Review

Timeline:

- The Notice of Intention to Seek Review must be personally served upon the school district not less than ten (10) days before a copy of the petition is served, and within twenty-five (25) days from the date of the decision sought to be reviewed. *Id.*

- The Petition for Review must be personally served upon the school district within thirty-five (35) days from the date of the decision sought to be reviewed. If the decision has been served by mail upon petitioner, the date of mailing and the four (4) days subsequent thereto shall be excluded in computing the twenty-five (25) or thirty-five (35) day period. *Id.*

Notice with Petition (8 NYCRR § 279.3)

- Each petition must contain the Notice set forth in 8 NYCRR § 279.3

Petition (8 NYCRR § 279.4)

Timeline:

- Petitioner must file with the Office of State Review the Petition for Review and the Notice of Intention to Seek Review where required, together with proof of service upon the other party to the hearing, within three (3) days after service is complete. *Id.*

- Filing by facsimile or electronic transmission is not permitted. *Id.*

- The Petition for Review must "clearly indicate the reasons for challenging the impartial hearing officer's decision, identifying the findings, conclusions and orders to which exceptions are taken, and shall indicate what relief should be granted by the State Review Officer to the petitioner". *Id.*

Affidavit of Service (8 NYCRR §275.9)

- Within five days after the service of any pleading or paper, the original, together with the affidavit of verification and an affidavit of service, proving the service of a copy such pleading or paper on the other party, must be transmitted to the Office of Counsel, New York State Education Department, State Education Building, Albany, NY 12234.
- The affidavit of service must be in substantially the form set forth in 8 NYCRR §275.9, and indicate the name and official character of the person upon whom service was made (see attached).
- The Affidavit of Service must be signed in the presence of a Notary Public or a Commissioner of Deeds by the person who delivered the Petition, Answer, Reply, etc. The original of the Affidavit should be attached to each pleading.

Cross Appeals (8 NYCRR § 279.4)

- A respondent who wishes to seek review of an IHO's decision may cross-appeal from all or a part thereof by setting forth a cross-appeal in respondent's answer. A cross-appeal is timely if it is included in the answer, which is served within the time permitted by section 279.5 of the Commissioner's Regulations.
- The petitioner must answer respondent's cross-appeal within ten (10) days after service of a copy of the answer and cross-appeal and file the answer to the cross-appeal, together with proof of service, with the Office of State Review within two (2) days after service is complete. *Id.* No filing by facsimile or electronic transmission is permitted. *Id.*

Answer (8 NYCRR § 279.5)

- Respondent shall, within ten (10) days after the date of service of a copy of the petition, answer by either concurring in a statement of facts with petitioner or by service of an answer, with any written argument, memorandum of law, and additional documentary evidence. *Id.*
- Such answer or agreed statement of facts, together with proof of service of a copy of such documents upon the petitioner, shall be filed with the Office of State Review within two (2) days after such service. *Id.* No filing by facsimile or electronic transmission shall be permitted. *Id.*

Additional Pleadings (8 NYCRR §279.6)

- No pleading, other than a petition or answer, will be accepted or considered by the SRO, except a reply by petitioner to any procedural defenses interposed by respondent and to any additional documentary evidence served with the answer. *Id.*
- Such reply must be served upon the opposing party within three (3) days after service of the answer and thereafter shall be filed, along with proof of service, with the Office of State Review within two (2) days after service of the reply is complete. *Id*.
- No filing by facsimile or electronic transmission is permitted. *Id.*

Verification of Pleadings (8 NYCRR § 279.7)

- All pleadings must be verified. The petition must be verified by the oath of at least one of the petitioners, except that when the appeal is by a Board of Education, it will be verified by any person who is familiar with the facts underlying the appeal, pursuant to a resolution of such Board authorizing the commencement of such appeal on behalf of such trustees or Board (e.g. superintendent). *Id.*

- When the appeal is brought from the action of a school district, verification of the answer must be made by any person who is familiar with the facts underlying the appeal. If two or more respondents are united in interest, verification of the answer must be made by at least one of them, who is familiar with the facts. *Id.*

- A reply must be verified in the manner set forth for the verification of an answer. *Id.*

Pleadings and Memorandum of Law (8 NYCRR § 279.8)

Form:

- Documents that do not comply with the requirements listed below may be rejected by the SRO. All pleadings and memoranda of law shall be in the following form:
  - a. On 8 ½ by 11 inch white paper of good quality, with erasures or interlineations materially defacing the pleadings;
  - b. Typewritten in black ink, single sided, and text double-spaced (block quotation and footnotes may be single spaced). All text with the exception of page numbering, shall appear on pages containing margins of at least 1 inch. Text shall appear as minimum 12-point type and the Times New Roman font (footnotes may appear as minimum 10-point type and the Times New Roman font). Compacted or other compressed printing features are prohibited;
  - c. Pleadings shall set forth the allegation of the parties in numbered paragraphs;

Pleadings and Memorandum of Law (8 NYCRR § 279.8) (cont'd)

- d. Pages shall be consecutively numbered and fastened together; and

- e. Petition, answer, or memorandum of law shall not exceed twenty (20) pages in length and a Reply shall not exceed ten (10) pages in length. A party shall not circumvent page limitation through incorporation by reference e.g. memorandum of law submitted as a closing statement for impartial hearing. Extensive footnotes may not be used to circumvent page limitations.

Petition Answer, Reply and Memorandum of Law

Pleadings and Memorandum of Law:

These documents must cite the record on appeal, identify the relevant page number(s) in the hearing decision, transcript, exhibit number, or letter, and if the exhibit consists of multiple pages, the exhibit page number. *Id.*

Record (8 NYCRR § 279.9)

Introduction:

- Whether the Board of Education is the petitioner or the respondent, it must file with the Office of State Review, a copy of the IHO's decision, a bound copy of the transcript from the impartial hearing including a word index for the transcript, an electronic copy of the transcript, copies of pre-hearing conference summaries or transcripts, a copy of the original exhibits accepted into evidence at the hearing, and an index to the exhibits. *Id*.

Record (8 NYCRR § 279.9) (Cont'd)

Certification:

- The Board of Education must submit a signed certification with the record stating that the record submitted is a true and complete copy of the hearing record before the IHO. *Id*. (See draft copy of such certifications attached hereto).
- Where petitioner is a party other than the Board of Education, the Board of Education must file the completed and certified record with the Office of State Review within ten (10) days after service of the notice of the intention to seek review.
- Where the Board of Education is the petitioner, it must file the record before the IHO together with the petition for review. *Id*.

Record (8 NYCRR § 279.9) (Cont'd)

Certification (cont'd):

- An SRO may dismiss an appeal by the Board of Education when a complete and certified hearing record is not filed with the petition for review. *Id*. An SRO's dismissal of an appeal from an IHO's decision, when based on procedural grounds, will not be overturned unless it is arbitrary and capricious. *B.C. v. Pine Plains Cent. Sch. Dist.,* 2013 U.S. Dist. LEXIS 127554 at *19-20.

Record (8 NYCRR § 279.9) (Cont'd)

- The "arbitrary and capricious" inquiry requires the Court to determine whether the SRO's decision was supported by a consideration of the relevant factors and whether a clear error of judgment occurred. *R.S.*, 899 F. Supp. 2d at 290-91 (citation omitted). "The law of arbitrary and capricious administrative behavior...requires consistency in agencies' application of law," and "ultimately...is a rule of reasonableness" that safeguards against unpredictability. *Id.* citing *Id*. at 291.

Additional evidence (8 NYCRR § 279.10(b))

- In the event the SRO determines that additional evidence is necessary, it may seek additional oral testimony or documentary evidence. *Id*.
- The SRO may conduct hearings for the purpose of taking additional evidence at a time and place which is reasonably convenient to the parties.
- The procedures for such hearing shall be consistent with the requirements of 8 NYCRR § 200.5(j)(3).
- (8 NYCRR § 200.5(j)(3) sets forth the school district's responsibilities upon its receipt of a parent's due process complaint or the filing of a school district's due process complaint notice and the rules associated with conducting an impartial hearing).

Interim Determinations (8 NYCRR § 279.10(d))

- With the exception of a pendency determination, it is not permissible to appeal an IHO's ruling, decision, or refusal to decide an issue *during a hearing*. *Id*. However, either party may appeal any interim ruling, decision, or refusal to decide an issue to the SRO from a *final determination* of an IHO. *Id*.

Extensions of Time to Answer (8 NYCRR § 279.10(e))

- No party shall be granted an extension of time to answer the petition for review, interpose a cross-appeal, or reply to an answer by the SRO unless timely application is made, upon written notice to all parties. *Id*.
- Such application shall be in writing, addressed to the Office of State Review, postmarked no later than the date on which the time to answer a reply expires, set forth the reasons for the request, and briefly state whether the other party consents or opposes the application for extension. *Id*.
- The time to respond to a pleading may not be extended solely by stipulation of the parties or their counsel. *Id*.

Computation of Days

- When computing the ten (10) day period in which service of an answer and cross-appeal must be made, the date upon which personal service of the petition was made upon respondent is excluded. *Id*.
- If the answer was served by mail upon petitioner or petitioner's counsel, the date of mailing and the two (2) days subsequent thereto shall be excluded in the computation of the three (3) day period in which a reply to procedural defenses or a response to additional documentary evidence served with the answer may be served and filed by petitioner. *Id*.

Computation of Days (Cont'd)

- If the last day for service of a notice of intention to seek review, a petition for review, an answer, or response to an answer falls on a Saturday or Sunday, service may be made on the following Monday; if the last day for such service falls on a legal holiday, service may be made on the following business day. *Id*.

Decision of SRO (8 NYCRR § 279.12)

- The SRO's decision must be based solely upon the record, and is final, unless an aggrieved party seeks judicial review. *Id*.
- The decision of the SRO must be mailed by the Office of State Review to counsel for petitioner and respondent, parties appearing *pro se* and the Superintendent or Superintendent's designee of the school district involved as a party in the appeal. *Id*.
- The Superintendent, or the Superintendent's designee, must forward a copy of the decision as soon as practicable to the Principal and Chairperson of the Committee on Special Education of the school involved in developing the most recent Individualized Education Program ("IEP") that was in contention in the appeal. *Id*.

Dismissal by SRO (8 NYCRR § 279.13)

- An SRO may dismiss *sua sponte* a late petition for review. *Id*.
- However, an SRO may excuse a failure to timely serve or file a petition for review within the time specified for good cause shown. *Id*.
- The reasons for such failure shall be set forth in the petition for review. *Id.*

Appeal of SRO Decision

- The Decision of the SRO is final unless either party seeks review, in either State Supreme Court or Federal District Court, within four (4) months from the date of the SRO's decision. *N.Y. Educ. Law § 4404(3)(a).*

PENDENCY

- If an SRO issues a placement decision that agrees with the parents, pendency during any subsequent appeal to a Court is the placement decision by the SRO.
- If the SRO issues a placement decision that agrees with the school district, pendency during the subsequent appeal to a Court is the student's current educational placement.
- Unless the school district and the parents or persons in parental relationship otherwise agree, the student shall remain in his or her then current educational placement during the pendency of an appeal of an SRO decision to either State or Federal Court, or, if applying for initial admission to a public school, shall be placed in the public school program until all such proceedings have been completed. *N.Y. Educ. Law § 4404(4)(b).*

RECENT COURT AND SRO DECISIONS

B.C. v. Pine Plains Cent. Sch. Dist., 2013 U.S. Dist. LEXIS 127554, supra:

- The Court granted, defendant, school district's motion to dismiss, and thus declined to review the merits of Plaintiff's claim because of Plaintiff's failure to timely and properly initiate her appeal to the SRO, and therefore failure to exhaust her administrative remedies under the IDEA.

R.S. and M.S., individually and on behalf of their minor child, O.S. v. Bedford Cent. Sch. Dist., 899 F. Supp. 2d 285 (S.D.N.Y. 2012)

- Plaintiffs appealed an SRO decision dismissing their appeal as untimely. In dismissing Plaintiffs' appeal, the SRO relied on 8 NYCRR §§ 279.2(b) and 279.13 which provide that "the petition for review shall be personally served upon the school district" within 35 days, *id*. at 279.2(b); and that the SRO, "in his or her sole discretion, may excuse a failure to timely serve or file a petition for review within the time specified for good cause shown," *id*. at 279.13.

- In this case Plaintiffs did not dispute that service on the school district was a day late, or show cause for their lateness. The Court granted defendant, school district's motion for summary judgment and denied as moot Plaintiffs' previous motion for an extension of time to file their notice of appeal because Plaintiffs were unable to circumvent the IDEA's exhaustion requirement.

T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438 (W.D.N.Y. 2012)

- The Court granted defendant, school district's motion to dismiss, stating in part, "I conclude that plaintiffs have failed to exhaust their administrative remedies, or to plausibly allege that such exhaustion would have been futile, and have failed to state a claim upon which relief can be granted. The defendants' motions to dismiss the complaint pursuant to Fed. R. Civ. Proc. 12(b)(6) (Dkt. #11, #12) are granted, and the complaint is dismissed in its entirety, with prejudice." *Id.* at 13.

Appeal No. 12-120 (2013)

- Petitioner, school district, appealed the decision of an IHO which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the McCarton School and home-based services for the 2011-2012 school year. The parents cross-appealed and sought modifications to the IHO decision. The SRO dismissed the appeal, finding that the school district failed to properly initiate the appeal, in that the District failed to serve the notice of appeal on a timely basis.

Appeal No. 12-100 (2013)

- Petitioner, school district, appealed from the IHO's decision which denied its motion to dismiss and found the district denied the student a FAPE for the 2011-2012 school year. The SRO dismissed the appeal, before reaching the merits of the case, because the district failed to properly initiate the appeal.

- The district's affidavit of service indicated that the petition was served on parents' counsel, instead of serving the parents personally, which is not permitted by State regulations (see 8 NYCRR 275.8(a); 279.2(b)). Moreover, the parents did not agree to waive service by personal delivery. Accordingly, the SRO dismissed the appeal, finding that while the district filed a reply to the parents' procedural defense, the reply did not assert any reason why the district failed to serve the parents on a timely basis, and there was no record of any attempt to personally serve the parents.

Appeal No. 12-077 (2012)

- Petitioner (the parent) appealed from the decision of an IHO which denied her request to be reimbursed for her son's tuition costs at the Gow School for the 2011-2012 school year.

- The parent's affidavits of service indicated that the petition for review was served on the district by mail and on counsel for the district by private overnight delivery service, which is not permitted by state regulations, and the district did not agree to waive service by personal delivery.

Appeal No. 12-077 (2012) (Cont'd)

- The parent also did not file a reply responding to the district's procedural defense, or assert in the petition any reason why she could not timely personally serve the district or that the district agreed to waive personal service.
- There was also no indication in the record that the parent attempted to effectuate personal service of the petition on the district prior to mailing or made a request to an SRO to effectuate service by alternative means. Accordingly, the SRO dismissed the appeal.

Appeal No. 12-065 (2012)

- Petitioners (the parents) appealed from an interim decision of an IHO which ordered the appointment of a *guardian ad litem* for the student. The impartial hearing began on June 1, 2011, continued for additional hearing dates, but at the time of the appeal had not yet concluded. The IHO ordered the appointment of a *guardian ad litem* in an interim decision. The SRO found that the parents' appeal was premature and dismissed the appeal since the "authority of an SRO in direct appeals from interim decisions of IHOs is limited to pendency placement determinations." The SRO's decision was based upon 8 NYCRR §279.10(d).

Appeal No. 12-059 (2012)

- Petitioner (the district) appealed from the decision of an IHO which ordered it to reimburse respondents (the parents) for a portion of their son's tuition costs at the Norman Howard School for the 2011-2012 school year. The parents cross-appealed, from the IHO's determination which denied their request for full tuition reimbursement.

Appeal No. 12-059 (2012) (Cont'd)

- The IHO's decision was dated February 4, 2012, but was mailed on February 3, 2012. The date of the mailing and the four days subsequent were excluded in calculating the 35-day period within which the petition needed to be timely served. Therefore, the petition was required to be served personally on the parents no later than March 13, 2012.
- However, the district personally served the petition upon the parents on or before March 22, 2012, which was nine days late. The district requested the delay be excused, explaining that they failed to serve the petition on a timely basis, because of their belief that the parents were going to serve the district with an appeal. The SRO dismissed the appeal, finding that their reason didn't constitute good cause.

Appeal No. 12-059 (2012) (Cont'd)

- The SRO also noted that even if the district's late petition had been accepted, it would still have been dismissed because while 8 NYCRR 275.8 states that respondents must be served between 6:00 a.m. and 9:00 p.m., the parents here were served at approximately 9:10 p.m. Therefore, the appeal was dismissed on this ground as well.

Appeal No. 12-042 (2012)

- Petitioner (the parent) appealed from the decision of an IHO which denied her request to be reimbursed for her son's tuition costs at the Kildonan School for the 2011-2012 school year. The SRO dismissed the appeal holding, "Based upon the aforementioned nonconformities with State regulations including the parent's failure to initiate the appeal in a timely manner with proper service, I will exercise my discretion and dismiss the petition without determination of the merits of the parent's claims (8 NYCRR 279.13; see 8 NYCRR 1279.2(b), (c), 279.11 . . .)"

Appeal No. 12-042 (2012) (Cont'd)

- In this appeal personal service of the second petition* upon the district did not occur, nor did service occur pursuant to any of the enumerated exceptions to personal service requirement. In this regard the parent's affidavit of service was not filed, as required to show that the second petition was served upon the district, and the district alleged that it was never served with the petition.

*The first petition was rejected by the SRO because it exceeded 20 pages in length and thus failed to comply with 8 NYCRR 279.8(a)(5).

Appeal No. 12-042 (2012) (Cont'd)

- In the petition, the parent did not offer any explanation for her failure to personally serve the petition. Given that the original petition was rejected by the Office of State Review, and in the absence of any showing that the parent personally served the district with the second petition, obtained an agreed upon waiver of personal service, or obtained permission from an SRO for service by means other than personal service, the SRO found that the parent did not effectuate proper service pursuant to 8 NYCRR 279.2.

Appeal No. 12-042 (2012) (Cont'd):

- The SRO found that the appeal had not been initiated in a timely manner with proper service and the cause alleged in the petition was not sufficient to excuse the 42 of the parent's appeal.
- In the instant case, the IHO's decision was dated January 19, 2012. Accordingly, personal service on the district was required no later than February 28, 2012, after excluding the date of mailing and the four days subsequent thereto in calculating the 35-days within which the petition would have been timely served pursuant to 8 NYCRR 279.2(b).

Appeal No. 12-042 (2012) (Cont'd):

- The parent failed to set forth any reasons in the petition to explain why she could not personally serve the petition within the requisite time period, and did not file a reply to the procedural defenses interposed by the district in its answer.
- The parent was represented by "experienced counsel who ha[d] previously appeared before the Office of State Review".
- "Under the circumstances of this case, I find that the petition was not properly served upon the district prior to the expiration of the parent's time to initiate an appeal (8 NYCRR 279.13; see 8 NYCRR 279.2[b])."

Appeal No. 12-042 (2012) (Cont'd):

- In addition, the SRO held that the parent did not personally serve a notice of intention to seek review upon the district, which resulted in the delay of the hearing record being submitted to the Office of State Review.
- The SRO also noted that the parent's memorandum of law failed to comply with the regulations as it did not include a table of contents as required by 279.8(a)(6) of the Commissioner's regulations.
- Finally since the verification appeared to be a copy of the original verification from the rejected petition which was then affixed to the second petition, the SRO held that he could not conclude that the second petition was verified as required by 279.2 of the Commissioner's regulations.

NYSBA

SPECIAL EDUCATION LAW UPDATE – 2013

FEE SHIFTING UNDER THE IDEA - ANALYSIS OF FEE AWARDS

November 6, 2013

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FEE SHIFTING UNDER THE IDEA – ANALYSIS OF FEE AWARDS

I. INTRODUCTION

The Individual with Disabilities Education Act ("IDEA") contains a fee shifting provision which "award(s) reasonable attorneys' fees . . . to a prevailing party who is a parent of a child with a disability." (20 U.S.C. § 1415(i)(3)(B)(i)(II)). In any action or proceeding brought under the IDEA, a federal district court may award reasonable attorneys' fees as part of the costs to a "prevailing party" who is the parent of a child with a disability (20 U.S.C. § 1415(i)(3)(B)(i) and 34 C.F.R. § 300.517(a)(1)(i)).[1] "Proceedings" brought under the IDEA include administrative proceedings, such as a hearing before an Impartial Hearing Officer ("IHO") or State Review Officer ("SRO") (*see A.R. v. New York City Dept. of Educ*., 407 F.3d 65 (2d Cir. 2005); *Streck v. Bd. of Educ. of East Greenbush Cent. Sch. Dist.*, 408 Fed Appx. 411, 2010 WL 4847481 (2d Cir. 2010)).

As a threshold matter, in order for a parent to be eligible for attorneys' fees, they must be considered to be a "prevailing party." A party achieves "prevailing party" status if that party attains success on any significant issue in the litigation or proceeding that achieves some of the benefit sought, and the manner of the resolution of the dispute constitutes a change in the legal relationship of the parties (*See Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. of Health & Human Res*., 532 U.S. 598 (2001); *B.W. ex rel. K.S. v. New York City Dept. of Educ*., 716 F. Supp. 2d 336 (S.D.N.Y. 2010)). In the context of an IDEA proceeding, an IHO-ordered relief on the merits alters the legal relationship between the parties and thus confers an "administrative imprimatur" sufficient to support an award of attorneys' fees (*See e.g*., *A.R. v. New York City Dept. of Educ*., 407 F.3d at 76; *B.W. ex rel. K.S.*, 716 F. Supp. 2d at 344).

II. PREVAILING PARTY:

The prevailing party standard has been liberally interpreted by the Supreme Court and the Second Circuit in terms of the degree of relief required (*D.M. ex rel. G.M. v. Bd. of Educ., Center Moriches Union Free Sch. Dist.*, 296 F. Supp. 2d 400 (E.D.N.Y. 2003); *see also Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782 (1989)). To qualify for attorneys' fees "a party need not prevail on all issues" but rather must "succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the

[1] Under the IDEA and its implementing regulations, "parent" is defined to include a guardian. 34 C.F.R. §300.30.

suit." (*Texas State Teachers Ass'n*, 489 U.S. at 789). A 'purely technical or *de minimis*' victory, however, will not qualify a plaintiff as a prevailing party (*B.W. ex rel. K.S.*, 716 F. Supp. 2d at 346).

A plaintiff may be considered a prevailing party even though the relief ultimately obtained is not identical to the relief demanded in the complaint, provided the relief obtained is of the same general type (*G.M. ex rel. R.F. v. New Britain Bd. of Educ.* 173 F.3d 77 (2d Cir. 1999)). In *B.W. ex rel. K.S. v. New York City Dept. of Educ*., *supra,* the District Court held that a parent achieved the necessary level of success to qualify as a prevailing party where the IHO found that the district failed to provide a free appropriate public education ("FAPE") and directed the Committee on Special Education ("CSE") to reconvene and develop a compliant individualized education program ("IEP"), notwithstanding the fact that the parent did not receive the exact relief she sought, namely payment of tuition at a private school (*B.W. ex rel. K.S.*, 716 F. Supp. 2d at 348; *see also, J.S. v. Crown Point Cent. Sch. Dist.*, 2007 WL 475418 (N.D.N.Y. 2007) (where the IHO found that even though plaintiff was not entitled to reimbursement for money paid to private entities for educational and evaluation services, the IEP had to be annulled because it was "totally insufficient to address [the student's] special education needs", and thus plaintiff was entitled to attorneys' fees because she won on the adequacy of the IEP, which was "the most important claim" and was "interrelated" with the other issues); *N.S. ex rel. P.S. v. Stratford Bd. of Educ.*, 97 F. Supp. 2d 224 (awarding attorneys' fees where plaintiffs requested an order directing the child's placement in a general education classroom but the IHO instead ordered defendant to design a new IEP to replace the deficient one, and noting that "the hearing officer's failure to make a specific directive with regard to the child's permanent placement does not impact the determination of whether the child's parents are prevailing parties").

III. LODESTAR APPROACH:

A. Attorneys' Fees Recoverable By Parents:

Attorneys' fees in IDEA actions are calculated using the "lodestar approach", in which the fee is derived by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate (*B.W. ex rel. K.S.*, 716 F. Supp. 2d at 346). Although there is a strong presumption that the lodestar figure represents a reasonable fee, a court may reduce the award based on the results obtained (*Id.*). A reduction may be appropriate where a party lost on claims unrelated to the ones on which he prevailed and where the overall level of success is low (*Id.*; *see also N.S. ex rel. P.S.*, 97 F. Supp. 2d at 242 (court

determined that a 15% reduction in fees was appropriate where parents failed to succeed on several issues). Moreover, in determining reasonableness of attorneys' fees under the IDEA, the fees should be based on rates prevailing in the community, in which the action or proceeding arose for the kind and quality of services furnished, and the fees may be reduced based on a finding, *inter alia*, that the rates charged or time spent and legal services spent were excessive (20 U.S.C. § 1415 (i)(3)(C), (F)).

B. Attorneys' Fees Recoverable by School District:

In any action or proceeding for attorneys' fees brought under the IDEA, the Court in its discretion may award reasonable attorneys' fees as part of the cost, "to a prevailing party who is a State, educational agency or local educational agency (1) against the attorney of a parent who files a complaint or subsequent course of action that is frivolous, unreasonable, without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or (2) to a prevailing State educational agency or local educational agency against the attorney of a parent, or against the parent, if the parent's complaint or subsequent cause of action was presented for an improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation (20 U.S.C. § 1415(i)(3)(B)(i)). Accordingly, a school district may seek attorneys' fees against the parent if it can establish that the parent's complaint was presented for an improper purpose.

IV. ADVOCATES:

In *Bowman v. District of Columbia*, 496 F. Supp. 2d 160 (D.D.C. 2007), the Court held that the Court appointed educational advocates for children who were allegedly prevailing parties against the District of Columbia Public Schools ("DCPS") in the Due Process Hearing, were "parents", for purposes of the IDEA's attorney fee provisions, notwithstanding that the children had *guardians ad litem*. The Court noted that the definition of "parent" under the IDEA includes "guardian(s)," and 34 CFR § 300.30 which defines "parent" to include guardians, "authorized to make education decisions for the child." Thus, the Court held that education advocates are "parents" under the attorneys' fee provision of the IDEA. However, since this decision was issued by a Federal Court in the District of Columbia, it is not binding upon New York Courts.

V. PARENT ATTORNEYS:

In 1991 in *Kay v. Ehrler,* 499 U.S. 432 the Supreme Court held that a *pro se* litigant who was also an attorney could not recovery attorneys' fees under § 1988's fee-shifting provision. According to the Court, even though the fee-shifting provision was intended to encourage litigants to protect their civil rights, "its more specific purpose was to enable potential plaintiffs to obtain the assistance of competent counsel in vindicating their rights." *Kay v. Ehrler,* 499 U.S. 432 (1991).

In a Second Circuit decision issued in 2006, entitled, *S.N. v. Pittsford Cent. Sch. Dist.*, 448 F.3d 601, the Court affirmed the order of the District Court, denying the parent's application for attorney's fees and dismissing the action, thus finding that a parent-attorney is not entitled to attorneys' fees under the IDEA for the representation of his or her own child. *Id.* The Court explained:

> The question whether a parent representing his child in an IDEA case can obtain attorneys' fees is one of first impression in this Circuit. Two circuits have considered this issue and both have concluded that parent-attorneys cannot recover fees. *Woodside v. Sch. Dist. of Phila. Bd. of Educ.*, 248 F.3d 129, 131 (3d Cir.2001); *Doe v. Bd. of Educ.*, 165 F.3d 260, 265 (4th Cir. 1998), *cert. denied*, 526 U.S. 1159, 119 S.Ct. 2049, 144 L.Ed.2d 216 (1999).
>
> Those circuits relied on the Supreme Court's reasoning in *Kay v. Ehrler,* 499 U.S. 432, 111 S.Ct. 1435, 113 L.Ed.2d 486 (1991), which held that an attorney representing himself was not entitled to attorneys' fees under the Civil Rights Attorney's Fees Award Act, 42 U.S.C. § 1988 (1988) (current version at 42 U.S.C. § 1988(b)) (hereinafter "Civil Rights Attorney's Fees Awards Act" or "§ 1988"). Like the IDEA, § 1988 gives district courts the discretion to award "a reasonable attorney's fee" to the prevailing party. The Supreme Court found that Congress enacted § 1988 primarily "to enable potential plaintiffs to obtain the assistance of competent counsel in vindicating their rights." *Kay*, 499 U.S. at 436, 111 S.Ct. 1435. The Court also

noted that "[a] rule that authorizes awards of counsel fees to *pro se* litigants—even if limited to those who are members of the bar—would create a disincentive to employ counsel whenever such a plaintiff considered himself competent to litigate on his own behalf." *Id.* at 438, 111 S.Ct. 1435. Reasoning that "[e]ven a skilled lawyer who represents himself is at a disadvantage in contested litigation," the Court determined that the "statutory policy of furthering the successful prosecution of meritorious claims is better served by a rule that creates an incentive to retain counsel in every such case." *Id.* at 437–38, 111 S.Ct. 1435.

The Supreme Court's concerns about awarding fees for pro se representation by attorneys under § 1988 are also relevant to parent-attorney representation under the IDEA. A rule that allows parent-attorneys to receive attorneys' fees would discourage the employment of independent counsel. Yet, just like an attorney representing himself, a parent-attorney representing his child "is deprived of the judgment of an independent third party in framing the theory of the case, ... formulating legal arguments, and in making sure that reason, rather than emotion," informs his tactical decisions. *Kay*, 499 U.S. at 437, 111 S.Ct. 1435. The danger that a parent-attorney would lack sufficient emotional detachment to provide effective representation is undeniably present in disputes arising under the IDEA. The statute itself recognizes that parents do and should have an intense personal interest in securing an appropriate education for their child. See, e.g., 20 U.S.C. § 1400(c)(5) ("[Y]ears of research and experience has demonstrated that the education of children with disabilities can be made more effective by ... strengthening the role of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children ....") (current version at 20 U.S.C.A. § 1400(c)(5) (West Supp. 2005));

Schaffer ex rel. Schaffer v. Weast, 546 U.S. 49, ––– –, 126 S.Ct. 528, 532, 163 L.Ed.2d 387 (2005) (noting that "[t]he core of the [IDEA] ... is the cooperative process that it establishes between parents and schools," and describing the "significant role" that "[p]arents and guardians play ... in the IEP process"). In order to best promote the effective litigation of a child's meritorious claims under the IDEA, we hold that attorney-parents are not entitled to attorneys' fees under § 1415(i)(3)(B).

CHARTER SCHOOLS, NONPUBLIC SCHOOOLS
AND SPECIAL EDUCATION:
AN ATTEMPT AT DE-MYSTIFYING THE MANY MYSTERIES

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November 13, 2013

A. The Charter Schools.

1. Some Charter School Basics.

Charter schools are publically funded, privately run,[1] not-for-profit education corporations created by and through the issuance of a "charter" from the New York State Board of Regents. *See*, N.Y. Education Law §§2853(1)(a) and 216. The charter has a term of up to five years, which may be renewed for additional five year terms upon application by the school's board of trustees to the school's "charter entity"[2]. *See*, N.Y. Education Law §§2851(2)(p) and (4).

Charter schools are independent and autonomous public schools, unless the Charter School Act expressly provides otherwise. N.Y. Education Law §2853(1)(c) (Emphasis added). As discussed herein, there are several circumstances when charter schools are deemed to be nonpublic schools. Thus, charter schools are rare in legal nature; a legal oddity of sorts. They represent one of the few and perhaps only examples of a corporation that at times is considered

[1] Unlike traditional public schools, which are run by board members who are elected by the public, New York charter schools are governed by boards of trustees who are appointed or elected pursuant to a school's bylaws.

[2] Charter entities are statutorily designated monitoring bodies that include the Regents, the SUNY Board of Trustees, and local school board of the school district within which a charter school is located. N.Y. Education Law §2851(3). A charter school applicant submits an application to create and operate a charter school to a charter entity of its choosing. The charter entity evaluates the application and determines whether to recommend it for approval to the Regents. If the Regents approve the application and grant a charter to the school, the charter entity becomes responsible for ensuring that the charter school complies with applicable law and meets the myriad programmatic and fiscal goals upon which the school's Regent's-approved existence was based. *Id.* If a charter school fails to meet its goals, the charter entity may recommend that the Regents revoke or not renew a school's charter. Independent and autonomous though they may be, charter school autonomy has been diminished significantly by the virtually unfettered oversight and power that charter entities and Regents wield over them.

to be a "public"[3] entity, and still other times a private one. So when are New York's charter schools deemed not to be public schools? Among other limited exceptions, charter schools are considered nonpublic schools for purposes of special education,[4] as discussed more fully below. First, though, I provide a few more charter school basics, some of which may come as a surprise.

State laws don't apply to charter schools, unless the Charter School Act or a school's charter affirmatively states that they do. N.Y. Education Law §2854(1)(b). In particular, state laws pertaining to student assessments, civil rights, and health and safety apply to charter schools, as do provisions of the General Municipal Law regarding conflicts of interest and codes of ethics (N.Y. Education Law §2854(1)(f)); Articles 6 (FOIL) and 7 (Open Meetings) of the Public Officer's Law (N.Y. Education Law §2854(1)(e)); the Dignity for All Students Act (N.Y. Education Law §§10-18)); and local laws governing zoning, land use, and buildings (N.Y. Education Law §2853(3)(a-2)). The law makes clear that "charter school[s] shall be exempt from all other state and local laws, rules, regulations or policies governing public or private schools, boards of education and school districts, including those relating to school personnel and students". N.Y. Education Law §2854(1)(b). However, as independent and autonomous public schools and Local Educational Agencies ("LEA"), federal law is applicable to charter schools. Therefore, as with other public schools, the United States Constitution applies to New York charter schools, as do all other federal statutory, regulatory, and decisional law affecting traditional public schools (most notably, the Individuals with Disabilities Education Improvement Act of 2004, §504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act, No Child Left Behind, the Family Educational Rights and Privacy Act, and Title VI of the Civil Rights Act of 1964).

The impact of the Legislature's decision to make state and local laws inapplicable to charter schools is far reaching, and in ways that have not been fully contemplated or realized. One significant consequence is that New York's

[3] Charter schools are public in the quasi-governmental sense, as distinct from, and not to be confused with, a publically owned corporation, the shares of which are traded on an exchange. To be sure, the statutorily prescribed powers of charter schools "constitute the performance of essential public purposes and governmental purposes of this state." N.Y. Education Law §2853(1)(d).

[4] Charter schools are also deemed nonpublic schools for purposes of school transportation governed by N.Y. Education §3635 *et seq.*; for purposes of aid for textbooks, library materials, computer software, and health and welfare services, *see*, N.Y. Education Law §2853(4); and also for purposes of local zoning, land use, and building codes, under specific circumstances. *See*, N.Y. Education Law §2853(3)(a-2).

law governing student discipline in the public schools[5] does not apply to charter schools. Instead, federal case law defines the contours of due process applicable to charter school students.[6] This is significant because the federal decisional law provides a floor of rights, not a ceiling, giving charter schools a great deal of discretion in fashioning policies and procedures on student discipline. In particular, in *Goss* the Supreme Court ruled that a suspension of more than 10 days required the full panoply of due process protections (e.g., right to a formal hearing, counsel, cross-examination, a transcript, and formal appeals), but suspensions of 10 days or less required only an informal hearing (e.g., a meeting with the principal and the right to ask questions of the witnesses against you, but not more). In New York, however, the Legislature provided more protection to its students by requiring maximum due process (e.g., formal hearing, etc.) for suspensions lasting more than five days. Thus, charter schools may choose to implement discipline policies that provide less process and fewer rights to its students than they otherwise would be entitled to under state law if enrolled at a traditional public school.

Second, in New York City, despite widespread misunderstanding even among Chancellor-authorized charter schools,[7] the Chancellor's regulations do not apply to New York charter schools. All too often New York City charter schools unwittingly adopt or comply with the Chancellor's regulations, thereby make those regulations applicable by policy and/or practice.

What's more, in 2007 the New York City Department of Education ("DOE") published a memorandum to all New York City superintendents, charter schools, and CSEs that established protocols for the provision of special education services to charter school students ("DOE Protocols").[8] In it, the DOE declared that charter schools must use and fully complete the DOE's official form designated for special education referrals, whenever a charter school decided to refer a student to the CSE for evaluation. The DOE stated that if the charter

[5] The student discipline statute can be found at N.Y. Education Law §3214.

[6] Federal law applicable to discipline of and due process for public school students is defined by the seminal case of *Goss v. Lopez* and its progeny. 419 U.S. 565 (1975).

[7] A Chancellor-authorized school is one where the Chancellor of the New York City Department of Education is the school's charter entity.

[8] A copy of the DOE protocols document can be found at: http://www.nyccharterschools.org/sites/default/files/resources/NYC_DOE_Protocols_for_SPED_in_Charter_Schools_0.pdf

school did not use or fully complete its form, it would return the form as incomplete and delay the evaluation process until it received one that was fully completed. *See*, DOE Protocols at page 3. Under what authority does the DOE believe it can compel charter schools to comply with its DOE's policies and protocols? Because charter schools are independent and autonomous public schools separate and apart from the DOE, and because the DOE Protocols are not incorporated into schools' charters, the DOE's regulations, policies, procedures, practices, and protocols do not apply to charter schools.

Third, despite reports by the popular media, and a common misconception as a result, charter schools cannot refuse to enroll, or limit the enrolment of, students with disabilities. To the contrary, the Charter School Act requires that before a proposed charter school can be approved or an existing charter school can be renewed, such school must demonstrate how it "will meet or exceed enrollment and retention targets [prescribed by the state] of students with disabilities, English language learners, and students who are eligible applicants for the [NCLB] free and reduced price lunch program…." N.Y. Education Law 2851(4)(e); N.Y. Education Law 2852(9-a)(b)(i). Further, the state, when developing these targets, must ensure that (1) the enrollment targets are "comparable to the enrollment figures of [students with disabilities, ELL students, and students eligible for free or reduced lunch] attending the public schools within the school district…; and (2) such retention targets are comparable to the rate of retention of [students with disabilities, ELL students, and students eligible for free or reduced lunch] attending the public schools within the school district…." *Id*. Moreover, the Regents or a charter entity may revoke or not renew a school's charter, if the school repeatedly fails to meet or exceed requirements relating to the enrollment and retention of students with disabilities. N.Y. Education Law 2855(1)(e).

- Question: What does "comparable" mean? Comparable in what ways? Would not the word "ratable" make more sense?

- Question: How can a charter school <u>applicant</u> establish retention targets comparable to the school district within which the charter school will be located, if the applicant does not know, at the time she submits her application, if the school's location will be approved?

Fourth, the Charter School Act explicitly prohibits discrimination against students on the basis of their disability. N.Y. Education Law § 2854(2)(a). However, a charter school may be designed or tailored to serve students with disabilities. *Id.* Moreover, "charter school(s) shall demonstrate good faith efforts

to attract and retain a comparable or greater enrollment of students with disabilities…when compared to the enrollment figures for such students in the school district in which the charter school is located." *Id.* (Emphasis added).

- Question: Here again, what is the Legislature's expectation with respect to comparing the "enrollment figures"?

- Question: What must a charter school do to "attract and retain" students with disabilities?

B. Special Education in the Charter Schools

1. The "Nonpublic", Not-So-Autonomous Public School.

Charter schools are deemed nonpublic schools for purposes of special education. N.Y. Education Law §2853(4)(a). In other words, they are not the LEA responsible for determining what constitutes a free and appropriate public education ("FAPE") for their students under the IDEA and corresponding state law. That responsibility falls on the school districts of residence ("DOR") of each child enrolled in a charter school. *Id*. Accordingly, charter schools have no legal authority to establish or convene committees on special education ("CSE") for the students whom they serve; they cannot recommend a student's program and placement, or issue the IEP memorializing same, nor do they have responsibility under the Child Find provisions of the IDEA. All of these duties and responsibilities are the school districts' alone.[9] Thus, in all respects charter schools in New York are legally and functionally nonpublic schools when it comes to special education.

Like nonpublic schools, charter schools are responsible for making sure that each child's IEP is implemented. Surprisingly, many charter schools believe incorrectly that they must provide the services themselves. While they are entitled to do so, and in most cases it certainly would make the most sense to do so, there are actually three statutorily prescribed ways that a charter school can implement an IEP:[10]

[9] However, a charter school student's special and general education teachers are mandated members of his or her CSE. 34 C.F.R. 300.321. Still, because charter schools are not the LEA for purposes of special education, and because the DOR has CSE responsibility for charter school students, charter schools often have little influence over the CSE's final decisions regarding services, programs, and placement, even though charter school staff are often best suited to make those decisions and are responsible for implementing the IEPs that are offered.

[10] N.Y. Education Law 2853(4).

(a) Provide the special education and/or related services itself;
(b) Ask the school district of residence to provide the services; or
(c) Contract with a qualified service provider to provide the services.

If a charter school asks the DOR to provide special education programs and/or services, then the DOR must do so. It is not optional. *See*, N.Y. Education Law 2853(4)(a); *see also*, New York State Education Department ("SED") Charter Schools Office Q&A on Charter Schools and Special Education ("SED Guidance,") at Question 17 (The DOR "must cooperate in making arrangements to deliver such services.").[11] In addition, the DOR must provide services in the same manner and to the same extent to which it serves students with disabilities enrolled at its own schools. *Id*.; 34 C.F.R. 300.209.

Notably, the early history reflects that time and again charter schools seek guidance from the DOR on how to appropriately serve particular students with disabilities, without realizing that they can compel districts to provide the services, and school district CSEs, in turn, advise charter schools that the responsibility to implement IEPs is the charter school's alone. This recurring scenario suggests that proactive technical assistance from charter entities and the SED, on behalf of the Regents, is sorely needed.

Remarkably, the DOE Protocols[12] declare that if a charter school asks the DOE to provide the services for a child who requires "full-time special education services", the DOE "will not" provide the services at the site of the charter school. Regardless of the fact that the DOE Protocols are unenforceable as against charter schools, the DOE's protocol would be in further violation of law if, as a result, a student's placement was changed without resort to the CSE process. Such a result is easy to envision since, as a matter of policy, the DOE prohibits students who receive full-time special education services from receiving such services at his or her charter school. Thus, the DOE's policy ignores the specific and unique needs of the individual students, which is paramount when determining an IEP, deprives the student of being educated in his school with and among his friends and peers, and may be in conflict with the least restrictive environment principle. The policy

[11] The SED Guidance document can be found at: http://www.p12.nysed.gov/psc/specialed.html.

[12] Discussed supra, at pp 3-4 and available at: http://www.nyccharterschools.org/sites/default/files/resources/NYC_DOE_Protocols_for_SPED_in_Charter_Schools_0.pdf

also is discriminatory in that it treats an entire class of students with disabilities in a particular way on the basis of the severity of their disability alone.

C. Problems and Conflicts with Charters as Non-publics.

CSEs cannot and do not recommend a charter school placement for a student with a disability. Children apply for admission to a charter school by submitting an application created by, interestingly, SED. N.Y. Education Law §2854(2)(b). If the charter school has more applicants for admission than seats available, applicants must be admitted by a "random selection process", which has become popularly and universally known as the charter school admissions "lottery". *Id.*[13] As a result, without the benefit of a CSE meeting in advance of a student's enrollment into a charter school, often times students are not matched to an appropriate placement since the very educational experts charged with program and placement responsibilities are shielded from the process until after a student is enrolled or "placed". One resultant problem that occurs all too often involves the disabled child who is failing at the district school, whose parents learn that an exciting new charter school is opening in the neighborhood and obtain a seat after winning the enrollment lottery, an exciting if not euphoric experience in and of itself. The child is enrolled, and a CSE is convened by the DOR in an effort to create an appropriate IEP, but the charter school does not have the class profile or student-teacher ratio that the CSE believes the child needs, and the charter school does not have the capacity to create a class consistent with the recommendation, at least not yet. Now what?

For a less severely disabled student, the CSE, charter school, and parents are often able to work together to create additional strategies and supports that enable the charter school to overcome the particular issue and provide an appropriate program. However, all too often charter schools are unable to serve the more severely disabled student population and students remain placed inappropriately at the charter school as a result. Students invariably remain placed inappropriately through at least the end of the school year, sometimes longer, for various reasons. For one, charter schools would appear powerless to move CSEs into action. That is, since charter schools are not the LEA for purposes of special education and, therefore, are not responsible for the CSE function, they cannot convene meetings to change a placement; they can ask the CSE to convene a meeting, but they are virtually powerless to compel the CSE to make a change, especially since charter schools have no standing to invoke the impartial due process hearing remedy available to the DOR and parents. The fact

[13] The Commissioner of Education shall promulgate regulations to ensure a transparent and equitable lottery process. *Id.*

that charter schools are powerless to do so certainly emboldens the CSE in its efforts to defer the child's needs until a later date. Consequently, CSEs often ask the charter school to try harder. The DOR will impress upon the charter school to provide more classroom and school-based supports; to find a way to get to the child's annual review, which often occurs toward the end of the school year. Unfortunately, all too often CSEs do nothing because there are seldom, if ever, any appropriate public school placements or state-approved nonpublic school placements available, especially after the school year begins. While it may be unfair to assume this scenario, it is one we have seen time and again.

The problem is further exacerbated by the parent's high expectations and optimism for the perceived opportunities presented by enrollment into a charter school, expectations and optimism that can be blind after having left behind a failing traditional public school. As a result, a parent almost never will agree to leave a charter school once they have been lucky enough to "win" enrollment through the statutorily prescribed lottery admissions process.

What is a charter school to do when the placement is obviously inappropriate, but the DOR or the parent does not agree and will not, as a result, subject themselves to the CSE process to reexamine the recommended program and, more specifically, the charter school placement? What should the charter school do in this circumstance? The charter school might consider demanding that the DOR provide the services pursuant to N.Y. Education Law 2853(4)(a), and asking SED to intercede so as to ensure DOR compliance.

If the student is the subject of discipline and the school believes that he or she presents a danger to the health, welfare, or safety of other students or staff, the charter school can request an immediate due process hearing to obtain an order seeking removal to an Interim Alternative Educational Setting. While the Charter School Act is silent on this issue, SED has taken the position that charter schools may do so under such circumstances.[14]

A charter school in New York City might consider a "lawyer letter" to the applicable Region, with appropriate copies (e.g., the Chancellor, local politicians, etc.), regarding the CSE's refusal to take responsibility. This approach often creates the pressure necessary to jump start the process.

A charter school might also consider an IDEA "State Complaint" to SED, as the State Educational Agency, which no school district would knowingly

[14] *See*, SED Guidance, Question 9 http://www.p12.nysed.gov/psc/specialed.html.

invite.

As the parent's attorney, what advice would you have if the charter school was unable to provide a class profile or group size that was in compliance with the IEP mandate? New York Education Law and regulations regarding class size and groupings are inapplicable to charter schools, yet charter schools are legally required to implement the IEP. Is there an argument to be made based on the IDEA or the Charter School Act, which provides that: "Special education programs and services shall be provided to students with a disability attending a charter school in accordance with the individualized education program…." N.Y. Education Law 2853(4)(a). This would appear to be a conflict in the law that is in need of resolution.

D. A Couple of More Questions to Contemplate.

1. What if a student with a disability wins the admissions lottery and gains entrance to a charter school, but the DOR-CSE recommends a state-approved, special education day school placement on the student's IEP? SED has taken the position that absent consensus and agreement by the CSE, the charter school must discharge the student to the DOR and discontinue serving the student once the IEP is issued, unless the student files an impartial hearing demand and the charter school is established as the pendency placement.[15]

2. In its guidance, SED takes the position that charter schools "must cooperate with school district personnel and school district attorneys in the conduct of due process proceedings, by making charter school personnel available to testify and providing documentary evidence open request."[16] However, charter schools are independent and autonomous privately run public schools, and the Charter School Act is devoid of any requirement that charter schools "cooperate" in any such way. What if the charter school's interests align with the student's but are adverse to the school district's? Has SED acted beyond the scope of its legal authority? Again, charter schools are nonpublic schools for purposes of special education. N.Y. Education Law 2853(4)(a). Notably, no such rule of law applies to nonpublic schools in New York.

[15] *See*, SED Guidance, Question 7, http://www.p12.nysed.gov/psc/specialed.html

[16] *See*, SED Guidance, Question 8, http://www.p12.nysed.gov/psc/specialed.html.

II. The Nonpublic Schools

Like public school students, private school[17] students with disabilities have both substantive educational rights as well as civil rights, found in both federal and state law.

Substantive Rights/Consultation

The IDEA, New York's Dual Enrollment statute (Education Law §3602-c), and SED corresponding guidance require that school districts consult with nonpublic school officials as well as representatives of parents of parentally placed nonpublic school students with disabilities enrolled in nonpublic schools located in the school district's boundaries. *See*, 20 U.S.C. 1412(a)(10(A)(iii); 34 C.F.R. 300.134; *Guidance on Parentally-Placed Nonpublic Elementary and Secondary School Students*, SED (Sept. 2007),[18] (hereinafter, "SED Guidance"). The consultation requirements must be both "timely and meaningful", and topics of consultation necessarily include "how, where, and by whom special education and related services will be provided for parentally placed private school children with disabilities". 20 U.S.C. 1412(a)(10(A)(iii)-(iv); *see also*, N.Y. Education Law §3602-c(2-a); SED Guidance. All school districts must obtain a written affirmation, signed by the nonpublic school representatives that were consulted, stating that "timely and meaningful" consultation has occurred. *Id*. Where a school district has not upheld its obligation under federal and state law to timely and meaningfully consult, a nonpublic school official shall have the right to submit a complaint to NYSED and to the U.S. Department of Education. *Id*.

The school district of location ("DOL") is also responsible for "Child Find" for students who are parentally placed in nonpublic schools located within their geographic boundaries. Child find is the way in which the DOL identifies, locates and evaluates students suspected of having disabilities that are parentally placed in nonpublic schools. Like the consultation requirements regarding provision of services to parentally placed students, DOLs are also required to consult with the nonpublic schools within their district on the child find process.

The IDEA, Article 89 of New York's Education Law, and their respective implementing regulations also apply to nonpublic schools. Regarding nonpublic

[17] In New York, private schools are referred to as "nonpublic schools" throughout most of the education law and its regulations.

[18] The SED guidance document is available at: http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.htm.

school students, most of the IDEA's and Article 89's obligations fall upon the DOL.

When a parent sends a child with a disability to a private school, N.Y. Education Law §3602-c requires that that students receive "equitable" services through the school district in which the private school is located. § 3602-c was amended in 2007 to comply with § 612(a)(10) of IDEA 20 U.S.C. §1412(a)(10), as reauthorized in 2004, and 34 CFR §§ 300.130 to 300.147, to require the DOL to provide students with disabilities enrolled in nonpublic elementary and secondary schools with special education services. Services may, and indeed must, be provided to students in parochial/religious nonpublic schools as well, though the services provided by the school district must be secular, neutral, and non-ideological. Districts may provide services to students with disabilities on the premises of nonpublic schools, including religious or parochial schools. *See*, 20 U.S.C. §1412(a)(10)(A)(i)(III); 34 C.F.R. § 300.139(a).[19]

Even though it is ultimately a school district's responsibility to create and implement an Individualized Education Services Plan ("IESP"),[20] the private school still has a responsibility to implement whatever services the district is offering to provide to the student, including aides, assistive learning devices, or any other service called for in the student's IESP. The IESP itself must be developed by the CSE of the DOL, for all parentally placed students with disabilities in nonpublic schools within the district.[21]

Despite the obligation to provide IESP-mandated services in the nonpublic school, the nonpublic school is not legally obligated to provide every classroom profile (e.g., student-teacher-aide ratio) that an IESP would call for. Thus, not all nonpublic schools can accommodate every student whose parents might be interested in enrolling their child there. For example, if the student has an IESP that calls for 6:2:1 and the nonpublic school does not have a corresponding class, then that school may not be the appropriate setting for the student. Still, a dually-enrolled student with an IESP is entitled to equitable services and such services must be provided in a manner that reflects that the "pertinent question is what the educational needs of [the] student require." *See, Bd. of Educ. of Bay Shore Union*

[19] *See also,* Agostini v. Felton, 521 U.S. 203 (1997). The Supreme Court of the United States in *Agostini* held that public school districts may provide services in religious nonpublic schools without running afoul of the Establishment Clause of the Constitution.

[20] IESP is the functional equivalent of an IEP for students with disabilities in nonpublic schools.

[21] The district of location may recover the "actual cost for CSE administration, evaluations and special education services" from the student's district of residence. *See*, SED Guidance.

Free Sch. Dist. v. Thomas K., 14 N.Y.3d 289, 926 N.E.2d 250 (N.Y. 2010); N.Y. Education Law 3602-c(2)(b)(1).

Civil Rights

The Americans with Disabilities Act ("ADA") (42 U.S.C. §12101 et seq.) and §504 of the Rehabilitation Act of 1973 ("Section 504") (29 U.S.C. §794) are the signature pieces of federal legislation that protect a student's civil rights. The ADA and its various protections apply to all "public accommodations" and for the purposes of the Act, a private school is considered a "public accommodation". Section 504, on the other hand, applies only to those private schools that receive federal funds. Many of the protections of the two laws overlap, but because they are not identical and thus create differing obligations for schools, it is important to understand whether a student's private school accepts any federal funding, be it in the form of financial aid, grants, No Child Left Behind Title funding, or any other money from the federal government. If it does, then Section 504 will attach.

Pursuant to these laws, a private school may not deny admission to a student on the basis of that student's disability. This does not mean that a private school cannot deny admission to a student with disability, only that the reason for the denial must be a legitimate academic reason and not the student's disability. These laws further require that a private school not discriminate against a student with a disability after admission, though a private school may not be required to fundamentally alter its programs and its legitimate academic requirements and policies. Nonetheless, a private school is still responsible for working to implement required services to the students with disabilities it serves.

The ADA further requires that nonpublic schools, like all public accommodations, not discriminate on the basis of physical disability. The ADA deems it discriminatory to "fail[] to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities . . . where such removal is readily achievable". 42 U.S.C. § 12182(b)(2)(A)(iv). Readily achievable under the ADA "means easily accomplishable and able to be carried out without much difficulty or expense" and is a fact-specific inquiry which takes into account the cost of the barrier removal as well as the financial resources of the public accommodation. 42 U.S.C. § 12181(9).

ATTORNEYS' FEES UNDER THE IDEA

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I . The Statutory Framework - 20 U.S.C. §1415(i)(3)(B); 45 C.F.R. § 300.517

(i) **In general**

In any action or proceeding brought under the IDEA, the Court[1] may, in its discretion, award reasonable attorneys' fees as part of the costs:

(I) To the prevailing party who is the parent the child with a disability;

(II) To a prevailing party who is an SEA or LEA against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or

(III) To a prevailing SEA or LEA against the attorney of a parent, or against the parent if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

Determination of the amount of attorneys' fees - (20 U.S.C. §1415(i)(3)(C))

…. shall be based on rates prevailing in the community in which the action or proceedings arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees in calculating the fees awarded….

Prohibition of attorneys' fees and related costs for certain services
(20 U.S.C.§1415(i)(3)(D))

(i) Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceedings …for services performed subsequent to the time of a written offer of settlement to a parent if –

[1] Neither hearing officers nor the State Review Officer have authority to award attorneys' fees. 20 U.SC. § 1415 (i)(3)(B) *Murphy v. Bd. of Educ. of Arlington C.S.D.* 74 A.D. 2d 874, 426 NYS 2d 34 (2d Dept. 1980).

(I) The offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure[2] or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

(II) The offer is not accepted within 10 days; and

(III) The court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

NOTE: In addressing these claims, courts are not inclined to cut off fees entirely even when the relief finally obtained is only slightly more favorable than the original offer. In such cases, courts have routinely applied across the board reductions for all time billed following an offer of settlement, following a detailed analysis of the terms of settlement as compared to the relief ultimately obtained through ongoing litigation.

- A plaintiff will defeat the IDEA's settlement bar by obtaining an order that is **at all** more favorable to that plaintiff, but the amount by which the order is more favorable will affect any award of fees for work performed after the offer of settlement. *See C.G. v.. Ithaca City Sch. Dist., No. 11*–CV–1468, 2012 WL 4363738, at *3 (N .D.N.Y. Sept. 24, 2012);
- Court reduces fees requested by 50% and 70% due to the limited degree of success plaintiffs achieved by rejecting the offer of settlement and pursuing an administrative hearing instead. *S.M. v. Evans-Brant Cent. Sch. Dist.,* 09-CV-686S, 2013 WL 3947105 (W.D.N.Y. July 31, 2013).
- In light of the limited relief obtained in excess of the settlement offer, the Court reduced all hours for work performed subsequent to the offer, except work related to this fee litigation, by 50%. *S.M. v. Taconic Hills Cent. Sch. Dist.,* 1:11-CV-1085 LEK/RFT, 2013 WL 1180860 (N.D.N.Y. Mar. 20, 2013) *reconsideration denied*, 1:11-CV-1085 LEK/RFT, 2013 WL 2487171 (N.D.N.Y. June 10, 2013).
- Court ordered 60% reduction across the board. *S.M. v. Taconic Hills Cent. Sch. Dist*., 1:09-CV-1238 LEK/RFT, 2013 WL 1181581 (N.D.N.Y. Mar. 2013).
- Court awards 20% of hours expended after an offer of settlement in light of the offer's "substantial similarity" to, and therefore the

limited degree of success in, the administratively-ordered relief obtained thereafter) *C.G. v. Ithaca City Sch. Dist.*, No. 11–CV–1468, 2012 WL 4363738, at *4–5 (N.D.N.Y. Sept. 24, 2012);

- Court applies a 50% reduction across the board after determining that final relief 'just barely" beat the defendant's settlement offer; *Mrs. M. ex rel "T" v. Tri–Valley Cent. Sch. Dist*., 363 F.Supp.2d 566, 572 (S.D.N.Y.2002);
- Court cuts fees after settlement offer by 80%. *Auburn Enlarged Cent. Sch. Dist*., 2008 WL 5191703, at *15;
- Court reduces fees by 50% across the board. *Hofler v. Family of Woodstock, Inc*., 1:07-CV-1055, 2012 WL 527668 at *7 (N.D.N.Y. Feb. 17, 2012).

Exception to prohibition on attorneys' fees (20 U.S.C.§1415(i)(3)(E)).
Applies in those cases where the state or school district unreasonably protracted the final resolution of the action or proceeding or there was a violation of the IDEA.

(ii) **IEP Team Meetings**

Attorneys' fees may not be awarded relating to any meeting of the IEP Team unless the meeting is convened as a result of an administrative proceeding, judicial action, or for mediation at the discretion of the State;

(iii) **Opportunity to resolve complaints**

A resolution meeting /session shall not be considered

- A meeting convened as a result of an administrative hearing or judicial action; or
- An administrative hearing or judicial action.

Reduction in amount of Attorneys' Fees (20 U.S.C.§1415(i)(3)(F))

(i) The parent or parent's attorney, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) The amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;

(iii) The time spent and legal services furnished were excessive considering the nature of the action or proceeding; or

(iv) The attorney representing the parent did not provide to the local educational agency the appropriate information in the notice of the complaint.

Exception to Reduction in the Amount of Attorneys' Fees - (20 U.S.C. §1415(i)(3)(G)) - No reduction to fees if the court finds that the State or LEA unreasonably protracted the final resolution of the action or proceedings or there was a violation of this section.

II. **Prevailing Party Status – The Threshold**

A. Is the decision **"Judicially Sanctioned**"

1. *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Human Resources*, 532 U.S. 598 (2001).The U.S. Supreme Court throws out the traditional "catalyst" theory adopted by the Second Circuit and several other Circuits[3] imposing a new test that requires:

(a) A party to prevail on a significant issue in the litigation that achieves some of the benefit sought in bringing the litigation,

(b) A resolution that constitutes a change in the legal relationship of the parties. *Farrar v. Hobby*, 506 U.S. 103, 111–12, (1992); *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.,* 489 U.S. 782 (1989); *G.M. ex rel. R.F. v. New Britain Bd. of Educ.,* 173 F.3d 77, 81 (2d Cir. 1999); and

(c) A decision that is "judicially sanctioned." *Id* at 605.

2. The Second Circuit – applies the *Buckhannon* rule to IDEA cases. *J.C. ex rel. Mr. & Mrs. C. v. Reg'l Sch. Dist. 10, Bd. of Educ.*, 278 F.3d 119, 123–24 (2d Cir. 2002).

3. The Second Circuit applies *Buckhannon* rule to IHO ordered relief on the merits as conferring an "administrative imprimatur "sufficient to award attorneys' fees while a settlement not so ordered by the hearing officer would effectively reinstate the catalyst theory. "[T]he combination of administrative *imprimatur,* the change in the legal relationship of the parties arising from it, and subsequent judicial enforceability, render such a winning party a "prevailing party" under *Buckhannon* 's principles." *A.R. ex rel. R.V. v. New York City Dep't of Educ.,* 407 F.3d 65, 76 (2d Cir. 2005)..

a. Rule: Regardless of the degree of success, a settlement agreement that does not provide the imprimatur of the hearing officer or the courts does not impart prevailing party status. *Id*.

B. Degree of Relief Required for Prevailing Party Status

1. Although the Second Circuit generously interprets prevailing party status in terms of the degree of relief required, a "purely technical or *de minimis'* victory, however, does not qualify. *B.W. ex rel. K.S. v. New York City Dept. of Educ., 716 F.Supp.2d 336, 345–46 (S.D.N.Y. 2010); J.G. v. Kiryas Joel Union Free Sch. Dist.*, 843 F. Supp. 2d 394, 396 (S.D.N.Y. 2012).

2. The court ruled that an order for the CSE to develop a new IEP that provided greater benefits than those proposed in the initial IEP was not *de minimis* relief so minor that it does not warrant attorneys' fees, even when the specific placement initially sought was denied. *J.S. v. Crown Point Cent. Sch. Dist.*, No. 8:06-CV-159 (FJS/DRH), 2007 WL 475418 at *1–*3, *5 (N.D.N.Y. Feb. 9, 2007).

3. In another case, the court awarded attorneys' fees where plaintiffs requested an order directing the child's placement in a general education classroom but the IHO only ordered the District to design a new IEP ao replace the deficient one. In that case, the court specifically noted that "the hearing officer's failure to make a specific directive with regard to placement did not impact the determination of whether the parents were prevailing parties. *N.S. ex rel. P.S. v. Stratford Bd. of Educ.*, 97 F. Supp. 2d 224, 240 (D. Conn. 2000). c.*f. J.G. v. Kiryas Joel Union Free Sch. Dist.,* 834 F. Supp. 2d 394, 396 (S.D.N.Y. 2012).

III. **Calculating the Reasonable Fee**

A. The Lodestar represents a reasonable attorneys' fee - The lodestar = the number hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Blum v. Stenson*, 465 U.S. 886, 887 (1984).

B. Defining the Reasonable Rate - *Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cnty. of Albany and Albany Cnty. Bd. of Elections*, 522 F.3d 182, 184 (2d Cir. 2007).

(1) In determining an appropriate hourly rate, the Second Circuit looks to factors set forth in *Johnson v. Georgia Highway Express, Inc.* to approximate the market rates "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation."

(2) The Court will analyze the following factors to determine the " market rate"

a. The time and labor required;
b. The novelty and difficulty of the questions;
c. The level of skill required to perform the legal service properly;
d. The preclusion of employment by the attorney due to acceptance of the case;
e. The attorney's customary hourly rate;
f. Whether the fee is fixed or contingent;
g. The time limitations imposed by the client or the circumstances;
h. The amount involved in the case and the results obtained;
i. The experience, reputation and ability of the attorneys;
j. The "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and
k. Awards in similar cases.

Johnson v. Ga. Highway Express, Inc., 488 F.2d 714 (5th Cir.1974).

(3) Calculating the Community Rate:

(a) Attorneys affidavits with similar experience

(1) Exceptions: *K.F. v. N.Y.C. Dep't of Educ.*, No. 10 CIV. 5465 (PKC), 2011 WL 3586142 (S.D.N.Y. Aug. 10, 2011); *J.S. ex. rel. Z.S. v. Carmel Cent. Sch. Dist.,* No. 7:10-CV-8021(VB), 2011 WL 3251801 at *3 (S.D.N.Y. July 26, 2011). Court rejects fees when attorneys fail to demonstrate that these are fees actually paid.
(2) *N.Y. State Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136 (2d Cir. 1983). The applicable rate is the one applicable at the time the action for fees is brought as opposed to the rate in place at the time the services were rendered.
(3) *)Weather v. City of Mt. Vernon*, No. 08 Civ. 192(RPP), 2011 WL 2119689 at *1, *4 (S.D.N.Y. May 27, 2011). Travel time is generally billed by an attorney at half the attorney's hourly rate.

(b) Recent hourly rates awarded (10/3/13) – fees awarded vary widely depending on skills, experience and reputation.

(1) S.D.N.Y. - $475 highest rate in a straight forward IDEA case where the attorney had 30 years of experience in complex civil rights litigation. *E.F. ex rel. N.R. v. New York City Dep't of Educ.*, 11 CIV. 5243 GBD FM, 2012 WL 5462602 (S.D.N.Y. Nov. 8,

2012); Another court in the Southern District of New York awarded $375 an hour for an attorney with 26 years of experience in family law and a law professor with 6 years of work in special education. *M.C. ex rel. E.C. v. Dep't of Educ. of City of New York*, 12 CIV. 9281 CM AJP, 2013 WL 2403485 (S.D.N.Y. June 4, 2013). Court awards $415 an hour to a highly experienced attorney *J.S. ex rel. Z.S. v. Carmel Cent. Sch. Dist.,* 501 F. App'x 95, 99 (2d Cir. 2012);

(2) The Second Circuit upheld an award to a highly experienced attorney in the field at $415 an hour and in another case where the court awarded of $350 an hour to a managing attorney with fourteen years of experience litigating civil rights cases . *E.S. v. Katonah-Lewisboro Sch. Dist*., 796 F. Supp. 421,430 (S.D.N.Y. 2011)**.**

(3) The Northern District recently awarded $275 an hour in an IDEA case handled by a highly experience IDEA attorney. *M.C. v. Lake George Cent. Sch. Dist*., 1:10-CV-1068 LEK/RFT, 2013 WL 1814491 (N.D.N.Y. Apr. 29, 2013) ;*G.B. v. Tuxedo UFSD*, No. 09-cv-859 (KMK) Sept. 18, 2012 which awarded another attorney in the firm with 15 years of civil rights law experience $300.

(a) In a later decision, another court found that $250 per hour remains in line with prevailing rates in the relevant community for the kind and quality of services furnished. *S.M. v. Taconic Hills Cent. Sch. Dist.*, 1:11-CV-1085 LEK/RFT, 2013 WL 1180860 (N.D.N.Y. Mar. 20, 2013) *reconsideration denied*, 1:11-CV-1085 LEK/RFT, 2013 WL 2487171 (N.D.N.Y. June 10, 2013)

(4) The Western District awards $ 295 an hour for experienced IDEA attorneys. *S.M. v. Evans-Brant Cent. Sch. Dist*., 09-CV-686S, 2013 WL 3947105 (W.D.N.Y. July 31, 2013).

C. What Constitutes Reasonable Hours?

(1) Documentation Required - The fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate

hours expended," .*E.S. v. Katonah-Lewisboro Sch. Dist*., 796 F. Supp. 2d 421, 437 (S.D.N.Y. 2011); and

b. Contemporaneous Records that specifies for each attorney, the date, the hours expended, and the nature of the work done *N.Y. State Ass'n for Retarded Citizens, Inc. v. Carey*, 711 F.2d 1136, 1136 (2d Cir. 1983).

c. Fees that are vague, lacking in detail or confusing may be reduced. *G.B. v. Tuxedo UFSD*, 894 F Supp. 2d 415, 436 (S.D.N.Y.2012).

d. Excessive, redundant or unnecessary hours spent are not compensable.

a. Excessive time vague entries - Court strikes hours for general topics such as "legal research," "review of transcripts," client conferences, "work on discovery documents," and the like, without further specifics. *Starkey v. Somers Cent. Sch. Dist*. 02 CIV. 2455(SCR), 2008 WL 5378123 (S.D.N.Y. Dec. 23, 2008).

(1) Where documentation of hours is inadequate, the district court may reduce the award accordingly. *E.S. v. Katonah-Lewisboro Sch. Dist*., 796 F. Supp. 421,433 (S.D.N.Y. 2011).

(a) In such cases, a district court is authorized "to make across-the-board percentage cuts in hours 'as a practical means of trimming fat from a fee application'" and recognizes as unnecessary, under such circumstances, item-by-item accounting of the hours disallowed. *Id.*

(2) The Degree of Success Obtained - In determining the reasonable hours expended the most important factor is "the degree of success obtained" which involves an analysis of the "quantity and quality of relief obtained compared to what the parents sought to achieve as evidenced by their complaint. *J.S. ex. rel Z.S. v. Carmel Cent. Sch. Dist.*, No. 7:10-CV-8021(VB), 2011 WL 3251801 at *1, *3 (S.D.N.Y. July 26, 2011).

(a) Plaintiff successfully obtained an order for a triennial evaluation and three months of daily individual reading instruction as compensation for Defendant's failure to provide FAPE but was not successful in obtaining tuition reimbursement for parent's unilateral placement in nonpublic school. The Court awards 50%

of the billed hours and related expenses for limited success. *M.C. v. Lake George Cent. Sch. Dist.*, 1:10-CV-1068 LEK/RFT, 2013 WL 1814491 (N.D.N.Y. Apr. 29, 2013)

(3) Severability of Claims – The general rule: where a party is successful on only some claims and the failing claims are unrelated and severable, fees will only be awarded for time spent on successful claims. *Hensley v. Eckerhart,* 461 U.S. 424, 434 (1983); *Green v. Torres,* 361 F.3d 96, 98 (2d Cir. 2004); *Concerned Citizens Neighborhood Ass'n v. Cty of Albany*, 522 F. 3d 182, 190 (2d Cir. 2008).

(a) However, the courts will not reduce fee requests due to an unsuccessful claims where the successful and unsuccessful claims are inextricably intertwined and involve a common core of facts or are based upon related legal theories. *E.S. v. Katonah-Lewisboro Sch. Dist,*796 F Supp. 2d 421, 427 (S.D.N.Y. 2011).

(b) For any practical litigator, a plaintiff's various claims for relief will frequently "involve a common core of facts or will be based on related legal theories" that cannot neatly be divided. *Hensley* at 435.

(c) In a case where it was clear that the "core" of plaintiff's complaint was devoted to the IDEA claims, that those claims were predicated and ultimately rejected on the basis of legal theories (and in substantial part on facts) that were distinct from those relating to a successful due process argument, the court reduced the award by 70% of the effort expended by plaintiff's counsel on the case before the motion to dismiss was granted. *Starkey v. Somers Cent. Sch. Dist.*, 02 CIV. 2455(SCR), 2008 WL 5378123 (S.D.N.Y. Dec. 23, 2008).

D. Fee Availability

(1) **Expert Witness Fees -** IDEA does not authorize an award of expert fees. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 301, 126 S. Ct. 2455, 2462, 165 L. Ed. 2d 526 (2006).

(2) **Pendency** "[A] favorable judicial statement of law in the course of litigation. awarding a TRO enforcing pendency that results in judgment against the plaintiff does not suffice to render him a 'prevailing party.' *Christopher P. by Norma P. v. Marcus,* 915 F.2d 794, 805 (2d Cir. 1990).

(3) **Multiple Attorneys** "Efficient staffing of a case may mean that more than one lawyer is utilized to represent a client. There is nothing remarkable or unusual in

the practice, which often leads to lawyers with lower billing rates completing tasks rather than a more senior lawyer with a higher rate. Nor is it per se unreasonable for two or more lawyers to participate in a trial of a case." *N.Y.S. Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136, 1146 (2d Cir.1983). The district court should make an 'assessment of what is appropriate for the scope and complexity of the particular litigation.'" *Id.*

Rejecting the argument that two attorneys were necessary to facilitate note taking and communication with the parent was rejected, the court found it unreasonable to bill for two lawyers to appear together at the administrative hearings. Consequently, the court excluded all hours billed for travel and attendance at the hearing billed by the less-experienced lawyer. *K.F. v. N.Y.C. Dep't of Educ.*, No. 10 Civ. 5465, 2011 WL 3586142, at *7 (S.D.N.Y. Aug. 10, 2011); see also *S.M. v. Taconic Hills Cent. Sch. Dist.*, 1:11-CV-1085 LEK/RFT, 2013 WL 1180860 (N.D.N.Y. Mar. 20, 2013).

Travel The court excluded all time and mileage billed for for commuting from Auburn or Ithaca N.Y to Brooklyn and back as unreasonable. *K.F. v. New York City Dep't of Educ.*, 10 CIV. 5465 PKC, 2011 WL 3586142 (S.D.N.Y. Aug. 10, 2011) *adhered to as amended*, 10 CIV. 5465 PKC, 2011 WL 4684361 (S.D.N.Y. Oct. 5, 2011).

(4) **Time Spent Prior to Filing Complaint -** Courts in this circuit typically award attorneys' fees for pre-filing preparations. *G.B. ex rel. N.B. v. Tuxedo Union Free Sch. Dist.*, 894 F. Supp. 2d 415, 438 (S.D.N.Y. 2012).

(5) **Clerical Work -** Clerical and secretarial services are part of overhead and are not generally charged to clients. Preparation of trial exhibits is more akin to work properly performed by paralegals and is reimbursable as such. *G.B. ex rel. N.B. v. Tuxedo Union Free Sch. Dist.*, 894 F. Supp. 2d 415, 439 (S.D.N.Y. 2012).

(6) **Time on Motions Never Filed – C**ompensation denied for work done on motions never filed. *G.B. ex rel. N.B. v. Tuxedo Union Free Sch. Dist*., 894 F. Supp. 2d 415, 438 (S.D.N.Y. 2012).

(7) **Quarter Hour Billing Accepted -**Court recognizes that small firms often record their time in quarter hour increments and concludes that such billing is no more likely to result in over-billing than billing in six minute increment. *G.B. ex rel. N.B. v. Tuxedo Union Free Sch. Dist.*, 894 F. Supp. 2d 415, 441 (S.D.N.Y. 2012).

(8) **Filing Fees and Service of Process is Recoverable** The costs which Plaintiff paid for filing and for service of process are recoverable. *G.B. ex rel. N.B. v. Tuxedo Union Free Sch. Dist.*, 894 F. Supp. 2d 415, 443 (S.D.N.Y. 2012).

E. What Constitutes the Presumptively Reasonable Fee?

l. "It is the duty of the fee applicant to exercise good faith billing judgment to 'adjust for inefficiencies prior to making a request for attorneys' fees.' Therefore, where the 'fee applicant's own billing adjustments are adequately documented and sufficiently substantial" to account for the……inefficiency, the Court need not make additional substantial reductions. Consequently, fee applications that reflect sound billing judgment from the inception tend to be viewed favorably and serve to substantially reduce fee litigation." *M.C. ex rel. E.C. v. Dep't of Educ. of City of New York*, 12 CIV. 9281 CM AJP, 2013 WL 2403485 (S.D.N.Y. June 4, 2013).

2. The Relationship between Retainers and Attorneys' Fees

Nothing in law requires that potential plaintiffs become actually liable for the fees associated with IDEA cases "The criterion for the court is not what the parties agree but what is 'reasonable' The "fee is not contingent on the agreement between the prevailing party and her attorney. Instead, it simply must be 'reasonable. No more and no less' is required." (Internal citations are omitted. *S.M. v. Evans-Brant Cent. Sch. Dist*., 09-CV-686S, 2013 WL 3947105 (W.D.N.Y. July 31, 2013).

> **Note**: Defendant (school district) lacks standing to raise issues involving retainer agreements and alleged violations of the New York Rules of Professional Conduct. *S.M. v. Taconic Hills Cent. Sch. Dist.*, No. 1:09–CV–1238 LEK/RFT, 2012 WL 3929889 (N.D.N.Y. Sept.10, 2012); *S.M. v. Evans-Brant Cent. Sch. Dist*., 09-CV-686S, 2013 WL 3947105 (W.D.N.Y. July 31, 2013

3. In determining a reasonable fee – the Second Circuit reminds courts to … "bear in mind that a reasonable paying client wishes to spend the minimum necessary to litigate the case effectively." *Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cnty. of Albany and Albany Cnty. Bd. of Elections*, 522 F.3d 182, 184 (2d Cir. 2007).

USING A SUPPLEMENTAL NEEDS TRUST IN SPECIAL EDUCATION LITIGATION

BY ADRIENNE ARKONTAKY, ESQ. AND ROBERT P. MASCALI, ESQ.

INTRODUCTION:

Since 2009, Ms. Smith has been arguing with the local school district (the "District") regarding the provision of special education services to her daughter, Jane. After moving in her mother (Mrs. Jones), from another state Ms. Smith concluded that the school district could not facilitate a placement in an appropriate special education program. As a result, Jane was without a special education program for months and remained at home. Jane regressed emotionally, socially and academically. Her reading comprehension was far below what it should be and she was far below grade level in every area. In addition, she did not receive the related services that were mandated on her Individualized Education Program (IEP) because the District was not able to secure providers for an extended period of time. After trying to work with the District for several months, Ms. Smith secured the services of a special education lawyer who subsequently filed a request for an impartial hearing with the District and the New York State Department of Education.

After three days of the due process hearing, it became evident that there was a very good chance that the District would be found liable for a denial of a free appropriate public education (FAPE). In an effort to resolve the case without further litigation and associated legal costs, the District offered to settle the case. As part of the negotiation and eventual settlement, the District agreed to pay the parent and/or student a monetary amount that could be used to fund the provision of various special education services to the student and agreed to an appropriate placement in a state-approved private school immediately.

The special education attorney consulted with a special needs planning attorney to draft a special needs trust ("SNT") that would be funded with the proceeds of the settlement. However, there were many questions that needed to be addressed before the Trust was established and funded. Who could establish the Trust? Should the trust be a first party, third party of pooled special needs trust? Should there be restrictions (in addition to the statutory ones)? Is a special needs or supplemental needs trust appropriate for this purpose? Who would be the Trustee? Should Ms. Smith consider using a "pooled trust"?

Recently several special education attorneys have sought to use special needs trusts in situations such as our hypothetical. Perhaps the family wanted to fund private services for the student and/or the school district realized that the denial of certain aspects of the special education program were so extreme that the services that had to be retroactively provided could not be given directly through the school district. Perhaps both the school district and the parent were concerned with the possibility that payment of funds would affect a child with

special needs' eligibility for government benefits. Perhaps the school district wanted an assurance that the funds would in fact be used for the benefit of the student if prospective amounts were paid. Perhaps, given her financial situation, Ms. Smith may require public benefits in the future?

Although the funding of a special needs trust may be a very effective way to handle the situation, there are many questions and issues that need to be addressed before a special needs practitioner proceeds down this road.

As most practitioners are aware, a supplemental needs trust (also often referred to a "special needs trust") can be either a first party or third party SNT depending upon the source of the funds that will be deposited into the trust. In cases of special education challenges brought against school districts if there is a monetary settlement it will be imperative to properly identify for whose benefit the funds are being paid. When settling such a case, the attorney must investigate what public benefit programs t the parents and/or the student-child may be on, or entitled to in the future, to ensure that the receipt of any funds will not interfere with those benefits, currently or prospectively. If public benefit programs are part of the family scenario then the attorney must consider the need to use a SNT.

If the parent or the student/child is the beneficiary and the funds are to be deposited into a SNT, it is important to determine which type of SNT should be used. It is conceivable that this could result in two or even three separate trusts, one being a first party SNT where the award is specific to the child and/or the parent and another trust set up for the child as a third party SNT with a portion of the settlement designated as payment to the parents on account of damages incurred by them but which the parents want to be held for the benefit of the child. It is also quite possible that the school district as part of the settlement will want all, or a portion, of the funds earmarked solely for the specific benefit of the student/child for supplemental purposes, such as for assistive technology.

In addition, questions may arise where there are issues dealing with the parental obligation of support and care must be taken by the attorney to advise the parties that the SNT funds should not be used to pay for items that would otherwise be considered the obligation of the parents to provide. In many instances, especially in less affluent families, the dividing line between appropriate and inappropriate items is not that clear and thought should be given up front to citing specific examples in the trust document.

While some attorneys may consider drafting a single hybrid document to cover both scenarios, the authors experience is that this type of hybrid trust can cause considerable problems in the future such as an unintended Medicaid payback requirement, and should be avoided at all

costs. The extra cost necessitated by separate trusts will be minimal when compared against the possible loss of public benefits or the unintended requirement of a Medicaid payback.

In our hypothetical, Ms. Smith paid privately for the cost of special education services during the litigation. In addition to the cost of the services, Ms. Smith claimed that because the District could not initially provide a special education program, she was forced to leave her position as a receptionist in a corporate office to home school her daughter while waiting for the school district to identify an appropriate program. Ms. Smith also raised the possibility that she would file a civil rights claim against the District. For these reasons, the District (hypothetically) agreed to a monetary amount that took into consideration the fact that in addition to Jane's denial of an appropriate education, the family was also adversely affected and that additional civil rights litigation might be looming. Perhaps the amount allowed the District to settle all potential claims against the school district without the risk of future litigation (such as any civil rights claims). In such cases, the District may seek to obtain a general release of all claims and the parents may seek to earmark the funds for the child with special needs. Therefore it is important to decide whether a third party/first party or pooled trust or a combination should be used.

As indicated above, the funding of a special needs trust with settlement funds from a special education litigation settlement ensures that the funds will not be used improperly and in a manner that will jeopardize the child's right to government benefits. The Trust can allow the Trustee to pay for special services that the school district might not be able to provide (Applied Behavioral Analysis, Vision Therapy, one-one reading instruction with a private tutor, vocational training).

A payment into a special needs trust allows a school district to bring closure to a case and focus on providing an appropriate program going forward without having to monitor the provision of compensatory services and handle future payments that might extend years from the resolution of the case. It eliminates bookkeeping and enforcement problems and additional litigation if the school district fails to comply with the terms of any settlement.

As mentioned above SNTs are a classified as either **first party** (where the funds deposited to the trust consist of property belonging to the disabled beneficiary) FN 1 or third **party** (where the funds deposited to the trust belong to a third party not legally obligated to support the disabled individual) FN 2. These trusts allow for funds to be set aside for the benefit of an individual with a disability during his or her lifetime and as long as the funds are properly managed and disbursed, the value of the funds will not impact the eligibility of the individual for various public benefit programs. A first party SNT can be established by either by a parent, grandparent, and guardian or through a court order and the trust must contain a provision that any funds remaining upon the termination of the SNT are subject to reimbursement for

benefits received by the beneficiary. FN 2 Consequently, in the hypothetical, Ms. Smith could establish a first party SNT for her daughter and if it was determined that a SNT might be appropriate for any funds paid to or for the benefit of Ms. Smith, the SNT could be established by Mrs. Jones.

However, a third party SNT may be established by any interested person or persons and the remainder can be distributed free of any such reimbursement requirement. In the hypothetical, if a first party SNT was ruled out for Ms. Smith but she was still going to receive some funds on her own account in settlement of her own claim, then she could decide to use all or a portion of the funds to establish a third party SNT for the benefit of her daughter. If at some point in the future, Ms. Smith needed to seek public assistance, the transfer into the SNT would be exempt as a transfer for the benefit of a disabled child. In addition, if Ms. Jones at some point wanted to set aside some funds for the benefit of her granddaughter, she could deposit those funds into the third party SNT.

Each type of SNT requires an individual or corporate entity to act as the trustee. However, in some instances there is no one available to serve as a trustee or for one reason or another , the traditional, individually established SNT, may be unavailable or inappropriate and in those instances, what is referred to as a "pooled trust" may be a solution.FN 3

A **pooled first-party supplemental needs trust** is specifically authorized by both federal and New York State law. While similar to the traditional supplemental needs trust referred to above, as to the treatment of the trust funds for public benefit eligibility, the pooled trust has a number of requirements, specifically:

1. The funds of multiple individuals are pooled for investment and management purposes but separate sub-accounts must be established and maintained for each beneficiary;
2. The pooled trust must be administered and managed by a not for profit organization;
3. The beneficiary must be disabled as defined under the Social Security Act;
4. The account can be established by the disabled individual, or his/her parent, grandparent, guardian or by court order;
5. To the extent that the pooled trust provides, any funds that remain upon the termination of the sub account can be retained by the not for profit organization and do not need to be used for reimbursement for benefits provided to the beneficiary.

In addition, some non profit organizations operate third party pooled supplemental needs trusts.

In New York State there are a number of both first and third party pooled trusts that are available with different fee structures, remainder policies and minimum requirements. A listing can be found at www.wnylc.com/health/entry/4

One of the key components of either the first or third part SNT is the requirement that the trust funds be used for the benefit of the disabled beneficiary. A discussion of whether the use must be for the "sole benefit" of the disabled beneficiary or for that matter what is even meant by "sole benefit" is better left for another article. Nonetheless in all events, the trust funds must primarily benefit the disabled beneficiary and cannot be used to directly benefit another person although some tangential benefit to a third party may be permissible. No where does this issue arise more often than in the area of parental support and the obligation of a parent under New York State law to provide for the support of a child. Care must always be taken to advise the parent that the funds in the SNT must not be used to satisfy obligations that are otherwise a part of the parent's legal obligation. A discussion at the outset is helpful so the parent knows what types of items for the child may be acceptable to be paid from the SNT.

CONCLUSION.

The authors believe that the use of special needs trust in special education litigation will become more popular as school districts and parents look for ways to minimize litigation costs and provide effective ways to resolve special education challenges in more efficient ways. After being involved in these matters, we understand all too well, the time, expense and emotional tolls these cases take on both school districts and families. We also believe that in addition to school districts and parents using SNT's, Impartial Hearing Officers and Courts may utilize SNT's to protect a student's government benefits while securing desperately needed funds for special education services.

FN 1 42 USC 1396p (d)(4)(A), see also NY EPTL Sec. 7-1.12

FN 2 see NY EPTL Sec. 7-1.12

FN 3 42 USC 1396p (d)(4)(C) see also NY Social Services Law Sec. 366(2)(b)(2)(iii)(B)

Morales trust
TRUST AGREEMENT

This TRUST AGREEMENT made this ____ day of _____, 2013, by and between GUARD, as Guardian of the Property of AIP, and GUARD and CO-TRUSTEE, as Co-Trustees, is established pursuant to an Order of the Supreme Court, State of New York, Bronx County. The Guardian and Co-Trustee, GUARD, currently resides at. Her telephone number is . The Co-Trustee, CO-TRUSTEE, maintains offices at

TRUST PURPOSE

1.0 Trust Name: The Trust shall be known as the AIP Supplemental Needs Trust.

1.1 Purpose of Trust: The Beneficiary of the Trust is AIP. The purpose of the Trust is that the Trust's assets be used to supplement, not supplant, impair or diminish any benefits or assistance of any Federal, State, County, City, or other governmental entity for which the Beneficiary may otherwise be eligible or which the Beneficiary may be receiving. The Trust is intended to conform with New York State EPTL § 7-1.12, N.Y. Soc. Serv. Law §366, and 42 U.S.C. § 1396p(d)(4)(A) and 42 U.S.C. § 1382b(e).

1.2 Declaration of Irrevocability: The Trust shall be irrevocable and may not at any time be altered, amended or revoked without Court approval.

1.3 EPTL § 7-1.6: EPTL 7-1.6 or any successor statute, or any similar statute of any other jurisdiction, shall not be applied by any court having jurisdiction of an inter-vivos or testamentary trust to compel, against the Co-Trustees' discretion, the payment or application of the trust principal to or for the benefit of AIP, or any beneficiary for any reason whatsoever.

USE OF TRUST INCOME AND PRINCIPAL

2.0 Administration Of Trust During Lifetime of Beneficiary: The property shall be held in trust for the Beneficiary, and the Co-Trustees shall collect income and, after deducting all charges and expenses attributed thereto, shall apply for the benefit of the Beneficiary, in-kind, so much of the income and principal (even to the extent of the whole) as the Co-Trustees deems advisable in her sole and absolute discretion subject to the limitations set forth below. The Co-Trustees shall add the balance of net income not paid or applied to the principal of the Trust.

2.1 Availability of Other Benefits: Consistent with the Trust's purpose, before expending any amounts from the net income and/or principal of this Trust, the Co-Trustees shall consider the availability of all benefits from government or private assistance programs for which the Beneficiary may be eligible. The Co-Trustees, where appropriate and to the extent possible, shall endeavor to maximize the collection and facilitate the distribution of these benefits for the benefit of the Beneficiary.

2.2 Use of Income or Principal: None of the income or principal of this Trust shall be applied in such a manner as to supplant, impair or diminish any governmental benefits or assistance for which the beneficiary may be eligible or which the beneficiary may be receiving, unless the Co-Trustees, in their sole and absolute discretion determines that such use of trust assets is beneficial to the beneficiary..

2.3 Power to Execute or Assign Distributions: The Beneficiary does not have the power to assign, encumber, direct, distribute or authorize distributions from this Trust.

2.4 Food, and Shelter: Notwithstanding the above provisions, the Co-Trustees may make distributions to meet the Beneficiary's need for food, clothing, shelter, health care, or other personal needs, even if those distributions will impair or diminish the Beneficiary's receipt or eligibility for government benefits or assistance only if the Co-Trustees determine that the

distributions will better meet the Beneficiary's needs, and it is in the Beneficiary's best interests, notwithstanding the consequent effect on the Beneficiary's eligibility for, or receipt of benefits.

2.5 Nullification of § 2.4: However, if the mere existence of this authority to make distributions will result in a reduction or loss of the Beneficiary's entitlement program benefits, regardless of whether the Co-Trustees actually exercise this discretion, the preceding paragraph (2.4) shall be null and void and the Co-Trustees' authority to make these distributions shall terminate and the Co-Trustees' authority to make distributions shall be limited to purchasing supplemental goods and services in a manner that will not adversely affect the Beneficiary's government benefits.

2.6 Additions To Income And Principal: With the Co-Trustees' consent, any person may, at any time, from time to time, by Court order, assignment gift, transfer, Deed or Will, provide income or add to the principal of the Trust created herein, and any property so added shall be held, administered and distributed under the terms of this Trust. The Co-Trustees shall execute documents necessary to accept additional contributions to the trust and shall designate the additions on an amended Schedule A of this trust.

DISTRIBUTION UPON DEATH OF BENEFICIARY

3.0 Disposition Of Trust On Death Of Beneficiary: The Trust shall terminate upon the death of BENEFICIARY. The Co-Trustees shall distribute any principal and accumulated interest that then remain in the Trust pursuant to paragraphs 3.1 and 3.2 of this Trust.

3.1 Reimbursement to the State: The New York State Department of Health, or other appropriate Medicaid entity within New York State shall be reimbursed for the total Medical Assistance provided to AIP during the lifetime of the beneficiary, as consistent with Federal and State Law. If AIP received Medicaid in more than one State, then the amount distributed to each State shall be based on each state's proportionate share of the total amount of Medicaid benefits paid by all states on behalf of the Beneficiary.

3.2 Distribution after Reimbursement to State: All remaining principal and accumulated income shall be paid to the legal representative of the Estate of the Beneficiary.

CO-TRUSTEES

4.0 Co-Trustees: GUARD and CO-TRUSTEE are appointed Co-Trustees of this Trust.

4.1 Consent of Co-Trustees: The Co-Trustees shall file with the Clerk of the court, Bronx County, a "Consent to Act" as Co-Trustee, Oath and Designation, duly acknowledged.

4.2 Bond: The Co-Trustees shall be required to execute and file a bond and comply with all applicable law, as determined by the Supreme Court, Bronx County.

4.3 Resignation: A Co-Trustee may resign by giving written notice, a signed and acknowledged instrument, delivered to (i) the Supreme Court, --County; (ii) the Guardian of the Beneficiary, if any; (iii) the Successor Trustee; (iv) the Beneficiary; (v) the surety; and (vi) the LOCAL DEPARTMENT OF SOCIAL SERVICES. The Trustee's resignation is subject to approval of the Supreme Court, ---County.

4.4 Discharge and Final Accounting of Co-Trustees: No Co-Trustee shall be discharged and released from office and bond, except upon filing a Final Accounting in the form and in the manner required by §81.33 of the Mental Hygiene Law, and obtaining judicial approval of same. The Final Accounting shall be delivered to the LOCAL DEPARTMENT OF SOCIAL SERVICES

4.5 Annual Accounting: The Co-Trustees shall file during the month of May in the Office of the Clerk of the County of---, an annual report in the form and manner required by §81.31 of

the Mental Hygiene Law, and such annual accountings shall be examined in the manner required by §81.32 of the Mental Hygiene Law. Such annual accounting shall also be sent to the LOCAL DEPARTMENT OF SOCIAL SERVICES and, TO THE LOCAL Social Security Administration OFFICE, If the Co-Trustees do not receive written objections to the annual accounting within 90 days of its service upon DSS, such accounting shall be deemed approved by the DSS.

4.6 Continuing Jurisdiction: The Supreme Court, ---County, shall have continuing jurisdiction over the interpretation, administration and operation of this Trust, and all other related matters.

4.7 Powers of Co-Trustees: In addition to any powers which may be conferred upon the Co-Trustees under the law of the State of New York in effect during the life of this Trust, the Co-Trustees shall have all those discretionary powers mentioned in EPTL §11.1.1 et. seq., or any successor statute or statutes governing the discretion of a Co-Trustees, so as to confer upon the Co-Trustees the broadest possible powers available for the management of the Trust assets. In the event that the Co-Trustees wish to exercise powers beyond the express and implied powers of EPTL Article 11, the Co-Trustees therefor shall seek and must obtain judicial approval.

4.8 Appointment of a Successor Trustee: Appointment of a successor Trustee not named in this Trust shall be upon application to the Supreme Court, ---County, with Notice to the LOCAL DEPARTMENT OF SOCIAL SERVICES

4.9 Commissions of Co-Trustees: The Co-Trustees shall be entitled to commissions pursuant to SCPA 2309 upon the review of the annual accounting each year.

MISCELLANEOUS PROVISIONS

5.0 Governing Law: This Trust Agreement shall be interpreted and the administration of the Trust shall be governed by the laws of the State of New York; provided, however, that Federal law shall govern any matter alluded to herein which shall relate to or involve government entitlements such as SSI, Medicaid, and or other federal benefit programs.

5.1 Notifications to Social Services District: The Co-Trustees shall provide the required notification to the Social Services District in accordance with the requirements of Section 360-4.5 of Title 18 of the Official Regulations of the State Department of Social Services, and any other applicable statutes or regulations, as they may be amended. These regulations currently require notification of the creation or funding of the trust, the death of the beneficiary, and in the case of trusts exceeding $100,000, in advance of transactions that tend to substantially deplete the trust principal (as defined in that section), and in advance of transactions for less than fair market value. For all required notification and each time court approval is sought for any matter hereunder, the Co-Trustees shall give written notice to the Department of Social Services at least 30 days in advance of required notification and requests for court approval.

5.2 Savings Clause: If it is determined that any provision hereof shall in any way violate any applicable law, such determination shall not impair the validity of the remaining provisions of the Trust.

5.3 Usage: In construing this Trust, feminine or neuter pronouns shall be substituted for those of the masculine form and vice versa, and the plural for the singular and vice versa in any case in which the context may require.

5.4 Headings: Any headings or captions in the Trust are for reference only, and shall not expand, limit, change, or affect the meaning of any provision of the Trust.

5.5 Binding Effect: This Trust shall be binding upon the estate, executors, administrators and assigns of the Grantor and any individual Co-Trustee, and upon any Successor Trustee.

Effective Date:
Title: Section 360-4.5 - Availability of assets held in trust.

360-4.5 Availability of assets held in trust.

(a) Inter vivos trusts created before August 11, 1993. In determining the initial or continuing eligibility of any person applying for or receiving MA, there must be included in the amount of income and resources considered available to such person the maximum amount of payments that may be permitted to be distributed under the terms of an MA-qualifying trust, assuming the full exercise of discretion by the trustee or trustees. For purposes of this subdivision, an MA-qualifying trust is a trust or similar legal device established by a person or by his/her spouse (the grantor or grantors) other than by will, under which the grantor may be the beneficiary of all or part of the payments from the trust and under which one or more trustees are permitted to exercise any discretion with respect to the distribution to the grantor.

(1) This section applies without regard to:

(i) whether the MA-qualifying trust is irrevocable or is established for purposes other than to enable a grantor to qualify for MA; or

(ii) whether the trustee actually exercises discretion with respect to the distribution of payments to the grantor.

(2) Exception. Any trust or initial trust decree established prior to April 7, 1986 solely for the benefit of a mentally retarded individual who resides in an intermediate care facility for the mentally retarded will be excluded in determining initial or continuing eligibility for MA.

(b) Inter vivos trusts created on or after August 11, 1993. For purposes of this subdivision, an individual will be considered to have created a trust if assets of the individual were used to form all or part of the principal (corpus) of the trust, the trust was established other than by will, and the trust was established by: the individual; the individual's spouse; a person acting at the direction of the individual or the individual's spouse, including a court or administrative body; or a person with the legal authority to act in place of or on behalf of the individual or the individual's spouse, including a court or administrative body. In the case of a trust which contains the assets of an individual and of another person or persons, the provisions of this subdivision apply to the portion of a trust's assets which are attributable to the individual.

(1) Irrevocable trusts created by an applicant/recipient. The availability of assets held in an irrevocable trust to an applicant/recipient depends on the trustee's authority, under the specific terms of the trust agreement, to make payments to or for the benefit of the applicant/recipient.

(i) Any portion of the trust principal, and of the income generated by the trust principal, from which no payments may be made to the applicant/recipient under any circumstances, must be considered to be assets transferred by the applicant/recipient for purposes of subdivision (c) of section 360-4.4 of this Subpart. The date of the transfer in such cases is the date the trust is established or, if later, the date on which payment to the applicant/recipient is foreclosed under the terms of the trust agreement.

(ii) Any portion of the trust principal, and of the income generated from the trust, which can be paid to or for the benefit of the applicant/recipient, under any circumstances, must be considered to be an

available resource.

(iii) Payments made from the trust to or for the benefit of the applicant/recipient must be considered to be available income in the month paid.

(iv) Any payments from the trust other than those described in clause

(iii) of this paragraph must be considered to be assets transferred by the applicant/recipient for purposes of subdivision (c) of section 3604.4 of this Subpart.

(2) Revocable trusts created by an applicant/recipient.

(i) The trust principal and the income generated by the trust principal must be considered as an available resource.

(ii) Payments made from the trust to or for the benefit of the applicant/recipient must be considered to be available income in the month paid.

(iii) Any payments from the trust other than those described in clause

(ii) of this paragraph must be considered to be assets transferred by the applicant/recipient for purposes of subdivision (c) of section 3604.4 of this Subpart.

(3) Trusts created by the spouse of an applicant/recipient with the spouse's assets.

(i) Revocable trusts. The availability of trust assets to the spouse is governed by the provisions of paragraph (2) of this subdivision.

(ii) Irrevocable trusts. (a) The trust principal and the income generated by the trust principal must be considered to be assets transferred by the applicant/recipient for purposes of subdivision (c) of section 360-4.4 of this Subpart.

(b) Payments made from the trust to or for the benefit of the applicant/recipient must be considered to be available income in the month paid.

(4) Trusts created by anyone other than the applicant/recipient or a legally responsible relative, including trusts created pursuant to section 7-1.12 of the Estates, Powers, and Trusts Law. Payments made from the trust to the applicant/recipient are available income in the month received. Neither the principal of such a trust nor any in-kind benefits received by the applicant/recipient as a result of disbursements from the trust will be counted as or deemed to be available income or resources for purposes of determining MA eligibility.

(5) Exceptions. (i) Notwithstanding the provisions of paragraphs (1)

(4) of this subdivision, the principal and income of the following trusts must not be considered as available income or resources:

(a) A trust containing the assets of a disabled individual if: the trust was created for the benefit of the disabled individual when the disabled individual was under the age of 65; the trust was established by a parent, grandparent, legal guardian, or court of competent jurisdiction; and the trust agreement provides that upon the death of the individual the State must receive all amounts remaining in the trust up to the

total value of all MA paid on behalf of the individual.

(b) A trust containing the assets of a disabled individual if: the trust is established and managed by a non-profit association which maintains separate accounts for the benefit of disabled individuals, but for purposes of investment and management of trust funds, pools the accounts; each account in the trust is established solely for the benefit of a disabled individual by the individual, by the parent, grandparent, or legal guardian of the individual, or by a court of competent jurisdiction; and upon the individual's death amounts remaining in the individual's account which are not retained by the trust must be paid to the State up to the total value of all MA paid on behalf of the individual.

(ii) In the event that a lien has been imposed pursuant to the provisions of section 104-b or section 369 of the Social Services Law upon the funds which are to be used to establish a trust described in subparagraph (i) of this paragraph, on account of MA provided prior to the date the trust is to be established, such lien must be satisfied or otherwise resolved in order for the assets subject to such lien to be disregarded in determining MA eligibility.

(iii) A trustee of a trust described in subparagraph (i) of this paragraph, in order to fulfill his or her fiduciary obligations with respect to the State's remainder interest in the trust, must:

(a) notify the appropriate social services district of the creation or funding of the trust for the benefit of an MA applicant/recipient;

(b) notify the social services district of the death of the beneficiary of the trust;

(c) notify the social services district in advance of any transactions tending to substantially deplete the principal of the trust, in the case of a trust valued at more than 100,000 dollars; for purposes of this clause, the trustee must notify the district of disbursements from the trust in excess of the following percentage of the trust principal and accumulated income: five percent for trusts over 100,000 up to 500,000
dollars; ten percent for trust valued over 500,000 up to 1,000,000 dollars; and fifteen percent for trusts over 1,000,000 dollars;

(d) notify the social services district in advance of any transactions involving transfers from the trust principal for less than fair market value; and

(e) provide the social services district with proof of bonding if the assets of the trust at any time equal or exceed 1,000,000 dollars, unless that requirement has been waived by a court of competent jurisdiction, and provide proof of bonding if the assets of the trust are less than 1,000,000 dollars, if required by a court of competent jurisdiction;

(iv) A social services district or the department may commence a proceeding under section 63 of the Executive Law against the trustee of a trust described in subparagraph (i) of this paragraph, if the district or the department considers any acts, omissions, or failures of the trustee to be inconsistent with the terms of the trust, contrary to applicable laws or regulations (including but not limited to this paragraph), or contrary to the fiduciary obligations of the trustee.

(c) Trusts created by will. Payments made from the trust to the applicant or recipient are available income in the month received. Neither the principal of such a trust nor any in-kind benefits received by the applicant or recipient as a result of disbursements from the trust will be counted as or deemed to be available income or resources for purposes of determining MA eligibility.

(d) Any provision of a trust created on or after April 2, 1992 is void if it directly or indirectly limits, suspends, terminates, or diverts the principal, income, or beneficial interest of the grantor or grantor's spouse in the event that the grantor or grantor's spouse applies for MA or requires medical care, without regard to the irrevocability of the trust or the purpose for which the trust was created. The beneficial interest of the grantor or grantor's spouse includes any income or principal amounts to which the grantor or grantor's spouse would be entitled under the terms of the trust, by right or in the discretion of the trustee, assuming the full exercise of discretion by the trustee.

(e) The provisions of subdivision (b) of this section, with respect to trusts created on or after August 11, 1993, also apply to legal instruments and other devices similar to trusts created on or after August 11, 1993. A legal instrument or other device is similar to a trust if, attendant upon its creation, assets are put under the control of an individual or entity with fiduciary obligations to manage such assets for the benefit of a designated beneficiary or beneficiaries. Legal instruments and devices subject to the provisions of subdivision (b) of this section include, but are not limited to, escrow accounts, investment accounts, and pension funds.

Volume: A

Matter of JP Morgan Chase Bank, N.A. (Marie H.)

2012 NY Slip Op 22387 [38 Misc 3d 363]

December 31, 2012

Glen, J.

Sur Ct, New York County

Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.

As corrected through Wednesday, January 30, 2013

[*1]

In the Matter of the Accounting of JP Morgan Chase Bank, N.A., et al., as Cotrustees of the Mark C.H. Discretionary Trust of 1995, Created by Marie H., Grantor.

Surrogate's Court, New York County, December 31, 2012

APPEARANCES OF COUNSEL

Roy H. Carlin for H.J.P., individual trustee. *Davidson, Dawson & Clark* for Chase Manhattan Bank, trustee.

{**38 Misc 3d at 364} OPINION OF THE COURT

Kristin Booth Glen, S.

This case raises important questions about the obligations of fiduciaries, including institutional trustees, to beneficiaries, with disabilities, of trusts that seek to provide for the welfare of those beneficiaries. A review of the history of this trust and related proceedings places the issue in sharp perspective.

This history reveals a severely disabled, vulnerable, institutionalized young man, wholly dependent on Medicaid, unvisited and virtually abandoned, despite a multimillion dollar trust left for his care by his deceased mother. It reveals two cotrustees, one who was personally involved with the deceased and who holds himself out as an expert in planning for children with intellectual disabilities, and one which is a major banking institution,

neither visiting or inquiring after the beneficiary's needs nor spending a single penny on him.

The history turns brighter after a serendipitous SCPA article 17-A proceeding, where the cotrustees were called to task, educated about available services, and hired a certified care manager to attend to the beneficiary's needs. That intervention, now after almost four years, has dramatically improved the beneficiary's quality of life and his functional capacity to enjoy what is now a near "normal" existence in the community.

This history, and the legal consequences that flow from it, discussed below, should provide a clarion call for all fiduciaries of trusts whose beneficiaries are known to have disabilities to fulfill their "unwavering duty of complete loyalty to the beneficiary" (106 NY Jur 2d, Trusts § 247) or be subject to the remedies available for breach of their fiduciary obligation.

History

Will and Trusts

Marie H. died on March 20, 2005 at the age of 85, survived by two adopted children, Charles A.H., and Mark C.H., then 16 years old. Prior to her death, upon learning of her terminal cancer, Marie searched for an appropriate residential setting for Mark, and ultimately [*2]placed him in the Anderson School in{**38 Misc 3d at 365} Straatsburg, New York.[FN1] Mark's disabilities are described more fully below.

In her will, Marie left her entire estate to the Marie H. Revocable Trust of 1995, created by trust agreement dated March 23, 1995 (the Revocable Trust).[FN2] The Revocable Trust provided that, upon Marie's death, after dividing her tangible property between her two children, the balance was to be divided into two equal shares, one for Mark's trust, and one for Charles's trust. The will, also dated March 23, 1995, named her sister Betty as executor and guardian of the person and property of her minor children. Marie's attorney, H.J.P., was named the successor executor.

The will was admitted to probate on July 5, 2005. Because Betty predeceased Marie, letters testamentary issued to H.J.P.[FN3] The federal estate tax return (the 706) indicated a gross estate of approximately $12 million, of which $2,575,000 was the date of death valuation of Marie's co-op apartment, and $8,973,653.79 was the date of death value of her

stocks and bonds. Other miscellaneous property was valued at $471,439,77. According to the 706, the only assets that were transferred to the Revocable Trust during Marie's lifetime were two Citibank accounts totaling $1,390.41.

The 706 estimated the executor's commission at $133,000 and attorney fees at $300,000,[FN4] with other administration expenses[FN5] shown as $462,717.45. Federal estate taxes were shown as $3,479,561.55.[FN6] [*3]

{**38 Misc 3d at 366}On the same day that she executed her will and the Revocable Trust, March 23, 1995, Marie entered into two irrevocable trust agreements, one for Charles and one for Mark, the Mark C.H. Discretionary Trust of 1995 (the Mark Trust), with herself and Betty as trustees. H.J.P. was named successor trustee if either of the two named trustees should cease to serve, and, upon Marie's death, the Chase Manhattan Bank, N.A. (Chase) was designated as additional trustee "to serve with the other Trustees in office." The Mark Trust was funded with an initial contribution of $18.

It is clear that the Mark Trust is for the benefit of a person with disabilities.[FN7] Article 2.1 provides for distributions of income and principal to Mark for his "care, comfort, support and maintenance," in the trustees' discretion, and further provides:

> "(ii) In the event such net income shall in any year be insufficient to provide for the support, maintenance, care and comfort of the beneficiary or for necessary medical expenses as determined by the Trustees, in their sole and absolute discretion, the said trustees shall expend out of the principal of said fund such sums as they deem necessary for any such purposes. Before expending any amounts from the net income and/or principal of this trust, the Trustees may wish to consider the availability of any benefits from government or private assistance programs for which the Grantor [sic] may be eligible and that where appropriate and to the extent possible, the Trustees may endeavor to maximize the collection of such benefits and to facilitate the distribution of such benefits for the benefit of the beneficiary."

In article 2.1, section (iii) continues, authorizing the trustees "to pay or apply . . . to any facility [the beneficiary] may be{**38 Misc 3d at 367} residing in and/or to any organization where he may be a client or a participant in any program (s) sponsored by them, as the Trustees shall determine, for the general uses of such [*4]facility and/or organization."[FN8]

Article 2.1, § (v) gives the trustees the right to terminate the trust "as if the beneficiary were deceased" if the existence of the trust causes the beneficiary to be excluded from government benefits.

The Account

After probate of Marie's will, in the SCPA article 17-A proceeding, described below, this court, sua sponte, ordered H.J.P. and Chase to account as trustees of the Mark Trust, [FN9] noting, "questions having arisen as to whether the funds intended by Marie H. to benefit Mark . . . had been duly applied by [sic] for such purposes by her chosen fiduciaries." The court appointed a guardian ad litem (GAL) for Mark in this accounting proceeding (SCPA 403 [2]).

On December 7, 2010, the trustees filed an amended accounting covering the period of March 23, 1995 through March 31, 2010. Schedule A of that accounting showed the total amount of principal received as $1,420,343.28. In objections filed by the GAL, he noted his belief that, with a net estate of approximately $10 million, the Mark Trust should have been funded with $5 million. After meeting with Chase's attorney, he concluded, based on her statements to him, that estate taxes of $3,479,561.55 accounted for the diminution of the amount with which the Trust was funded. This, of course, was clearly not the case, as the estate tax would have been paid before distribution of the residuary estate, first to the Revocable Trust, and from there, in equal shares to the Mark Trust and the trust for Charles. If, in fact, all the estate taxes were somehow allocated to Mark's share, a major error would have occurred.

Schedule G, "the Statement of Principal Assets on Hand," as of March 31, 2010, showed a market value of $2,733,094.49. The substantial increase over the amount shown as principal received in 2005 is, however, not due to investment strategies but rather, according to a subsequent communication from Chase, the result of underreporting the initial principal received{**38 Misc 3d at 368} with many securities incorrectly listed at a $0 inventory value on schedule A.[FN10]

Schedule C shows commissions paid to the trustees in amounts of $17,622.53 to H.J.P. [FN11] [*5]and $34,914.61 to Chase.[FN12] Significantly, schedule G-1 shows income on hand of $248,881.36, while schedule E-1, distribution of income, shows $0. The statement

of administration expenses chargeable to income, schedule C-2, totals $29,493.49, of which the largest items are the commissions paid to the trustees. Of the total administrative expenses and taxes shown on schedule C, New York State income taxes (after substantial refunds) constituted $7,158.54; federal income taxes (after substantial refund) were $6,367.70; commissions were, as already noted, to Chase ($34,914.61) and H.J.P. ($17,622.53); H.J.P.'s firm's legal fees were $11,500; the fees of the guardian ad litem were $7,375; and the fees of Staver Eldercare Services (the care manager hired for Mark as a result of the article 17-A proceeding) were only $3,525.

The almost negligible amount paid to Staver, beginning in February 2009, is the *only* money paid out for the benefit of Mark, the disabled beneficiary, in five years. That is 1.4% of the income on hand at the end of the accounting period and 3.6% of all expenses. On an almost $3 million trust, the money spent on the beneficiary, over a five-year period—and only because of the court's intervention—was approximately 0.1%.

The Article 17-A Proceeding

In October 2006, H.J.P. brought a proceeding pursuant to article 17-A to be appointed as guardian of the person[FN13] of Mark. In support of his petition, he submitted affirmations from two{**38 Misc 3d at 369} health care providers. One, Robert C. Williams, Ph.D., described Mark as "[p]rofound[ly] mentally retarded, suffering from autism," as well as "non-verbal and engag[ing] in numerous repetitive and self stimulating behaviors." Dr. Lynn Liptay provided a diagnosis of autism and mental retardation, noting that Mark was "nonverbal and requires constant supervision and assistance with all ADL's,"[FN14] and, as well, that he "engaged in frequent aggressive behaviors including spitting, throwing objects and hitting his own head."

Because Mark was living in an institution, he was represented by Mental Hygiene Legal Services (MHLS) (Mental Hygiene Law § 81.07 [g] [1] [vii]). The report of the principal attorney for MHLS in the Second Department, who visited him there, notes that, according to the Anderson School records, Mark "has the receptive communication skills of someone less than two years old and the expressive skills of a three month old." The attorney described her visit to Anderson and her observation of Mark: "[E]ffective communication was not possible, [Mark's] only responses were facial grimaces and attempts to return to his classroom chair. He remained nonverbal, did not make eye contact, and

appeared to be responding to internal stimuli." [*6]

At the initial hearing, on September 18, 2007,[FN15] where Mark's presence was excused,[FN16] H.J.P. revealed that, although he was applying for guardianship as a result of a promise to Mark's mother on her death bed, he had not seen Mark since Mark was six years old, when Marie brought him and Charles to H.J.P.'s law office. H.J.P. had never visited Anderson to ascertain Mark's condition nor, more critically, his needs,[FN17] nor had he inquired of the staff about any unmet needs. Also revealing the existence of{**38 Misc 3d at 370} Mark's trust[FN18] and his position as cotrustee, H.J.P. admitted that he had not expended a single dollar on Mark's behalf in almost three years.

I adjourned the hearing to permit the other cotrustee to appear. Subsequently, a representative of Chase came to court with H.J.P. in response to my instruction; Chase's "excuse" for inaction was its lack of institutional capacity to ascertain or meet the needs of this severely disabled, institutionalized young man. If the bank lacked such expertise, I noted, they should obtain the services of someone who could assess Mark's situation and ascertain his needs. After some initial missteps, H.J.P. and Chase retained the services of a certified care manager with extensive experience with people with intellectual disabilities, Robin Staver, M.S., Ed., CMC.

First contacting, and then visiting Anderson, she learned of a list of items the professionals there believed would enhance Mark's quality of life and assist his learning and development. Over the past four years she has, as a representative of the trustees, been actively involved in Mark's life and care, attending meetings, in person or by phone, planning meetings, arranging medical and other consultations, purchasing equipment, including assistive communication devices, recreational materials, clothing, etc., and providing for Mark's first forays into the community. What follows is a brief snapshot of the extraordinary—and heartwarming—progress Mark has made since the funds his mother left for his care have been well and thoughtfully used [*7]for that purpose.[FN19] The detail included, what anthropologists call a "thick description," is important in {**38 Misc 3d at 371}understanding how apparently trivial expenditures and interventions can have a huge impact on the progress and quality of life of a person with intellectual disabilities.

December 2008

This was Staver's first meeting with Mark and the staff at Anderson. She noted that

> "Mark enjoys swinging and climbing outdoors. However, there is no playground in the vicinity of his residence. [In response to communications about Mark's needs, initiated by the court,] in August a proposal for a play structure with swings and Adirondack chairs was sent to H.J.P. To date, no plans for the structure are in place."

The residence manager poignantly told Staver that "as far as she knew, Mark has not had any visitors in the five years she has worked with him nor has he had a vacation. She stated that most of the students leave the school over Christmas vacation, and Mark remains on campus with staff."

Staver reported on Mark's pharmacological regime at the same time that she recommended an independent neurology consult with a non-Medicaid neurologist and a speech evaluation "to determine appropriate augmentative communication devices and purchase those devices." Significantly for the issues presented here, Staver reported that "Mark currently takes Keppra 500 mg. which is covered by Medicaid. However, this medication causes adverse reactions including physical aggression, agitation, frustration and vocalizations. Keppra SR, which is an extended release medication, causes fewer side effects, but is not covered by Medicaid."[FN20]

Staver also recommended the purchase of a personal computer and computer programs for Mark's room, an electric synthesizer and/or electric keyboard, gift certificates for restaurants and clothing stores, the playground system and outdoor chairs previously requested, a one-week vacation to Disney World with two staff members on duty 24 hours a day, and a recliner chair with [*8]massage capabilities.[FN21]

{**38 Misc 3d at 372}July 2009

Mark "graduated" from the special ed program in June,[FN22] and was being prepared to enter a vocational program and to move to an IRA (individualized residential alternative) residence in the community. He still required assistance with some ADL's (tooth brushing, applying deodorant) but was able to dress himself independently, eat with regular utensils and drink from a cup. He demonstrated "a limited sense of safety and require[d] supervision when out in the community." He had no skills in the areas of money, time-telling or calendar recognition. While he was still engaging in aggressive behavior, he was also enjoying some

community activities including playing ball and watching videos. As previously reported, "Mark loves to climb on the playground and go on the swings. He smiles and will reciprocate gestures such as high fives or handshakes." Staver also reported that Mark was now using the PECS (picture exchange communication system) for communication with others, and had made "significant progress," although the speech pathologist recommended that an augmentative communication device be purchased to further enhance Mark's communication skills.

April 2010

Mark continued to reside on the Anderson campus, awaiting completion of a new IRA site targeted for December 2010. In January 2010, he transitioned from Anderson's education program to adult day habilitation services. Mark, still entirely nonverbal, continued to use the PECS, but his inability to communicate effectively with others made it "difficult for him to self-regulate when transitioning from one activity to another . . . [causing him to become] agitated and exhibi[t] aggressive behavior."

Because of frequent signs of aggression, the residence manager "requested contact information for Mark's brother. Staff would like him to visit Mark. After Mark's mother died, he no longer had any contact with his brother. [The residence manager] believes that it would be beneficial for Mark emotionally to see his brother again." Finally, Staver reported that she had now been able to purchase gift certificates for a computer and headphones, clothing for Mark, grocery items, and meals in local restaurants. Recommended [*9]items included two air purifiers,{**38 Misc 3d at 373}[FN23] a portable DVD player, a radio with wireless headphones, a recliner chair, and more gift certificates for restaurants in the community.

August 2010

Mark was just about to move to his new housing; because he "does not adapt well to change," he was exhibiting more outbursts of aggression, including lunging and throwing items while in the van that takes him to and from his day program. The behavior specialist instituted a protocol for use of a safety harness in the van, but also

> "stated that Mark would benefit from use of enjoyable sensory items in the van. These items will assist in calming Mark and hopefully turn the van ride into a

> positive experience. [The behavior specialist] will consult with . . . the Occupational Therapist regarding items to be purchased for Mark . . . [and] forward all requests to [Staver]."

Staver reported that since her last report, she had purchased a touch screen computer, a computer table, Boardmaker Plus! software, clothing and certificates for dining out in the community, and was planning to purchase additional needed items once Mark moved to his new residence.

November 15, 2010

Staver reports purchasing an iPad, and gift cards to Best Buy for accessories and apps, a trampoline, a recumbent bike, augmentative communication devices, educational puzzles and, as requested, "sensory items."

March 2011

Mark transitioned well to the Plutarch Residence. He "continues to exercise daily, enjoys taking long walks, brushes his teeth independently, helps with the laundry, and participates in afternoon meetings." He was progressing toward having "40 van rides without lunging out of his seat" so that the safety harness could be discontinued. In addition, "Mark continues to show significant improvement during community integration. He enjoys meals, bowling, haircuts and shopping." Staver reports that she purchased for Mark's new residence a laptop computer, a 32-inch television, a mattress and box spring, headboard and footboard, a rocker/reclining chair with heat and{**38 Misc 3d at 374} massage, a recumbent bicycle, a trampoline and rubber mats for safety.

Under consideration for purchase were playground equipment for use at Mark's residence, a trampoline to be used at Mark's day program, Wii and XBox, a hammock, an iPad, and a Mayer-Johnson Tech/Talk augmentative communication system that aids users to communicate using direct selection.

August 26, 2011

Mark was reported to have continuously improved in the tasks and activities of daily life in his new residence, "participat[ing] in household tasks including putting laundry in the washing machine and transferring clean clothes to the dryer; reviewing his daily schedule,

[*10]removing his plate from the table after meals, scraping the plate, rinsing it off and putting it in the dishwasher."

The importance of exercise was noted,[FN24] with Mark "playing basketball, walking, sprinting and running, as well as using an exercise ball, recumbent bike, Wii exercises and a trampoline at home." He no longer required the safety harness in the van and, in the classroom, "accepts changes in his routine, shortens break time himself, interacts more with staff and is able to sit and complete tasks." The speech language pathologist noted that Mark's use of the recently purchased XBox allowed him to "pair an enjoyable game with work tasks and aid in peer interactions."

Staff requested purchase of a number of items including an iPad with apps for music, communication, labeling and categorization; a Proloquo2Go for augmentative and alternative communication; wireless headphones for music [for self-soothing] at his day program; Boardmaker software for communication pictures and symbols; and sensory items including a compression vest, hand held massager, and neck/shoulder weighted compression.

November 2011

Staver wrote to H.J.P.: "Staff reports that Mark has benefited from recent purchases [of the items noted in the August 26, 2011 report] on his behalf" and, as well, "I am working to coordinate a visit with Mark's brother. Staff thinks this would be beneficial to Mark."

{**38 Misc 3d at 375}July 2012

Mark was now ensconced in his IRA, where he had his own room, and where he was making substantial progress in communicating. He was able to lose the weight he gained over the winter through portion control and exercise, including his trampoline and recumbent bike. He showed "significant progress in the classroom" and "mastered most tasks including attending speech and occupational therapy sessions without staff accompaniment." He participated in preparation for the Special Olympics 50-meter run, though ultimately he was unable to start.[FN25]

The staff had begun planning a vacation for Mark, beginning with an introduction "to an amusement park and/or water park to see how he reacts and how accepting he is to new

activities." Options for the vacation include Disney World, as previously suggested by Staver, [*11]Autism on the Seas, a cruise for autistic individuals and their families/residential staff, and autism-friendly Broadway shows.

Also reported: "The case manager is working with Mark's brother, Charles, to facilitate a visit to Mark."

September 24, 2012

Despite some new physical problems, the most recent communication was positive on many fronts. Mark is reported as "using pleasant table manners" and using PECS, and is able to make his own choices for meals and snacks. He clears the table after meals, rinses and puts dishes in the dishwasher, and independently takes his laundry from his room to the laundry room where he places it in the washer without prompts. He "showers independently" though with a staff member nearby due to his seizure disorder. He "has become less prompt-dependent at home" and "will independently leave the living room to go upstairs to his room or to the bathroom and return to the living room alone." As an example of his increasing life skills, Mark is reported to enjoy walking on the rail trail, after which "Mark likes purchasing a drink, and especially likes receiving change from his payment."

Demonstrating the beneficial results of purchases made for him, his "gross motor skills have improved. He enjoys bouncing {**38 Misc 3d at 376}on the trampoline, using it as a sensory activity . . . He likes having meals in restaurants and enjoys dressing up prior to going out for dinner."

His communication skills are also improving, in part because of the devices that have been purchased for him and that are being incorporated into his regimes. According to the report, "Mark uses sign language to communicate the words 'cracker' and 'apple.' He uses the Super Talker 8 for dinner and chooses the foods he likes. Mark will start using programs on his iPad at home." And, as an apparently small, but enormously encouraging, advance, Staver reports that, as she was leaving Mark's classroom, he waived "bye" and, although previously entirely nonverbal, said, for the very first time, "buh"!

Finally, as a truly happy ending, Staver reports that she

"facilitated a visit and accompanied Mark's older brother Charles to see Mark at

> his residence on September 22, 2012 . . . [Charles] stated that he was amazed at the progress Mark made in the last 8 years. He also said he felt reassured by the staff's caring, sensitivity and commitment to their clients. He said he knows Mark thrives because of the environment he's in and looks forward to bringing his family to meet Mark in the near future."

Discussion

As this history demonstrates, once the trustees were required to make themselves knowledgeable about Mark's condition and his needs, and the availability of services that would [*12]enable them to provide for those needs, they began, and continue to use funds from his trust for the purposes his deceased mother anticipated and so deeply desired.

The history brings into sharp focus the obligations of trustees, both individual and institutional, to the beneficiaries of trusts they administer when they know,[FN26] or should know,[FN27] that those beneficiaries have disabilities, and have medical, educational or quality of life needs that can and should be met from trust income.{**38 Misc 3d at 377}

It is fundamental that a fiduciary takes on obligations beyond those imposed by ordinary relationships or transactions; in the oft-quoted works of Judge Cardozo, her responsibility is "something stricter than the [mere] morals of the market place . . . but the punctilio of an honor the most sensitive" (*Meinhard v Salmon*, 249 NY 458, 464 [1928]). This is no less the case for trustees, who have "an unwavering duty of complete loyalty to the beneficiary of the trust to the exclusion of the interests of all other parties" (106 NY Jur 2d, Trusts § 247).

The Mark Trust empowers the trustees with "absolute discretion," gives them latitude to withhold or pay out income, and, in the event of an income shortfall, to invade the principal, for the "care, comfort, support and maintenance" of Mark and his descendants. However, the words "absolute discretion" do not insulate the trustees, even trustees of lifetime trusts, as here, from liability.

Article 6.1 purports to absolve the trustees from a duty to account (except for a final account). That violates public policy and cannot be enforced (*Matter of Malasky*, 290 AD2d 631 [3d Dept 2002]) where, as here, the beneficiary is a person under a disability, and no one is protecting the beneficiary's interests (*Matter of Shore*, 19 Misc 3d 663 [Sur Ct, NY County 2008]). In an accounting, the court can assess the trustees' failure to take reasonable

interest in and action on behalf of Mark.

The trustees left Mark to languish for several years with inadequate care, despite the fact that the Mark Trust had abundant assets. In so doing, the trustees failed to exhibit a reasonable degree of diligence toward Mark. Courts will intervene not only when the trustee behaves recklessly, but also when the trustee fails to exercise judgment altogether ("even where a trustee has discretion whether or not to make any payments to a particular beneficiary, the court will interpose if the trustee, arbitrarily or without knowledge of or inquiry into relevant circumstances, fails to exercise the discretion") (Restatement [Third] of Trusts § 50, Comment *b*). That is, sadly, precisely what occurred here.

The plain language of the Mark Trust elucidates Marie's intent in its creation. Article 2.1, § (iii) authorizes the trustees to pay any income not applied for Mark's benefit[*13]"to any facility he may be residing in and/or to any organization where he may be a client or a participant in any program(s)." This provision reflects both the importance of Mark's quality of life to Marie and the minimum knowledge that Marie expected her trustees{**38 Misc 3d at 378} to have about Mark and his situation. In order to exercise their discretionary power of expenditure, at the very least they are required to take steps necessary to keep themselves fully informed of Mark's residential situation and ancillary services. It is not sufficient for the trustees to simply safeguard the Mark Trust's assets; instead, the trustees have a duty to Mark to inquire into his condition and to apply trust income to improving it. The trustees abused their discretion by failing to exercise it. H.J.P.'s complicity is exacerbated by the fact that as drafter of the Mark Trust, as well as the drafter of Marie's will, he was aware of Mark's incapacity for years before serving as trustee.

Although New York case law concerning inactive fiduciaries is sparse, the Appellate Division has clearly ruled that executors may not deny a needy beneficiary payment from an estate under circumstances far less compelling than those presented herein. In *Matter of Van Zandt* (231 App Div 381 [4th Dept 1931]), the decedent bequeathed his real property to his sons subject to a life estate in the same property to his wife. As in the Mark Trust, the decedent gave his executors discretion over spending, authorizing but not requiring them to invade the trust corpus if the income supplied by the widow's life estate was insufficient for her "care, support and maintenance" (*id.* at 383). As in the Mark Trust, decedent's will gave the executors wide latitude "to expend . . . so much of the corpus of his estate as, in their opinion, might be necessary" (*id.* at 382). The executors subsequently refused to pay the

widow's health care expenses.

Despite the discretion that the words "in their opinion" afforded to the executors, the *Van Zandt* Court held that the will required the executors to expend estate assets on the beneficiary's behalf. The Court looked to the plain language of the will to determine the testator's intent:

> "The language of [the] will . . . indicates a design on his part to devote his estate to the support of his wife. It is evident that he regarded her as the first object of his bounty. He makes it clear that, if the income from his property is insufficient for her care, support and maintenance, the corpus is available for that purpose" (*id.* at 383).

In addition, the Court qualified the executor's discretion, noting that it was not an "arbitrary" power that the executors could refuse to apply altogether:

> "The executors . . . cannot shut their eyes to Mrs. VanZandt's needs, and neglect to act, or refuse to{**38 Misc 3d at 379} approve proper and necessary payments which come early within contemplation of the bequest. The testator's intent to devote his entire estate, if need be, to the support of his wife must not be lost sight of" (*id.* at 384).

Rather, the Court suggested that trustees had an affirmative duty to exercise their spending power on expenses that fell within the parameters set forth in the will: "Where a trustee has been given freedom to act according to his own judgment in matters pertaining to another, and he fails, in the opinion of the court, to exercise such discretion in a proper manner, he may be compelled to do that which the trust fairly requires him to do" (*id.*). By not spending, the executors obstructed the testator's intent.

As in *Van Zandt*, it was not sufficient for the trustees merely to prudently invest the trust corpus and to safeguard its assets. The trustees here were affirmatively charged with applying trust assets to Mark's benefit and given the discretionary power to apply additional income to Mark's service providers. Both case law and basic principles of trust administration and fiduciary obligation require the trustees to take appropriate steps to keep abreast of Mark's condition, needs, and quality of life, and to utilize trust assets for his actual benefit.

While the accounting in this trust is not yet complete,[FN28] their failure to fulfill their

fiduciary obligations should result in denial or reduction of their commissions for the period of their inaction.

Next Steps

The current accounting leaves many questions unanswered, particularly since an accurate statement of the opening principal received depends on the administration under both Marie's will and the somewhat inexplicable[FN29] Revocable Trust. Without expressing a view, or making any negative assumption, whether or not the estate and Revocable Trust were appropriately{**38 Misc 3d at 380} administered affects the amount of assets the Mark Trust should rightfully have received.

There is no question that this court has the power to order such accountings sua sponte (SCPA 2205). The power, and, indeed the obligation to do so is especially important where, as here, the only interested person, the sole beneficiary, is under a disability, and there is no one but the court to protect his interests.

Accordingly, H.J.P. is ordered to account as executor of the will of Marie H., and he and Chase are ordered to account as cotrustees of the Marie H. Revocable Trust of 1995 within 90 days of the order to be entered following this decision. Further, the cotrustees of the Mark Trust are ordered to file and serve a supplemented and revised accounting herein for proceedings through December 31, 2012, reflecting the proper values of the assets with which the trust was funded, by that same deadline.

Footnotes

Footnote 1: Charles is Mark's biological brother, and is one year older. He had no contact with Mark from the time Mark was placed at the Anderson School.

Footnote 2: Marie was named trustee, with section 9 (c) of the Revocable Trust providing that, upon her incapacity, her sister Betty and H.J.P. should become successor trustees. Section 9 (b) provides that, upon Marie's death, the Chase Manhattan Bank, N.A. should become a successor trustee with Betty and H.J.P., or the survivor of them.

Footnote 3: According to the guardian ad litem's report, H.J.P. reported that he specializes in estate planning and trusts and estates, and has long been involved in issues around people with intellectual disabilities, having served, inter alia, as co-chairperson of the New York State Association for Retarded Children Trust and on the Board of the Association for the Help of Retarded Children (AHRC). He has lectured on planning for families who have children with intellectual disabilities, and, in fact, met Marie H. after one such lecture.

Footnote 4: According to a letter from H.J.P., his fees are "charged on a flat fee basis," and not on time spent. Accountant fees were estimated at $10,000.

Footnote 5: These expenses related primarily to the sale of Marie's co-op apartment.

Footnote 6: According to an affidavit in response to the report of the guardian ad litem in this accounting, discussed below, a federal audit increased the estate tax due by $38,496.44, plus interest of $5,584.65, while there was a refund of New York State taxes of $16,048.87. The affidavit continues, "the attorney fees for the estate were increased by $100,000"; expenses are shown on the 706 totaling $917,217.45.

Footnote 7: Much later, H.J.P. argued that the trust should not disqualify Mark from Medicaid eligibility as it was, and was intended to be an "*Escher* Trust." A precursor to the statutory supplemental needs trust (EPTL 7-1.12 [eff July 26, 1993]) was established in New York law by *Matter of Escher* (94 Misc 2d 952 [Sur Ct, Bronx County 1978], *affd on op below* 75 AD2d 531 [1st Dept 1980], *affd* 52 NY2d 1006 [1981]). There, the trustee with absolute discretion as to principal distributions could not be directed to transfer the trust corpus to the government entity providing for the life beneficiary's care (*id.*).

Footnote 8: Notably, these provisions do not appear in the trust for Mark's brother, Charles, established on the same day.

Footnote 9: It was the court's intention, at the same time, to order an accounting in the estate of Marie H., but, inexplicably, that order was never signed.

Footnote 10: It is difficult, if not impossible, to ascertain the amount with which the Mark Trust was funded, and thus also to compare that amount to the closing balance for purposes of evaluating the trustees' prudence as a manager of trust funds. A rough calculation of the net value of Marie's estate based on the 706 suggests that the Mark Trust would have received approximately $2.5 million. In a phone communication, the attorneys for Chase have agreed to file corrected schedules, but as reflected in the conclusion herein below, the trustees will be ordered to do so.

Footnote 11: According to H.J.P., the commissions to him were computed in accordance with SCPA 2309.

Footnote 12: Pursuant to article 5.7 of the Mark Trust, a corporate trustee is authorized to receive commissions in accordance with its published rates of compensation in effect when such compensation is payable (*see* SCPA 2312).

Footnote 13: The original petition sought appointment both as guardian of the person and of the property, but in communications with the Guardianship Clerk, H.J.P. made clear that he was not, at that time, applying for the latter.

Footnote 14: ADL's are activities of daily living and include bathing, feeding oneself, toileting, dressing, etc. Mark was, according to Anderson's records, unable to perform any of these activities.

Footnote 15: The proceeding was delayed for almost a year as a result of H.J.P.'s health-related issues.

Footnote 16: The health care professionals at Anderson wrote that Mark's aggressive and self-harming behavior would be seriously exacerbated by the changes accompanying a trip from the institution in Straatsburg to the court in Manhattan.

Footnote 17: According to the guardian ad litem, the director of corporate compliance at Anderson, Linda Geraci,

> "stated that she is concerned that [H.J.P.] has not inquired into Mark's needs nor has he purchased anything for him—[despite the fact] that Mark's residence manager has recommended purchasing the following for Mark's benefit : an acoustic synthesizer and other musical equipment, furniture, clothing, adult swings, slides, climbing equipment, a stereo system and a computer with game software."

Footnote 18: Because Mark was placed in Anderson before his mother died, Anderson was not aware of the trust, and H.J.P. never informed them of its existence. This raised substantial concerns about Mark's Medicaid eligibility, which were ultimately favorably resolved.

Footnote 19: The information comes primarily from the quarterly reports prepared for formal team meetings at Anderson which Staver attends, in person or by phone, and which she has supplied to the court, as well as her invoices and communications with H.J.P. and Chase. In accordance with the appointing order, H.J.P. now files extensive yearly reports which include the notes of the quarterly meetings and some additional, usually medical, information (*see Matter of Mark C.H.*, 28 Misc 3d 765, 783 [Sur Ct, NY County 2010] [requiring annual reports in the form described by Mental Hygiene Law § 81.31]).

Footnote 20: That is, had funds been made available for Mark's "medical needs" from the Mark Trust, he could have avoided the serious aggression and exacerbating effects of the only medication covered by Medicaid.

Footnote 21: Staff utilized massage and soft touching to deal with Mark's agitation, and the chair was intended to give him the ability to "self soothe."

Footnote 22: This is automatic, upon a special ed student's reaching the age of 21, and does not necessarily suggest any particular level of scholastic achievement. It is, however, the

transition from one set of government funded benefits to a different and separate system.

Footnote 23: Mark suffers from numerous allergies causing red and itchy eyes, and the air purifier was recommended by staff both for use in his residence and at the day habilitation program.

Footnote 24: Because Mark's medications have weight gain as a side effect, exercise is critical to maintain him at a healthy weight and BMI.

Footnote 25: According to the residence manager, there was a long wait between trials, and Mark removed his sneakers, behavior he engages in when frustrated. As a result, he was disqualified from the race, but staff "looks forward to Mark's participation next year and is hopeful there will be environmental accommodations for the participants."

Footnote 26: Through his 10 years of work with her, and the planning he did, H.J.P. unquestionably knew of Mark's severe disability, and the circumstances which had caused Marie to institutionalize him. Further, H.J.P. holds himself out as an expert in the legal needs of children with disabilities, and, in fact, first met Marie after giving a lecture on the subject at AHRC.

Footnote 27: Presumably Chase had conversations with its cotrustee H.J.P. But the language of the Mark Trust itself, quoted, supra, was more than enough to put them on notice that this was, as H.J.P. characterized it, an *Escher* trust for a person with disabilities (*see* n 7 *supra*).

Footnote 28: Many questions are left open by the accounting as it now stands, and they cannot be fully resolved without accountings in Marie's estate and the Revocable Trust, ordered below. The guardian ad litem may also wish to amend his objections to more clearly include commissions paid out in light of the abrogation of fiduciary duty.

Footnote 29: It is difficult to understand the use of this Revocable Trust, created on the same day as the execution of Marie's will and as the Mark and Charles trusts, and like the latter, only nominally funded, as a planning device. Marie's estate could, as easily and without any negative tax consequences, simply have poured directly into the Mark and Charles trusts. Without an accounting, it is impossible to know if commissions, appropriate or otherwise, were taken, or what expenses, if any, were charged to the Revocable Trust.

Matter of Mark C.H.
2010 NY Slip Op 20156 [28 Misc 3d 765]
April 21, 2010
Glen, J.
Sur Ct, New York County
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
As corrected through Tuesday, October 12, 2010

[*1]

In the Matter of the Guardianship of Mark C.H.

Surrogate's Court, New York County, April 21, 2010

APPEARANCES OF COUNSEL

Breslow & Walker, LLP (*Harvey J. Platt* of counsel), for petitioner. *Andrew H. Kulak*, guardian ad litem.

{**28 Misc 3d at 766} OPINION OF THE COURT

Kristin Booth Glen, S.

This case presents an issue of significant concern:

Can SCPA article 17-A meet constitutional standards in the absence of a requirement of periodic reporting and review? The facts of this case place the issue in stark relief.

Facts

Mark C.H. was adopted five days after his birth by Marie H., a woman of significant means, who subsequently also adopted his brother, Charles A.H. From the beginning, Mark suffered from disabilities and, at the age of seven, was diagnosed with autism. Marie traveled widely and spent substantial sums seeking to cure or improve Mark's condition, but with little success. When she was diagnosed with terminal cancer, and no longer able to care for him at

home, Marie was advised to find an appropriate institutional placement for Mark; in 2003, at the age of 14, he entered the Anderson Center for Autism in upstate Staatsburg, New York, where he resides to this day. Marie H. passed away in 2005, leaving an estate of approximately $12 million which passed into trusts for Mark and Charles. The instant proceeding for the appointment of an SCPA article 17-A guardian for Mark was commenced by petitioner in 2007.[FN1]

In the reports of health care providers at Anderson, submitted with the petition, Mark is [*2]described as suffering from "profound" mental retardation and autism.[FN2] According to the physician, Mark is "nonverbal, has poor social skills," "engages in numerous repetitive and self-stimulating behavior" and "exhibits aggressive behavior when placed in unfamiliar settings . . . includ[ing] spitting, throwing objects, and hitting his own head." Based on the latter, the professionals recommended that Mark's appearance at the 17-A hearing be dispensed with.{**28 Misc 3d at 767}

Because of these recommendations and the substantial distance Mark would be required to travel to court, the initial hearing, held September 18, 2007, involved only petitioner and the local Mental Hygiene Legal Service attorney.[FN3] Asked about the actions he had taken on Mark's behalf since Marie's death, petitioner revealed that he had never visited Mark,[FN4] nor had he ever contacted the authorities at Anderson to ascertain Mark's needs. Petitioner also revealed the existence of the trust for Mark valued at almost $3 million, of which he was cotrustee with a bank. Questioned further, he admitted that not a penny of the trust's income or principal had been spent on Mark, despite the clear intention of the trust's grantor that it be used for Mark's benefit.

The hearing was adjourned to permit an appearance by the corporate trustee. The court also appointed a guardian ad litem, instructed, inter alia, to investigate whether Anderson and/or Medicaid were aware of the existence of his trust.[FN5] The corporate trustee, a major bank, appeared at the subsequent hearing held October 6, 2008. Admitting it had done nothing to ascertain or meet Mark's needs, the bank pleaded lack of institutional competence. Petitioner and a representative of the bank were directed either to visit Mark personally, meet with his care providers at Anderson, and ascertain needs that could be satisfied with funds from the trust, or [*3]to secure the services of a qualified professional[FN6] to visit, make inquiry, and provide recommendations.{**28 Misc 3d at 768}

Thereafter the trustees engaged a certified care manager, Robin Staver Hoffman, M.S. Ed., CMC, who communicated with the staff at Anderson and, after some administrative and legal problems,[FN7] met with Mark in December 2008. Her first assessment is telling. Despite his diagnosis of "autism, developmental disorder, mental retardation, unspecified, and seizure disorder" and his "history" of physical aggression towards himself and others, Hoffman observed him in a classroom setting, noting that "though he is non-verbal, he appeared to respond appropriately to questions asked by classroom staff, using picture symbols and non-verbal gestures to communicate with others." She was told that Mark "enjoys swinging and climbing outdoors" but, unfortunately, "there is no playground in the vicinity of his residence."[FN8]

In her interview with Mark's residence manager, Hoffman was informed that

> "as far as [the resident manager] knew, Mark [had] not had any visitors in the five years that she had worked with him nor has he had a vacation. She stated that most of the students leave school over Christmas vacation,[FN9][but] Mark remains on campus with staff. She reported that Mark would enjoy eating in a restaurant, playing music on a synthesizer, and using a computer. He could benefit from enhanced augmentative communication devices."

In addition to these items and services that would likely improve Mark's quality of life, [*4]Hoffman also learned of significant medical issues that could be alleviated by expenditures from the trust. Most striking of the "medical" recommendations was one relating to the antiseizure medication Mark requires. That medication, Keppra, comes in two forms. One, covered by Medicaid, which Mark was receiving, "causes adverse reactions including physical aggression, agitation, frustration and vocalization," thus exacerbating symptoms Mark suffers as a result of his other disabilities. Keppra XR, however, an{**28 Misc 3d at 769} extended release form of the medication, causes fewer side effects but is not covered by Medicaid. Despite being the beneficiary of a $3 million trust, Mark was limited to a medication which actually made his condition worse.[FN10]

The story has a relatively happy ending. Hoffman has been retained to provide ongoing care management services, the trust has released funds to pay for many of the items and services identified as likely to improve Mark's habilitation and quality of life, and, this past summer, Mark "graduated" from his educational program. He is currently enrolled in a vocational program and continues to reside on the Anderson campus while a community placement is sought.

The story is, however, salutary as well. But for the occasion of the 17-A proceeding belatedly commenced by petitioner, Mark would, most likely, still be an entirely isolated institutional resident. Although his basic needs were met, he lacked the resources to reach his best potential and to thrive—even as significant monies left to care for him increased, unspent in his trust, from which both trustees presumably took their annual commissions. [FN11]

The facts in this case dramatically demonstrate why a statute that gives a guardian control over the life of a person with mental retardation and/or developmental disabilities must include provision for periodic court review.

The Need for Periodic Reporting and Review

In 1990 the Legislature mandated review of SCPA article 17-A, first enacted in 1969, in light both of the changing views of, and more sophisticated knowledge about, the populations covered by the statute, and changes in law and constitutional requirements over the intervening 20-year period (L 1990, ch 516, § 1). Although the Law Revision Commission was then in the midst of proposing massive changes to the state's conservator and committee laws for adult guardianship, resulting in Mental Hygiene Law article 81, there was no report, no proposal, and no change to article 17-A. Twenty years later there has still been no action, but the need for reconsideration of our{**28 Misc 3d at 770} scheme for guardianship of persons with mental retardation[FN12] and [*5]developmental disabilities is greater than ever. [FN13]

One aspect of the present law, raised by the instant case and implicating serious constitutional and international human rights issues,[FN14] is the absence, once a guardianship of the person is established, of *any* subsequent reporting or review.

Reasons for Periodic Review

Discussion of the purposes of laws requiring periodic reporting and review has thus far [*6]been confined almost entirely to so{**28 Misc 3d at 771}-called adult guardianships. [FN15] In formulating recommendations for the widespread reform of such statutes that occurred in the late 1980s and early 1990s,[FN16] the report of the eponymous Wingspread conference[FN17] included a recommendation that "[a] standard annual report form should be developed and required for guardianship of the person as well as guardianship of the

property" (ABA Comm on the Mentally Disabled & Comm on Legal Problems of the Elderly, *Guardianship, An Agenda for Reform: Recommendations of the National Guardianship Symposium and Policy of the American Bar Association*, recommendation V-B, at 23 [ABA 1989] [Wingspread recommendations]). A reporting and review requirement was subsequently{**28 Misc 3d at 772} included in an ABA Model Guardianship [*7] Statute,[FN18] in the National Probate Court Standards,[FN19] and incorporated in New York's adult guardianship statute, article 81.[FN20]

In their article on the subject,[FN21] Sally Balch Hurme and Erica Wood succinctly summarize the reasons for periodic review and reporting, termed "monitoring," as follows:

> "First, historically courts have had a parens patriae duty to protect those unable to care for themselves. Parens patriae is the fundamental basis for guardianship and the primary justification for curtailing civil rights. The court appoints the guardian to carry out this duty and the guardian is a fiduciary bound to the highest standards. 'In reality,' observed one judge, 'the court is the guardian; an individual who is given that title is merely an agent or arm of that tribunal in carrying out its sacred responsibility.' Second, unlike with decedents' estates, the incapacitated person is a living being whose needs may change over time. This argues for a more active court role in oversight. Third, monitoring can be good for the guardian by offering guidance and support in the undertaking of a daunting role. Fourth, monitoring can be good for the court by providing a means of tracking guardianship cases and gauging the effect of court orders. Finally, monitoring can boost the court's image and inspire public confidence." (*Guardian Accountability Then and Now: Tracing Tenets for An Active Court Role*, 31 Stetson L Rev 867, 871-872 [citations omitted].)

Arguments for monitoring have only grown stronger over the more than two decades since the Wingspread recommendations{**28 Misc 3d at 773} and apply, as well, to persons with mental retardation. Discussing the demographic changes that militate for effective court monitoring practices, two leading commentators note that guardianship

> "also serves a younger population of adults with mental retardation, developmental disabilities, and mental illnesses. Today '[i]t is estimated that there are [7] to [8] million Americans of all ages who experience mental retardation or intellectual disabilities. Intellectual disabilities affect about one in ten families in the USA.' This number will rise with new forms of medical treatment, which will increase life spans, and an increasing number will outlive family caregivers." (Naomi Karp and Erica F. Wood, *Guardianship Monitoring: A National Survey of Court Practices*, 37 Stetson L Rev 143, 150 [2007] [citations omitted].)

The great weight of commentary supports the need for, and wisdom of, a reporting and review requirement for guardians of the person, as well as those of the property.[FN22] If this were all, however, the remedy for the absence of such a requirement in article 17-A would rest solely with the Legislature (*see e.g. Matter of John J.H.*, *supra* [holding that courts cannot read gifting power into article 17-A]). But the very changes that the Legislature noted in 1990 have, since the enactment of article 17-A, included a sea change in the constitutional protections afforded the mentally ill and mentally retarded that compels consideration of the due process requirements of guardianship appointments pursuant to that statute.

Constitutional Considerations

Subsequent to the Supreme Court's decision in *Jackson v Indiana* (406 US 715 [1972]), holding that "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed" (*id.* at 738), both federal and state courts have held that persons involuntarily committed to mental hospitals have a right to periodic review (*see e.g. Clark v Cohen*, 794 F2d 79 [3d{**28 Misc 3d at 774} Cir 1986], *affg* 613 F Supp 684 [ED Pa 1985] [due process requires periodic review of continuing need for institutionalization]; *accord Fasulo v Arafeh*, 173 Conn 473, 378 A2d 553 [1977]). The constitutionally protected right to review has been extended to nonhospitalized mentally ill persons subject to involuntary treatment orders of unlimited duration (*see e.g. In re G.K.*, 147 Vt 174, 514 A2d 1031 [1986]), as well as to persons whose status changed from involuntary to voluntary commitment (*Matter of Buttonow*, 23 NY2d 385 [1968]).

In his concurring opinion in *Buttonow*, Judge Keating presciently anticipated the rights of persons whose liberty was significantly impaired, but who were not actually institutionalized, writing,

> "A State may not, consistent with 'due process', place any mentally ill person *in the custody of any person* or institution unless it makes some provision for periodic review of the propriety and suitability of the confinement before some impartial forum in which the incompetent is represented by a person or agency wholly committed to that person's interest." (*Id.* at 394 [emphasis added].)

Although there have been no reported cases involving guardianship, as opposed to commitment or involuntary treatment orders,[FN23] this state-imposed " 'drastic' restraint on a person's liberty" (*Matter of M.R.*, 135 NJ 155, 171, 638 A2d{**28 Misc 3d at 775} 1274,

1282 [1994]) clearly triggers inquiry under *Mathews v Eldridge* (424 US 319 [1976]), an opinion which has been applied in cases involving the mentally retarded (*e.g. Heller v Doe*, 509 US 312 [1993]).[FN24]

Due process guarantees are implicated when a protected interest is at stake. Guardianship [*8]directly infringes on liberty and property issues; as Congress noted more than two decades ago, despite the seemingly benevolent nature of the guardianship system, the consequences of guardianship are very harsh. When the court appoints a guardian, the ward loses all rights to determine anything about his life (Abuses in Guardianship of the Elderly and Infirm: A National Disgrace, *supra*).[FN25]

The consequences, and concurrent due process requirements, when the ward is a person with mental retardation or developmental disability—rather than an elderly person—are the same. As one federal court noted, "Where, as in both proceedings for juveniles and mentally deficient persons, the state undertakes to act in parens patriae, it has the inescapable duty to vouchsafe due process" (*Heryford v Parker*, 396 F2d 393, 396 [10th Cir 1968]).

The provisions of Mental Hygiene Law article 81, including notice, hearing, right to counsel, proof by clear and convincing evidence, tailored guardianship, and extensive reporting and review, recognize the due process required when liberty and/or{**28 Misc 3d at 776} property interests are at stake; our courts, similarly, have not hesitated to add additional protection where necessary to satisfy constitutional requirements (*see e.g. Matter of St. Luke's-Roosevelt Hosp. Ctr. [Marie H.]*, 159 Misc 2d 932 [Sup Ct, NY County 1993], *mod and remanded* 215 AD2d 337 [1st Dept 1995], *affd after remand* 226 AD2d 106 [1st Dept 1996], *affd* 89 NY2d 889 [1996] [holding that indigent alleged incapacitated person has the right to state paid counsel where involuntary transfer to a nursing home is requested]).

Given that due process clearly applies, the question becomes precisely, "What process is due?" a question answered by reference to *Mathews*' three-pronged test:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." (424 US at 335.)

These three prongs and their applicability to article 17-A will be considered seriatim.

(a) The Private Interest

The appointment of a plenary guardian of the person under article 17-A gives that guardian virtually total power over her ward's life (*see Matter of Chaim A.K., supra*), including virtually all medical decisions, where the ward shall live, with whom she may associate, when and if she [*9]may travel, whether she may work or be enrolled in habilitation programs, etc. This imposition of virtually complete power over the ward clearly and dramatically infringes on a ward's liberty interests.

As the Supreme Court recognized almost a century ago, the liberty protected by the constitution encompasses

> "not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men" (*Meyer v Nebraska*, 262 US 390, 399 [1923]; *see also Bolling v Sharpe*, 347 US 497 [1954] [Although{**28 Misc 3d at 777} the Court has not assumed to define "liberty" with any great precision, the term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective (*id.* at 499-500)]).

Appointment of a guardian of the property divests the ward of any control over that property and apparently deprives the ward of the right to contract,[FN26] implicating protected property interests.

(b) The Risk of an Erroneous Deprivation of Such Interests through Procedures Used and the Probable Value, If Any, of Additional or Substitute Procedural Safeguards

It is common for parents of children with mental retardation and/or developmental disability to apply for 17-A guardianship at the time their children reach their majority. The guardianship is granted on a dual finding that the person is in need of a guardian and that it is in the person's best interest that the particular person (or persons, in the case of coguardians) be appointed her guardian. Under the present statutory scheme, that is the end of the court's involvement; the guardianship may continue for decades and, unless the guardian becomes unable to act and someone else petitions for guardianship,[FN27] the court will never again

have an opportunity to ascertain either the ward's continuing need, or whether her best interests are being served.

With a periodic reporting and review requirement, however, the court can ascertain whether the deprivation of liberty resulting from guardianship is still justified by the ward's [*10]disabilities, or whether she has progressed to a level where she can live and{**28 Misc 3d at 778} function on her own.[FN28] Given the services and educational opportunities available to the target population, and the wide spectrum of disability/capacity among persons with mental retardation and developmental disability (*see e.g. Chaim A.K.*, *supra*; *Heller v Doe*, 509 US at 322), this is not purely speculative but a real possibility which, without periodic reporting and review, could leave functioning, capacitated adults with guardians whose powers constitute a "massive curtailment of liberty" (*In re Guardianship of Deere*, 708 P2d 1123, 1125 [Okla 1985]).[FN29]

Much more likely, but equally serious, is the possibility that a guardian is no longer acting in the ward's best interests. The guardian may have removed the ward from a program providing habilitation services for her own convenience but to the ward's detriment. She may fail to attend to the ward's physical health needs. She may have confined the ward to a single room, without outside stimulation, for years, causing the ward to "lose" the skills and capacities she learned while still in the educational system. She may fail to provide for the ward properly because she lacks knowledge of how to do so, often because of language limitations, or she may herself have become disabled, or partially disabled.[FN30] [*11]

{**28 Misc 3d at 779}The instant case provides a poignant set of examples of the potential risks attendant to the existing system. Without the procedural requirement of periodic reporting and review, Mark could be moved from Anderson to a setting in which his autonomy is not maximized, solely for administrative convenience, despite the availability of funds to maximize his well-being.[FN31] Similarly, he could be deprived of optimal medical care because, without attention, he is limited to what Medicaid provides. The very situation that has occurred for the past four years could continue indefinitely despite funds to provide a variety of capacity enhancing items (like computers) and services (like consultation with non-Medicaid physicians), as well as to improve significantly the quality of his life.

Thus, in the absence of periodic reporting and review, the risk of deprivation of protected liberty interests is great, while imposing a yearly reporting requirement on 17-A

guardians of the person would substantially increase the likelihood that guardianship is still needed and/or in the best interests of the ward, and the very reason for burdening her liberty interests is being served.

There is one final argument for requiring guardians to report on a periodic basis. In the absence of such reporting, there is virtually no other way for the court to stay apprised of the ward's situation,[FN32] since the ward herself may well lack capacity to engage the court. [FN33] As the Ninth Circuit has written in the context of involuntarily committed mental patients, "No matter how elaborate and accurate the . . . proceedings available . . . may be once undertaken, their protection is illusory when a large segment of the protected class cannot realistically be expected to set the proceedings into motion in the first place" (*Doe v Gallinot*, 657 F2d 1017, 1023 [9th Cir 1981]). And, as{**28 Misc 3d at 780} one commentator has noted, "[p]eriodic judicial review ensures that a mentally retarded person is treated as an individual by requiring the state to rejustify [the continued curtailment of her liberty]" (William Christian, Note, *Normalization as a Goal: The Americans with Disabilities Act and Individuals with Mental Retardation*, 73 Tex L Rev 409, 438 [1994]).

(c) The Government's Interest, Including the Function Involved and the Fiscal and Administrative Burdens That the Additional Procedural Requirements Will Entail

The policy of the State, enunciated by the Legislature, is "the promotion and attainment of [*12]independence, inclusion, individuality and productivity for persons with mental retardation and developmental disabilities" (Mental Hygiene Law § 13.01). The Office of Mental Retardation and Developmental Disabilities is charged with carrying out this policy, including ensuring that the "personal and civil rights [of the persons it serves] are protected" (Mental Hygiene Law § 13.07 [c]). New York has thus recognized both maximization of autonomy and protection of rights as among the fundamental responsibilities of the State to persons with mental retardation and developmental disabilities. This basic policy infuses the "government's interest" in guardianship proceedings for *Mathews v Eldridge* purposes.

The governmental interest is, thus, nothing less than ensuring that when, in the exercise of its parens patriae power, it places almost total control over a person with disabilities in the hands of another, that person is, at the very least, no worse off than she would have been had no guardianship been imposed. To accomplish this it is necessary to create and maintain a

periodic monitoring system in which guardians of the person report yearly on the condition of their wards and any changes that may have occurred. The court, in turn, must provide for review of those reports, and be prepared to take action if necessary to protect the ward and/or to ensure her well-being.

This function is not unknown to Surrogate's Court.[FN34] Article 17-A provides for yearly reports by 17-A guardians of the property (SCPA 1761), and article 17, which deals with property guardianships for minors without mental retardation or developmental disability, also requires yearly accountings (SCPA{**28 Misc 3d at 781} 1719). In this court, a clerk has been trained to review those accountings, and does so promptly and thoroughly. When reports are not filed timely, the court makes inquiry and takes action to obtain the mandated account(s); if unsuccessful, a guardian ad litem may be appointed for the ward, or the court may suspend or sanction the guardian on its own motion.

Although the *substance* of personal needs monitoring is different from financial accounting, the *process* is familiar, and the court's computer system is already set up to note due dates and to generate reminders and/or warnings for property guardians. Court personnel charged with monitoring the reports of guardians of the person may require some modest additional training, but almost certainly the major service providers for the mental retardation and developmental disability communities[FN35] will make such training available if requested.

Another question requiring attention, in the absence of legislative guidance,[FN36] is the form [*13]such monitoring should take. Most wards in New York City are already connected to services and to periodic contact and review, often through a Medicaid coordinator.[FN37] Substantial changes in physical and mental condition, or the existence of endangering conditions, are thus already likely to come to the attention of authority. This de facto oversight is not, however, available for all wards with guardians appointed by this court and, of course, even where available, it varies in quality and is subject to budget constraints.

The population of guardians, as well as of their wards, must also be considered. Mental retardation and developmental disability are not related to race, ethnicity, or socioeconomic status,{**28 Misc 3d at 782} although the latter may affect the range of services available because of access to paid private services, as in the instant case. It is also fair to say that many more persons of lower socioeconomic status seek 17-A guardianship than article 81

guardianship,[FN38] and many, as well, either do not speak English as a first language or do not speak English at all.[FN39] Any monitoring system must take these facts, as well as the lack of formal education of many guardians, into account.

In order to meet the court's due process obligations to its wards within its own fiscal and personnel constraints, and in light of the diverse population of guardians and wards involved, there should be a relatively simple questionnaire,[FN40] sent to guardians on the yearly anniversary of [*14]their appointment. Although this proactive practice causes a somewhat greater burden for the court than placing the obligation to report on the guardian, as is the case under article 81, computer-generated questionnaires minimize the additional effort, while recognizing the differing capacities of 17-A guardians. And, although there are no outside court examiners to review the responses,[FN41] it is possible, if not optimal, to redeploy existing court personnel to accomplish this additional function.[FN42]

In appropriate cases, as here, the appointing order of the court may require the guardian to provide more, and more nuanced,{**28 Misc 3d at 783} information to ensure that the resources available to the ward are utilized to maximize his habilitation and the quality of his life.[FN43] It is also possible that, going forward, the court may be able to develop more innovative—and less costly—ways of fulfilling its monitoring obligation, whether through a pro bono[FN44] or volunteer program[FN45] or otherwise.

The Applicability of International Human Rights Norms

In addition to the more familiar liberty and property rights protection offered by the Fourteenth Amendment, international human rights norms derived from treaties signed and ratified by the United States have relevance to the instant case and, more broadly, the situation of persons with intellectual disabilities, by virtue of the Supremacy Clause (*see United States v Pink*, 315 US 203, 230 [1942]).

In 2006 the United Nations General Assembly adopted the Convention and Optional Protocol on the Rights of Persons with Disabilities, opened for signature December 13, 2006 (46 ILM 443 [2007] [the Disability Convention]). According to a handbook for parliamentarians drafted by the Office of the United Nations High Commissioner for Human Rights, the purpose of the Disability Convention is to "reaffirm the dignity and worth of every person with a disability, and [*15]to provide States with an effective legal tool to end the injustice, discrimination, and violation of rights that confront most persons with

disabilities" (*From Exclusion to Equality: Realizing the Rights of Persons with Disabilities: The Compelling Reasons*, http://www.un.org/disabilities/default.asp?id=215 [accessed Oct. 3, 2009]). The United States became a signatory on July 24, 2009 (74 Fed Reg 37923 [July 24, 2009]).[FN46]

Article 12 of the Disability Convention protects a disabled person's rights to "[e]qual recognition before the law," with the{**28 Misc 3d at 784} goal of affirming that persons with disabilities have the right to recognition everywhere as persons before the law, and that they enjoy legal capacity on an equal basis with others in all aspects of life. States may act in order to support disabled individuals who are exercising their legal capacities (46 ILM at 450); other articles provide a plethora of rights to persons with disabilities that implicate 17-A guardianships.[FN47]

To the extent that article 12 recognizes the state's power to act to support disabled individuals, it requires that signatories

> "shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse . . . Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances,[FN48]

apply for the shortest time possible *and are subject to regular review by a competent, independent and impartial authority or judicial body*." (Art 12 [4], *id.* at 450 [emphasis added].) [*16]

Thus, as a matter of international human rights law, state interventions, like guardianships, pursuant to parens patriae power, must be subject to periodic review to prevent the abuses{**28 Misc 3d at 785} which may otherwise flow from the state's grant of power over a person with disabilities such as those covered by SCPA article 17-A. Because the Disability Convention has not yet been ratified by the Senate, a state's obligations under it are controlled by the Vienna Convention on the Law of Treaties, adopted May 22, 1969 (1155 UNTS 331, 8 ILM 679 [Vienna Convention]),[FN49] which requires signatories "to refrain from acts which would defeat [the Disability Convention's] object and purpose" (art 18, 8 ILM at 686). Arguably, granting guardianships (especially plenary guardianships) over persons with mental retardation and developmental disability with absolutely no review provisions defeats the "object[s] and purpose" of a convention intended to protect against

the"injustice . . . and violation of rights" confronting persons with intellectual disabilities. In any case, courts and the Legislature should be aware that, if and when the Disability Convention is ratified, the State's obligations with regard to the various rights guaranteed by the Convention will be affirmative ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty" [Vienna Convention art 27, 8 ILM at 690]), and current article 17-A will be problematic at best.

It should also be noted that the United States has long since ratified the International Covenant on Civil and Political Rights, opened for signature December 19, 1966 (999 UNTS 171, 1966 UST LEXIS 521 [ICCPR]).[FN50] While the ICCPR nowhere deals explicitly with persons with intellectual disabilities, it provides for "the right of self-determination" (art 1 [1], 1966 UST LEXIS 521, *96); "liberty of movement," including "[the right] to choose [one's own] residence" (art 12 [1], *id.* at *104);[FN51] freedom from "arbitrary or unlawful interference with . . . privacy" (art 17 [1], *id.* at *108); and "freedom of association with others" (art 22 [1], *id.* at *111). Similarly, although there is no specific{**28 Misc 3d at 786} requirement of periodic review when the State exercises its parens patriae power, the ICCPR requires signatories "to take the necessary steps . . . to adopt such . . . measures as may be necessary to give effect to the rights recognized" by the ICCPR (art 2 [2], *id.* at *98). It is difficult to see how the State can meet that obligation in the case of 17-A guardianships without some provision for monitoring the guardians appointed by the State, and the wards it has undertaken to protect. [*17]

Finally, whatever the treaty obligations already assumed, or likely to be assumed if and when the Disability Convention is ratified, international adoption of protection of the rights of persons with intellectual and other disabilities, including the right to periodic review of burdens on individual liberty, is entitled to "persuasive weight" in interpreting our own laws and constitutional protections (*see e.g. Lawrence v Texas*, 539 US 558, 576 [2003]; *Grutter v Bollinger*, 539 US 306, 344 [2003, Ginsburg, J., concurring, joined by Breyer, J.] ["The Court's observation that race-conscious programs must have a logical end point . . . accords with the international understanding of the office of affirmative action. The (treaty on point), ratified by the United States in 1994, . . . endorses special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms" (citations and internal quotation marks omitted)]); it further supports the conclusion that any guardianship statutes, including article 17-A, must contain provisions

for periodic review or be found constitutionally wanting.

Conclusion

As a matter of fundamental due process, the State may not impose the "extensive loss of personal liberty [inherent] in the guardianship process" (Norman Fell, *Guardianship and the Elderly: Oversight Not Overlooked*, 25 U Tol L Rev 189, 190 [1994]) without some guarantee that the person or persons to whom it has granted guardianship of the person continues to act in her ward's best interests, and that the ward is, at the very least, no worse off than before the guardianship was awarded.

Utilizing the "what process is due" analysis of *Mathews v Eldridge* (424 US at 333, 349), it is clear that a court granting guardianship of the mentally retarded and developmentally disabled must require periodic reporting and review—or "monitoring"—{**28 Misc 3d at 787}by 17-A guardians of the person, even as it does, by statute, of 17-A guardians of the property. This monitoring requirement is inherent not only in the Fourteenth Amendment guarantee of due process of law, but also under the international human rights norms contained in the Disability Convention and the ICCPR.

Where, as here, a statute would be unconstitutional in the absence of a particular required procedure, the courts of our state have not hesitated to "read in" those procedures (*see e.g. Matter of Buttonow*, *supra*, 23 NY2d 385, 393 [1968] ["we preserve the constitutionality of the statute" by reading into the Mental Hygiene Law "a requirement (1) that a mentally ill patient, converted from involuntary to voluntary status, be accorded a (judicial hearing on status and retention) and (2) that he be afforded the same sort of assistance from the (Mental Hygiene Legal Service)"]). Going forward, therefore, article 17-A should be read to include a requirement of yearly reporting (whether in response to a questionnaire from the court, or through the guardian's obligation to file a report, as contained in the letters of guardianship) and of review by the court as described in the *Mathews* discussion supra.[FN52]

In the instant case, the court finds, based on the evidence before it, that Mark is a person [*18]with developmental disabilities of such magnitude that he is in need of a guardian of the person;[FN53] that, in the absence of any other candidate, it is in Mark's best interest that petitioner be appointed his guardian;[FN54] and that the guardian shall report to this court, on a yearly basis, providing such information as is required by Mental Hygiene Law § 81.31 for

persons adjudicated incapacitated and appointed guardians under article 81.

Footnotes

Footnote 1: Petitioner was Marie's attorney, who drafted both her will and the two trusts. He brought the guardianship proceeding as the result of what he described as a "death bed promise" he made to Marie.

Footnote 2: The affirmation of the Mental Hygiene Legal Service (MHLS) attorney who visited Mark at Anderson and who reviewed his chart there notes diagnoses of mental retardation, autism and macrocephaly. Testing in 2007 indicates that "he has the receptive communication skills of someone less than two years old and the expressive skills of a three-month old." The attorney confirmed that "effective communication was not possible" and reiterated Mark's residence manager's belief that he "would not cooperate" for transport to a court hearing in Manhattan and that he would "display aggressive behavior if placed in an unfamiliar courthouse setting."

Footnote 3: MHLS is a party to the 17-A proceedings when the proposed ward is a resident in an institutional setting. (SCPA 1753 [2] [b].) Rather than have the attorney who visited Mark at Anderson travel to New York City, MHLS was represented by an attorney from its staff in the First Department.

Footnote 4: The MHLS attorney confirmed that examination of Mark's records showed he had not had a single visitor since before his mother's death.

Footnote 5: Neither had been told of the trust's existence, but because its terms complied with applicable rules, Mark was subsequently recertified for Medicaid.

Footnote 6: A "cottage industry" has grown up around the need for professional care supervision for older persons, especially persons with mental and physical disabilities. Social workers and other health care professionals are certified as geriatric care managers and may be contacted through their professional organization, the National Association of Professional Geriatric Care Managers. While there does not yet appear to be similar organizational growth in support of the mentally retarded and developmentally disabled, there is significant crossover; indeed, the care manager retained for Mark had previously been a case worker at YAI (Young Adult Institute), one of the major organizations serving the developmentally disabled in New York City.

Footnote 7: Because of privacy concerns under federal law, petitioner had to be given letters of temporary guardianship in order to authorize Hoffman's access to Mark's records and to Mark personally.

Footnote 8: Prior to her visit, Anderson personnel communicated this issue to Hoffman and submitted a proposal for a play structure with swings to petitioner. No action, however, had been taken.

Footnote 9: Mark's caregivers recommended a "1 week vacation to Disney World with 2 staff members on duty 24 hours per day."

Footnote 10: Among other "medical" recommendations was a request for a "neurology consultation with a non-Medicaid neurologist" and "Keppra XR and other medications and medical services not covered by Medicaid."

Footnote 11: As discussed below, the court has, sua sponte, ordered an accounting of the trust and of Marie H.'s estate to determine whether there are additional funds that might be added or returned to the trust and made available for Mark's needs.

Footnote 12: An initial reconsideration might involve the terminology employed. A recent contretemps about a public figure's use of the term "retard" demonstrates the continuing derogatory implication carried by the term "mental retardation." Advocacy groups have responded to the notion that "[s]ociety's labels have consequences" by changing their names (for example, from the American Association on Mental Retardation to the American Association on Intellectual and Developmental Disabilities [AAIDD]) and the definitions in the most respected resource on what are now denominated "people with intellectual disabilities." (*See* AAIDD, *New Professional Resource Establishes Ground-breaking Paradigm To Support People with Intellectual Disabilities*, Sept. 14, 2009, available at http://www.aamr.org/intellectualdisabilitybook/content_2351.cfm?nav ID=270 [last accessed Mar. 12, 2010] [noting publication of the 11th edition of the basic resource utilized by professionals working with what were previously called the mentally retarded and developmentally disabled].)

Recent legislation, both federal and state, has sought to replace the term "mental retardation" with the "respectful language" of "intellectually disabled" or "persons with intellectual disabilities." (*See e.g. What's in a name? Legislation would end use of the term 'mental retardation'*, Los Angeles Times, Nov. 19, 2009, available at http://latimesblogs.latimes.com/booster_shots/2009/11/whats-in-a-name-legislation-would-end-use-of-the-term-mental-retardation.html [accessed Mar. 18, 2010] [describing legislation introduced in the U.S. Senate by Senator Barbara Mikulski to outlaw the use of the term in federal statutes and policy papers]; 2009-2010 Washington House Bill HB 2490, enacted as L 2010, ch 94, available at http://apps.leg.wa.gov/billinfo/summary.aspx?bill=2490 [respectful language bill adopted in Washington state] [eff June 10, 2010]; Maine Developmental Disabilities Council, *Report of the Respectful Language Workgroup*, available at http://www.maineddc.org/respectful-language.html [Mar. 6, 2008] [recommendations from working group constituted by Maine Legislature].)

Footnote 13: In addition to the requirements of due process, discussed below, there is a need

to clarify the powers of a guardian. See this court's opinions in *Matter of John J.H.* (27 Misc 3d 705 [2010] [holding that 17-A guardian lacks power to make gifts from property of the ward]) and *Matter of Chaim A.K.* (26 Misc 3d 837 [2009] [discussing need for limited, tailored guardianships]). But see *Matter of Yvette A.* (27 Misc 3d 945 [2010, Webber, J.] [finding power to tailor in SCPA 1755]).

Footnote 14: As discussed infra, this issue also implicates the recently enacted United Nations Convention and Optional Protocol on the Rights of Persons With Disabilities, opened for signatures December 13, 2006 (46 ILM 443 [2007]).

Footnote 15: The distinction between guardianships under article 17-A and so-called "adult guardianship" under article 81 is a misnomer, since article 17-A is often utilized where the proposed ward is an adult, and article 81 has been employed for infants. Its roots lie in English common law where there was a distinction in the sovereign's powers over, and responsibility to, "idiots" (the mentally retarded who were born with disability) and "lunatics" (persons with mental illness). (1 F. Pollock and F. Maitland, The History of English Law, at 481 [2d ed 1909], as cited and discussed in *Heller v Doe*, 509 US 312, 326-328 [1993].) The practical distinction, however, is that "adult guardianship" generally applies to a person who has had, and then lost, capacity, while article 17-A was intended to apply to persons who never had capacity, such that the authority their parents had over them as minors needs to be continued indefinitely in their legal adulthood.

Indeed, New York appears to be one of the few states in the nation that has separate guardianship statutes for each of these populations; the other states to distinguish are California, Connecticut, Idaho, Kentucky, and Michigan. All of these states require the guardian of a person with developmental disabilities to report to the court on a regular basis to ensure that the need for a guardian still exists. States with yearly reporting requirements are Idaho (Idaho Code Ann § 66-405 [6]), Kentucky (Ky Rev Stat Ann § 387.670), and Michigan (Mich Comp Laws § 330.1631 [2]). California requires guardians to report one year after the appointment and biennially thereafter (Cal Prob Code § 1850.5). Connecticut courts require guardians to report every three years (Conn Gen Stat § 45a-681).

Footnote 16: The national movement for guardianship reform resulted from an Associated Press series that detailed massive abuses by adult guardians in states across the country. (*See*

Guardians of the Elderly: An Ailing System, AP Special Report [Sept. 1987] in Abuses in Guardianship of the Elderly and Infirm: A National Disgrace, a Report by the Chairman of the Subcommittee on Health and Long-Term Care of the Select Committee on Aging of the House of Representatives, 100th Cong, 1st Sess, HR Comm Print 100-639, at 13-57 [Dec. 1987].)

Footnote 17: The AP report triggered an interdisciplinary conference held at a center in Wingspread, Wisconsin, convened by, inter alia, the ABA's Commission on Legal Problems of the Elderly. The recommendations from that conference were subsequently adopted by the ABA House of Delegates. (*See* Sally Balch Hurme and Erica Wood, *Guardian Accountability Then and Now: Tracing Tenets for an Active Court Role*, 31 Stetson L Rev 867, 868 [2002].)

Footnote 18: Model Guardianship and Conservatorship Statute § 17 (b); § 18 (7), cited in Hurme and Wood at 898 n 216 (recommending that the guardian of the person inform the court of changes relating to the guardianship).

Footnote 19: Commission on National Probate Court Standards, National Probate Court Standards, standard 3.3.14, Commentary at 72 (Natl Ctr for State Cts 1993) (reflecting "judges' need to receive annual reports on the ward's condition" which "enables the court 'to determine whether the guardian is appropriately carrying out the guardian's assigned duties and responsibilities' " [Hurme and Wood at 899]).

Footnote 20: That statute requires the guardian to report 90 days after appointment, and thereafter on a yearly basis. A guardian of the person must include in her report current information about the ward's living situation, health, medical condition and medications taken, and rehabilitative services provided. (Mental Hygiene Law § 81.30 [a]; § 81.31 [a], [b].)

Footnote 21: *See* n 17.

Footnote 22: Significantly, article 17-A has always required yearly reports by property guardians for the mentally retarded and/or developmentally disabled. The content of such reporting is only broadly described, and there are variations in what is required among the various Surrogate's Courts. By contrast, article 81 sets out specific requirements for all

property guardians appointed pursuant to that statute. (*See* Mental Hygiene Law § 81.30 [b] [90-day report]; § 81.31 [a], [b] [7] [yearly report].)

Footnote 23: One reason for this may be the focus of civil rights litigators on involuntary commitment issues of the mentally ill in the 1970s and 1980s, while the emphasis of the lesser volume of litigation on behalf of persons with mental retardation was to obtain a "right to treatment." (*See e.g.* David J. Rothman and Sheila M. Rothman, The Willowbrook Wars: Bringing the Mentally Disabled into the Community [2d ed 2005].) Two thoughtful commentators offer another analysis:

"The state's parens patriae interest, exercised in guardianships or protective proceedings, should not be confused with the state's police power . . . [although those powers] have sometimes been commingled, causing confusion and imprecision in the language of court opinions on this subject. The result is that judicial scrutiny of the exercise of the parens patriae power has been imprecise and in guardianship and conservatorship proceedings, it has historically been exercised with little or no concern for due process protections. However, the parens patriae power (the purpose of which is to protect the incompetent individual's interests) constitutes a much less 'important' power from the government's perspective than does the police power (the purpose of which is to protect society at large, as well as the individual, from actual danger). Thus, a more restrictive due process environment is justified in the exercise of the parens patriae power." (Susan G. Haines and John J. Campbell, *Defects, Due Process, and Protective Proceedings: Are Our Probate Codes Unconstitutional?* 14 Quinnipiac Prob LJ 57, 86 n 144 [1999].)

Footnote 24: It is indisputable that, "although guardianship is generated from the standpoint of benevolence, it nonetheless results in a dramatic and substantial loss of personal autonomy, self-determination and civil liberty." (Norman Fell, *Guardianship and the Elderly: Oversight Not Overlooked*, 25 U Tol L Rev 189, 190 [1994].) In *Heller*, the Supreme Court considered an equal protection challenge to a Kentucky statute that, inter alia, required different burdens of proof for commitment of the mentally retarded (clear and convincing evidence) and the mentally ill (beyond a reasonable doubt). Notably, Kentucky's burden of proof for involuntary commitment of the mentally retarded is the same as New York's for guardianship of incapacitated adults. The Court also held the *Mathews* test applicable to the single due process claim made there, upholding the statute but leaving open other potential

procedural due process challenges.

Footnote 25: While the majority of cases, literature and commentary are directed at adult guardianships rather than those of the mentally retarded and developmentally disabled, the interests implicated are the same. Like persons suffering from mental illness, courts "must recognize the dignity and worth of such a person" with mental retardation or developmental disabilities. (*Superintendent of Belchertown State School v Saikewicz*, 373 Mass 728, 746, 370 NE2d 417, 428 [1977].)

Footnote 26: The single exception, permitting a limited guardian of the property, exists when the ward is self-supporting as a result of his wages. Under those circumstances, and only those circumstances, the ward is permitted to retain his wages *and* contract in an amount equal to a month's wages, or $300, whichever is greater. (SCPA 1756.)

Footnote 27: The statute provides for nomination of a standby guardian who assumes all the legal powers of the guardian upon the latter's inability to act. (SCPA 1757.) The authority of the standby guardian lasts for 180 days, and she or someone else must petition the court for a new guardianship or the existing guardianship terminates, leaving the ward with no guardian. It is this court's experience that guardianships have often lapsed under these circumstances, with petitions by the former standby guardian or another person only years, and sometimes decades, later, brought generally because of the need for the ward's hospitalization or some other major medical decision.

Footnote 28: In four years, this court has seen two such cases, one of which came to the court's attention because the guardian was also guardian of the property; her failure to file the required annual reports led to inquiry and discovery that the ward was living independently, working, and supporting herself and her new family. That guardianship was happily terminated (*see Matter of Keisha L. McLean*, file No. 1993-1963), as was another in which the ward himself petitioned to remove a guardian who had not seen, or communicated with the ward, for years (*Matter of Frederick Charles Smith*, file No. 2001-1776).

Footnote 29: This situation is exacerbated by the failure of article 17-A to provide for anything other than a plenary guardianship. As one commentator, who is also a practitioner, notes

"Developmentally disabled individuals . . . are not, and should not, be viewed or treated as 'eternal children.' A delicate balance must be struck between respecting the developmentally disabled individual's adult status, and the implicit legal rights granted by that status, with the parents' interest and understandable desire to continue to protect and assist their developmentally disabled child. Such a balance is found in limited [guardianships], which provide a protective proceeding that is uniquely tailored and specifically applied to the developmentally disabled individual in the least restrictive manner possible." (Melinda Hunsaker, *Limited Conservatorships: A Delicate Balance*, 50 Orange County Law [Nov. 2008] 26, 26.)

Footnote 30: In the past four years, this court has, sadly, become aware of each of these scenarios involving the caretakers of persons with mental retardation or developmental disability.

Footnote 31: In fact, Mark having "aged out" of the educational system which allowed him to reside at Anderson as a "student," the care manager is actively working with the staff at Anderson to find the best possible placement that will allow Mark to continue vocational training and habilitation.

Footnote 32: For a discussion of the danger that an intellectually disabled person whose liberty has been removed by a court may get "lost" in the system, see, e.g., James W. Ellis, *Decisions By and For People with Mental Retardation: Balancing Considerations of Autonomy and Protection* (37 Vill L Rev 1779, 1809 n 124 [1992]).

Footnote 33: Although article 17-A provides for a proceeding by which a guardianship may be terminated (SCPA 1759), commencing such a proceeding is unquestionably daunting, and may be impossible for someone who is immobile or illiterate. Of equal concern, there is *no* proceeding by which changes in the ward's condition or situation can be addressed.

Footnote 34: Nor is it unknown to courts with jurisdiction over persons with mental retardation and developmental disabilities in other states. (*See e.g.* Mich Comp Laws § 330.1631 [2] [requiring plenary or partial guardian to report "not less often than annually" on a wide variety of information about the ward].)

Footnote 35: In New York City, these are the Association for the Help of Retarded Children (AHRC) and, for those with developmental disabilities, the Young Adult Institute.

Footnote 36: In enacting article 81, the Legislature provided an extensive and detailed monitoring system, including court-appointed "Court Examiners" who review the yearly reports and, in turn, report to the court. The court examiners are paid a fee from the ward's estate, calculated by reference to the size of the estate.

Footnote 37: Medicaid pays for a variety of services for persons with mental retardation and developmental disabilities, including habilitation programs, transportation and, where necessary, home health aides or residential placement. Until a ward reaches 21 years of age, she is also served by the public education system, whether in the public schools or more specialized educational settings. After-school and weekend programs are also available. New York is to be commended for the wide range of services it provides to enable this population to reach their highest potentials and to lead the best lives possible.

Footnote 38: There are many reasons for this, including the encouragement and assistance parents receive from the agencies with which they are connected, or the schools where their children are enrolled at the time those children approach their majority and "age out" of the education system.

Footnote 39: Frequently in such situation, other children in the family are English speakers and assist their parents in navigating an official world that is mostly monolingual. AHRC and YAI also provide translation assistance, as do the limited pro bono programs that aid parents in obtaining 17-A guardianships of their children.

Footnote 40: Information requested will not differ substantially from that which guardians are required to provide in their initial petitions, and should include where and with whom the ward resides, services the ward is receiving, including any additions or deletions since the previous report, medications taken, the name and contact information of the Medicaid coordinator or social worker, if any, and any other significant changes in the ward's condition and/or situation.

Footnote 41: It is also unlikely that an independent court examiner system would be

workable for review of the reports of 17-A guardians of the person, since most wards have no funds from which a court evaluator could be paid.

Footnote 42: No funds or additional personnel were provided at the time that yearly reports for guardians of the property were required. Although "unfunded mandates" place increasing and ultimately unsustainable burden on courts, this additional monitoring requirement should not have so draconian a consequence on the Surrogate's Court.

Footnote 43: Petitioner here will be required to provide, on a yearly basis, a report that meets the requirements of Mental Hygiene Law § 81.31, which, because he is both an attorney and the trustee of the trust for Mark's benefit, should not be unduly burdensome.

Footnote 44: The current system of appointing guardians ad litem in 17-A proceedings is, for all intents and purposes, a pro bono program, and could benefit from being explicitly denominated as such, with appropriate training and credit for the attorneys who participate.

Footnote 45: In the area of adult guardianships, where there is no paid court examiner system, there have been successful programs utilizing trained volunteers, most notably those developed by AARP. (*See* Hurme and Wood, 31 Stetson L Rev at 908.)

Footnote 46: In his signing statement, President Obama noted,

"Disability rights aren't just civil rights to be enforced here at home; they're universal rights to be recognized and promoted around the world . . .

"This extraordinary treaty . . . reaffirms the inherent dignity and worth and independence of all persons worldwide. I've instructed Ambassador Susan Rice to formally sign the Convention . . . and I hope the Senate can give swift consideration and approval to the Convention once I submit it for their advice and consent." (*See* Remarks by the President on Signing of U.N. Convention of the Rights of Persons with Disabilities Proclamation, http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-on-Rights-of-Persons-with-Disabilities-Proclamation-Signing [accessed Apr. 14, 2010].)

Footnote 47: These include article 22's guarantee of an individual's right to privacy (*id.* at 453), the right to live independently and to choose one's place of residence and with whom

one lives, contained in article 19 (*id.* at 452), article 16's guarantee of "[f]reedom from exploitation, violence and abuse" (*id.* at 451-452) and article 15's right to "[f]reedom from torture or cruel, inhuman or degrading treatment or punishment" (*id.* at 451). Unsupervised, unreviewed guardianships of persons with mental retardation and developmental disability may, sadly, result in violations of any or all of these protected rights.

Footnote 48: The requirement of proportionality and tailoring, incorporated in article 81, is entirely lacking in article 17-A. (*See Chaim A.K.*, *supra*; *see contra Matter of Yvette A.*, 27 Misc 3d 945 [2010].)

Footnote 49: Although the United States has signed but not ratified the Vienna Convention, the State Department accepts the Convention "as an authoritative guide to customary international law [and as] comport[ing] with the general principles that govern customary international law" and, as such, it is "binding even for countries which have never, and do not, become parties to the Convention." (Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 Va J Intl L 431, 444 [2004] [citations omitted].)

Footnote 50: The full text of the ICCPR can be found at the Web site of the Office of the United Nations High Commissioner for Human Rights (http://www2.ohchr.org/english/law/ccpr.htm [accessed Apr. 21, 2010]).

Footnote 51: This was one of the rights, albeit not derived from the ICCPR, that figured in *Matter of M.R.* (135 NJ 155, 638 A2d 1274 [1994], *supra*).

Footnote 52: Effective as of the date of this decision, all new personal guardianships in Surrogate's Court, New York County shall be subject to a reporting requirement that guardians answer a yearly questionnaire to be generated by the court, unless the appointing order requires additional information, which shall be supplied in accordance with that order.

Footnote 53: Although the petition initially also requested guardianship of the property, that relief was stricken because petitioner already controls all funds due Mark as cotrustee of his trust.

Footnote 54: The court also finds that Mark is incapable of understanding end-of-life decision making, or of giving consent to maintenance or withdrawal of extraordinary measures for preserving life, and so grants petitioner end-of-life decision-making power in accordance with SCPA 1750-b.

SUPPLEMENTAL NEEDS TRUSTS:
The Basics

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I. Introduction

Planning for families who have loved ones with disabilities can be challenging, as it involves techniques which target the caregivers, but which must also contemplate the impact of such planning on the benefit program eligibility of the individual who has the disability. Generally speaking, a family's desire to embark on long term planning doesn't begin until after their child has left the educational system. In many cases, this planning proves very difficult for families, not due to cost or expense, but because some decisions cause a family to take an opposite position or approach then was taken when advocating for supports and services and or inclusion in the educational setting.

Another very significant challenge is that comprehensive planning often requires the practitioner to look beyond the immediate needs of the clients (where it can often be difficult for the clients to look), and to anticipate, to the extent possible, the changing benefit landscape and service delivery systems which support or are expected to support the individual with the disability in the community. And, finally, in many cases the individual with the disability will be unable to participate in any meaningful way in the decision making process.

[1] Much of this Article is derived from an article written by Edward V. Wilcenski, Esq. for a New York State Bar Association Elder Law Section program in the fall of 2002, updated for a similar program in 2007, and futher updated in 2013.

The legal centerpiece of an estate plan involving a younger disabled client (referred to in this article as a "future care plan") is in most cases the "Special" or "Supplemental" Needs Trust.[2] The law and practice involving Supplemental Needs Trusts in planning for the disabled continues to develop and mature. With the enactment of New York Estates Powers and Trusts Law §7-1.12 [*hereinafter* EPTL], the expansion of the use of these trusts to include the assets of the disabled themselves in the federal Omnibus Budget Reconciliation Act of 1993 ("OBRA '93"),[3] and with the more recent application of the OBRA '93 rules to the Supplemental Security Income program as part of the Foster Care Independence Act of 1999 ("FCIA '99"),[4] the law continues to expand the range of options available to plan for the financial security of the disabled in a fashion that contemplates life beyond the government benefit safety net. And subsequent interpretive cases, rulings and administrative memoranda also provide guidance on how these techniques can be used to assist families wishing to contribute to the well-being of a disabled family member, but who might otherwise be reluctant to do so because of the possible adverse impact on eligibility for government benefits.[5] As a result, the spectrum of planning options available to counsel working with individuals with disabilities and their families continues to expand.

This is not to say that estate and financial planning for the disabled is necessarily becoming any *easier*. Quite to the contrary, planning for the younger client with a disability can be a complicated endeavor involving many different areas of the law, and attorneys regularly find that practice can vary considerably in different regions of the

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[2] The terms "Special Needs Trust" and "Supplemental Needs Trust" have come to be used interchangeably, although some still use the term Supplemental Needs Trust to refer to the third party testamentary trusts originally codified by NY EST. POWERS & TRUSTS § 7-1.12, and Special Needs Trust to refer to the "payback" or "self settled" trusts approved as part of the Omnibus Budget Reconciliation Act of 1993 ("OBRA 93"). For the sake of simplicity, this article will continue to refer to both as "Supplemental Needs Trusts," and distinguish between the two by using the terms "First Party" (referring to the self settled payback trust) and "Third Party" (referring to the more traditional estate planning type trusts) to distinguish between the two.

[3] Pub. L. 103-66 (1993).

[4] Pub. L. 106-169 (1999).

[5] It is important to emphasize that notwithstanding the growing body of law on the subject, the various benefit program rules do not always provide for a consistent treatment of such trusts. For example, changes to the Social Security Administration's internal guidelines governing the treatment of trusts after the Foster Care Independence Act of 1999 included some provisions that were in many ways inconsistent with the Medicaid program rules governing Supplemental Needs Trusts. *See* for example, Pierro, Louis W., and Wilcenski, Edward V., *The Foster Care Independence Act of 1999 and the SSI Program: Just What We Needed - More Transfer of Asset Rules*, N.Y. S. Bar Association Elder Law Attorney, Vol. 11, No. 1., p. 43 (Winter 2001); *see* also, *Same Issues, Different Agency: Transfer Penalties and Trust Rules Under the Section 8 Program*, N.Y. S. Bar Association Elder Law Attorney, Vol. 11, No. 4, p 41 (Fall 2001) .

state, across government agency lines, and even before different judges who hear similar matters in the same court.

This article is not intended to be a treatise on the history and development of Supplemental Needs Trusts and government benefit eligibility, as there are many comprehensive and well-written materials already in existence on these topics.[6] Rather this article is intended to provide an introduction to and commentary about Supplemental Needs Trusts.

I. The Basics

A. First Party or Third Party Trust: Which One Is It?

In New York, all Supplemental Needs Trusts are essentially "discretionary" spendthrift trusts, which by design allow a trustee to make distributions of any type for the benefit of a disabled beneficiary. However, a Supplemental Needs Trust will circumscribe this general grant of discretion by instructing the trustee not to exercise it in a fashion which would have an adverse impact on a beneficiary's eligibility for publicly or privately funded benefits.[7] If drafted properly, the principal and accumulated income of such trusts (both First Party and Third Party, discussed below) are treated as "exempt" by the public agencies providing means tested benefits.

While all Supplemental Needs Trusts will meet this general criteria, there are two discrete subsets of Supplemental Needs Trusts: "First Party" Supplemental Needs Trusts and "Third Party" Supplemental Needs Trusts. The line of demarcation between the two is drawn to identify the source of the property used to fund the trust, and not necessarily the name of the settlor or beneficiary of the trust instrument, a fact which in many cases can lead to confusion for the practitioner and client alike.

Specifically, Supplemental Needs Trusts which are designed to hold the property of someone other than the person with the disability are most commonly referred to as

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[6] Arguably the most comprehensive treatise on the topic for a national audience is Third Party and Self-Created Trusts: Planning for the Elderly and Disabled Client, Kruse, Clifton B., Jr., A.B.A. Real Property, Probate and Trust Law Section, 3rd Ed. (2002). Within New York State, Elder Law and Guardianship in New York, Kasoff, Edwin and Robert, Charles (Lawyers Coop. 1997), and New York Guide to Tax, Estate and Financial Planning for the Elderly, Goldfarb, David and Rosenberg, Joseph (Matthew Bender & Co., Inc. 2006), contain comprehensive and well integrated discussions of these trusts and their use in planning for individuals with disabilities and their families.

[7] Distributions from a Supplemental Needs Trust will impact benefit eligibility differently depending on the program, a consequence recognized by New York's statute. NY EST. POWERS & TRUSTS § 7-1.12(b)(3).

"Third Party" Supplemental Needs Trusts, and will be referenced as such throughout this article.[8] These are to be contrasted with Supplemental Needs Trusts which are designed to hold the property of the person with the disability, which will be referred to throughout this article as a "First Party" Supplemental Needs Trusts.[9]

Intuitively, this distinction makes sense. A third party (defined in this context as someone other than the beneficiary, as well as someone other than a person who has a legal responsibility to support the beneficiary[10]) can do with his or her property whatever he or she may want, including disinheriting the disabled beneficiary altogether. To the extent the third party would like to create a trust for the benefit of a disabled beneficiary which explicitly limits the availability of trust funds so that the beneficiary can continue to receive benefits from the Medicaid program or otherwise, the third party should have the right to do so.[11]

By way of contrast, if a disabled beneficiary already owns assets that would otherwise need to be exhausted before government benefits were available, then there must be some accommodation in the rules of the benefit program itself before those assets can be disregarded in determining ongoing benefit program eligibility. This accommodation is found in the federal Medicaid and Supplemental Security Income

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[8] These trusts have also been referred to as "Escher" trusts, named after the New York Court of Appeals case of the same name which is considered to be the watershed decision in New York State for these trusts. In re: Escher, 94 Misc.2d 952 (Sur.Ct. Bronx County 1978), *aff'd* 75 A.D.2d 531 (App. Div. 1st Dep't, 1980), *aff'd* 52 N.Y.2d 1006 (1981).

[9] These trusts are also referred to as "self-settled" trusts, "payback" trusts, "OBRA '93" trusts, or "(d)(4)(A)" trusts (the latter two references being the common name and the relevant subsection of the federal legislation that officially authorized their use).

[10] Note that both the spouse of a Supplemental Needs Trust beneficiary and the parent of a *minor* disabled beneficiary are specifically precluded from using his or her resources to establish a third-party Supplemental Needs Trust and claim the statutory protection afforded by NY EST. POWERS & TRUSTS § 7-1.12. *See* NY EST. POWERS & TRUSTS § 7-1.12(c)(1). The existence of the parent's and spouse's support obligation would dictate that the trust include a lien in favor of the state, ie., a First-Party Supplemental Needs Trust, if spousal assets or assets of the parents of a disabled minor are to used to fund the trust. *See also*, Elder Law and Guardianship in New York, *supra*, note 6, p. 133.

[11] For an extremely well-written discussion of the history and drafting mechanics for Third Party and First Party trusts for New York beneficiaries, *see* Davis, Charles G. and Davis, Jordan S., *Financial, Estate and Trust Planning for Families of Persons With Disabilities*, Representing People with Disabilities, N.Y.S. Bar Association, 3rd Ed. (2003).

("SSI") statutes themselves.[12] Specifically, both of these benefit programs, which otherwise penalize an applicant for divesting himself of assets that could be used for support (SSI) or medical care and services (Medicaid), have provided an *exception* to these transfer penalty rules for transfers of assets to a First Party Supplemental Needs Trust.[13] If the trust is properly drafted, the transfer of property to the trust will not disrupt benefit program eligibility, and the principal and accumulated income of trust itself will be exempt. Thus, an effective way to conceptualize the "First Party" Supplemental Needs Trust is by understanding the instrument to be a receptacle for penalty-free gifting by the disabled beneficiary.

First Party Supplemental Needs Trusts

First Party Special Needs Trusts are essentially creatures of the federal Medicaid statute, and premised on a provision of the federal statute which states that transfers of assets to a properly drafted Special Needs Trust will not generate a period of eligibility for certain Medicaid program benefits. These trusts are usually framed by language provided by our state Special Needs Trust statute, N.Y. Estates Powers & Trusts Law § 7-1.12 . The statutory language is not complete, however, and there are other factors that will need to be considered when drafting a First Party Special Needs Trust.

As a preliminary matter, the drafting attorney will need to ensure, at a minimum, that the criteria found in the federal statute is met. Specifically, 42 U.S.C. §1396p(d)(4)(A) provides that:

> "[there shall be no transfer penalty for transfers to] a trust containing the assets of an individual under the age of 65 who is disabled (as defined in section 1614(a)(3) [42 U.S.C.S. §1382c(a)(3)]) and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if the state will receive all amounts remaining in the trust upon the death of such

[12] 42 U.S.C. §§ 1396p(d)(4)(A), 1382b(e)(5). Other program rules (Section 8, Food Stamps, etc.) treat transfers to First Party Supplemental Needs Trusts in different ways. For trust beneficiaries participating in more than one program, attention should be given to each specific program's criteria.

[13] In fact, in 96 ADM-8, *OBRA '93 Provisions on Transfers and Trusts*, New York State Department of Social Services Transmittal (March 29, 1996), First Party Supplemental Needs Trusts are referred to as "exception" trusts, reflecting the fact that contributions to such trusts do not generate a period of ineligibility for institutional level Medicaid services.

> individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this title [42 U.S.C.S. §1396 et. seq.]."

The federal Medicaid statute thus sets out four explicit criteria for these trusts:

* The assets being used to fund the trust must come from an individual who is under the age of 65 at the time the assets are transferred to the trust;
* The individual must be disabled as that term is defined in the Social Security law;
* The trust must be "established" (ie. created by) a parent (of the beneficiary), grandparent (of the beneficiary), legal guardian (of the beneficiary), or court (ie. pursuant to a court order);
* There must be a "lien" or "payback" provision in the trust which provides that upon the beneficiary's death, the state is repaid for any medical assistance provided during the course of the beneficiary's lifetime.

The age requirement needs little explanation, other than to point out that the age of the beneficiary is measured as of *the date the assets are transferred to the trust*. As long as the funds are transferred to the trust prior to age 65, they will remain exempt even after the beneficiary reaches that age.

The second requirement, that the individual be "disabled," is generally satisfied by providing proof of SSI or Social Security Disability Income ("SSDI") eligibility. For first-time applicants for benefits, this standard may cause a delay in the application process, or a denial altogether if the individual's disability is called into question by the local social services agency, which uses the same standard as the Social Security Administration in determining disability. Disputes such as this often arise for individuals with psychiatric disabilities who are controlling their illness through medication, and for high-functioning developmentally disabled individuals who may be able to secure some

employment, but who still need significant supervision and assistance in the management of their daily affairs.

The third requirement can prove to be troublesome in cases where there is no independent need for a guardian or court involvement, but where the disabled beneficiary lacks a parent or grandparent to "establish" the trust on his behalf. In such a case, the practitioner will need to obtain an independent court order for the sole purpose of establishing the trust, notwithstanding the fact that the beneficiary may be competent and able to establish the trust him/herself. Such an order can be obtained through a "single transaction" guardianship proceeding under Article 81 of New York's Mental Hygiene Law,[14] or through a miscellaneous proceeding in Surrogate's Court under SCPA §§ 2101 and 202.[15]

The fourth requirement, the "payback" to the state, is also a relatively easy requirement to meet. Language as simple as the following will be sufficient:

> "The New York State Department of Health, or other appropriate entity, shall be reimbursed for the total amount of medical assistance provided to the beneficiary during his/her lifetime, as consistent with federal and state law. Prior to making any such payment, the trustee shall request from the state agency or other entity requesting reimbursement a Claim Detail Report or other detailed record of expenditures which substantiates the reimbursement claim."

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[14] Use of the "self petition" is described in some detail in Guardianship Practice in New York State, in the chapter entitled, *Burden and Obligations of the Petitioner*, Flowers, Ellen L., and Newman, John, N.Y.S. Bar Association Pub. (2000), p. 297.

[15] Emanuelli, Hon. Albert J., *Special Needs Trusts: The Role of the Surrogate's Court*, Westchester Bar Journal, Vol. 25, Nos. 3, 4 (Summer/Fall 1998), p. 147. The use of the Surrogate's Court proceeding is, in the author's experience, more common in the upstate counties, whereas downstate practitioners have used actions in Supreme Court for the same purpose. Single transaction guardianship petitions under Article 81 of the Mental Hygiene Law continue to be a viable alternative statewide, but because in all events a Court Evaluator is appointed, even if the beneficiary is fully competent and residing in the community, the proceeding tends to be a more expensive means of obtaining this court order.

In addition to meeting the specific requirements of the federal statute, New York State Social Services Regulations contain certain additional requirements for First Party Special Needs Trusts, although these do not necessarily need to be drafted into the trust instrument. Instead, they are affirmative obligations of the trustee that govern issues such as reporting the creation and funding of the trust, bonding, etc.[16] Nonetheless, on occasion a social services agency will ask that one or more of these regulatory provisions be included in the text of the trust instrument.

Finally, in cases where the First Party Special Needs Trust is being drafted in connection with a court proceeding, a judge may have her own specific requirements governing the trustee's accounting obligations, designation of remainder beneficiaries, etc.. And because in most court proceedings the local social services agency will be put on notice and have a right to appear, there may be other, negotiated provisions that will need to be added to the trust instrument in order to have it approved.

Third Party Supplemental Needs Trusts

Third Party Supplemental Needs Trusts are in many ways the cornerstone of an estate plan of individuals who are planning with a mind toward protecting and supporting their loved one with a disability.

Much like First Party Supplemental Needs Trusts, these trusts are drafted as "discretionary" trusts and by and large should be consistent with the guidelines set forth in EPTL §7-1.12. The provisions of 1396p(d)(4)(A) are generally not applicable to "Third Party" supplemental needs trusts.

B. Using EPTL 7-1.12 as a Foundation for First and Third Party Supplemental Needs Trusts

[16] 18 N.Y.C.R.R. §360-4.5(b)(5)(iii)(*a*) through (*e*).

Because most means-tested benefit programs premise eligibility on the "availability" of assets held in trust, the primary obligation of the drafting attorney is to ensure that the terms of the trust do not have the effect of rendering the trust corpus "available" within the context of the particular benefit program in which the beneficiary is participating. With the drafting guidance found in EPTL §7-1.12, this task has been made considerably easier. EPTL § 7-1.12 does, however, provide some alternative drafting options that need to be considered when structuring the portion of the trust instrument that governs the extent of a trustee's discretion to make distributions. Recall that as a general rule a Supplemental Needs Trust is a discretionary trust drafted in a fashion that restricts the trustee's discretion only in the case where a distribution may impact the beneficiary's government or private benefit eligibility.[17] This restriction would otherwise *preclude* the trustee from making a distribution that might impact eligibility, even if the impact is minimal and the benefit to the beneficiary is significant. Consider, for example, a trustee whose beneficiary is receiving SSI payments (which are designed to pay for food and shelter, and are subject to penalty when payments for any one of these items are made on the beneficiary's behalf by any third party, including a trust). If the trustee is inclined to subsidize the beneficiary's rent in order to allow him to move to a better apartment, and even though there may be a limited impact on the SSI payment,[18] the terms of the trust would preclude it.

There is an option. The statute allows the drafting attorney to decide whether the trustee should nonetheless be provided with authority to make food and shelter distributions if the trustee believes such a distribution, and the impact on the beneficiary's benefits, to be in the beneficiary's best interest.[19] In other words, while the trustee of a Supplemental Needs Trust is generally directed to ensure that the trust is managed in a way that the beneficiary's benefits will continue without disruption, the drafting attorney can decide to provide the trustee the flexibility to make distributions

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[17] NY EST. POWERS & TRUSTS §7-1.12(e)(1).

[18] The consequence of such a payment would in most cases mean a maximum reduction in SSI benefits of one third of the federal SSI benefit rate plus $20, an amount currently just over $200. 20 C.F.R. §416.1130(c). If the beneficiary is receiving well in excess of that amount in monthly SSI income, this relatively modest decrease in monthly income may be a sacrifice the beneficiary is more than willing to make.

[19] NY EST. POWERS & TRUSTS §7-1.12(e)(2).

that would nonetheless impact government benefits. As long as the trustee accepts that there may be an adverse impact on benefit eligibility, and there is some benefit to the beneficiary notwithstanding the loss of benefits, the trustee may do so.

It is significant to note that this language is optional and not mandatory. This suggests, in the authors' opinion, that the drafters of the legislation were not certain how these trusts would be treated by programs that were not solely based on New York law, such as SSI. Along these lines, the statute provides *yet another* optional clause, an "opt out" provision (for lack of a better term) which states, in effect, that *if* the trustee is given the broader discretion to make distributions which impact eligibility, and *if* an agency administering a particular benefit program later decides that this discretion somehow renders the trust corpus "available" in determining ongoing eligibility, then the trustee's discretion to make such distributions will cease.[20] The statute thus allows the drafting attorney to "hedge" on this issue until such time as full discretion becomes an issue before an agency providing benefits to the beneficiary.

As a practical matter, and based on the authors' experience with numerous government benefit programs, the optional language allowing the trustee full discretion to make a distribution even if it adversely impacts benefits has never been found to render trust income and principal available here in New York, as long as the discretion rests with the trustee and in no event can be compelled by the beneficiary. Thus, New York attorneys drafting these trusts for New York beneficiaries should be encouraged to leave this flexibility in the trust document, as there may come a time when the beneficiary no longer participates in a government entitlement program, and the trust would be better used as a simple discretionary trust, available to pay for whatever the beneficiary needs. Caution must be exercised, however, if there is a possibility that the beneficiary will move across state lines, as different states view discretionary trusts differently in the context of the welfare programs that the state administers, especially when the trust provides the trustee with discretion to make support-type distributions (eg. food, clothing, shelter, etc.).[21]

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[20] The mechanics of this discretionary power and the consequences of a distribution that will adversely impact a beneficiary's benefits is discussed in some detail by Charles Davis in Representing Persons with Disabilities, *see* Davis, *supra* n.11.

[21] See the discussion of various states' treatment of support-type trusts in the text by Clifton Kruse, Esq., *supra,* note 6, p. 55.

C. Court Involvement

One common misconception about Supplemental Needs Trusts is that they must be settled under the order of a court. Quite to the contrary, most Supplemental Needs Trusts are drafted as a private agreement between a settlor and trustee, and are never subject to court review or pre-approval of any state agency.

Thus, in the Third Party Supplemental Needs Trust context, practitioners are free to draft the trust as they would with any estate planning client, using the trust in a fashion that may accomplish other, ancillary goals for the third party, including probate avoidance and tax planning. As long as the language in EPTL § 7-1.12 is followed for the portion of the trust describing the trustee's discretion in making distributions for the disabled beneficiary,[22] it will be presumed that the creator did not intend for trust assets to supplant government benefits, and the trust will be treated as a Supplemental Needs Trust under New York law.

In the First Party Supplemental Needs Trust context, other outside factors may necessitate court involvement (eg. the trust is being created through a guardianship proceeding, or one of the statutory class of individuals required under the federal Medicaid statute is not available (discussed in more detail above, etc.), but there is no requirement that a First Party Supplemental Needs Trust be created under court order.

C. The Nature of the Disability

It is important that the drafting attorney have some sense of the broad range of disabilities[23] that can make a Supplemental Needs Trust a useful tool for the disabled

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[22] As explained in more detail by Charles Davis in Representing People with Disabilities, *supra,* note 11, New York continues to have a "common law" Supplemental Needs Trust premised upon the Court of Appeals' decision in the Escher case. Thus, a trust that was drafted prior to the enactment of NY EST. POWERS & TRUSTS § 7-1.12, or drafted by someone without knowledge of NY EST. POWERS & TRUSTS § 7-1.12, will not necessarily jeopardize the beneficiary's ongoing eligibility for benefits. In such a case, the availability of the assets held within the trust will be analyzed in accordance with the case law following Escher, and the trust will simply lose the "guaranteed" protection that is currently available under NY EST. POWERS & TRUSTS §7-1.12.

[23] The definition describing the eligible class of disabled beneficiaries for whom a Supplemental Needs Trust may be useful is actually quite broad, and includes developmental disabilities, mental illness, and anyone with any "physical or mental impairment... whose

client, and to have some familiarity with the specific disability of the Supplemental Needs Trust beneficiary himself. Many practitioners believe, incorrectly, that a client needs to be cognitively disabled and unable make critical life decisions or otherwise function independently in the community before a Supplemental Needs Trust should be considered as a planning option. While there are certainly many beneficiaries who fit this category, there are many, many more individuals who are "disabled" within the legal definition of that term, but not necessarily "incompetent." A 45 year old man with a spinal cord injury, confined to a wheelchair and requiring extensive home health and personal care assistance, may be fully competent and capable of managing his own affairs. The same might be said for a young woman with muscular dystrophy, or with a psychiatric disability. All of these individuals may need services funded through the Medicaid program or otherwise, but nothing would preclude them from being actively involved in the decisions concerning the drafting and implementation of a Supplemental Needs Trust and future care plan.

In addition, the nature of the disability will often dictate the government benefit program or programs that will support the beneficiary, either in an institutional setting or in the community. This in turn will provide the drafting attorney with an idea about how trust assets can be used, which can be communicated to the trustees in the terms of the trust instrument itself, or through a separately prepared memorandum that would be delivered to the trustee and kept as part of the trust records and used when considering certain trust distributions. For example, a beneficiary with a severe developmental disability residing in a group home may have a much more predictable set of needs than an adult suffering from severe depression and bipolar disorder residing in federally subsidized housing and receiving outpatient mental health services. In the case of the former, the beneficiary will most likely be receiving SSI benefits, and distributions for food or shelter may impact SSI coverage.[24] In the case of the beneficiary with mental illness, and presuming that the individual is receiving basic community Medicaid without SSI, the trustee may be free to use trust funds to support any reasonable housing

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disability is expected to, or does, give rise to a long term need for specialized health, mental health, developmental disabilities, social or other related services... and who may need to rely on government benefits or assistance." NY EST. POWERS & TRUSTS § 7-1.12 (a) (1) - (4).

[24] 20 C.F.R. §4165.1130(b).

arrangement, and provide other necessities that will enhance the ability of the beneficiary to reside safely in the community.[25]

Finally, and perhaps most importantly from the beneficiary's perspective, the functional level of the beneficiary will also determine the extent to which the beneficiary may be able to participate in decisions involving trust expenditures and management, albeit in an "advisory capacity" only.[26]

V. Making the Plan Complete: The Life Care Plan or Letter of Intent

A final observation concerning special needs estate planning is warranted. As a general rule, attorneys and clients alike appreciate the need to address the legal and financial issues involved when a family member is disabled and relying on government benefits. And in most cases the clients will proceed as far as having the attorney prepare a Supplemental Needs Trust and other traditional estate planning documents (Power of Attorney, Health Care Proxy, etc.), and have guardians and standby guardians appointed, if Guardianship was indeed appropriate. But after the documents are drafted and executed, after the parents and caregivers themselves become disabled or deceased, and after the assets have been protected within the Supplemental Needs Trust, those family members and advocates who remain behind to administer the trust and implement the future care plan are left asking perhaps the most crucial question of all: *"Now what?"* How should the funds that the family has worked so hard to protect be used by the trustee to truly enhance the life of the person with the disability? To whom should the trustee look for advice and suggestions if the person with the disability cannot speak on his or her own behalf? Encouraging the family to prepare a "Life Care Plan" or "Letter of Intent" will help provide answers to these questions.

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[25] In New York, distributions for food and shelter will not have an adverse impact on Medicaid eligibility so long as the distribution is not in compensation for services provided by the beneficiary (ie. remuneration). 89 ADM-21, *Treatment of In-Kind Income in the Medicaid Program*, New York State Department of Social Services Transmittal (June 14, 1984).

[26] Providing the beneficiary with more than an advisory role might cause the beneficiary's right of participation to rise to the level of a general power of appointment, triggering the availability of the underlying trust assets in determining ongoing eligibility for program benefits. Social Security Administration Program Operations Manual System ("POMS") § SI 01110.100(B).

The Life Care Plan or Letter of Intent is a document designed to ensure, to the extent possible, that as much personal, financial, and other pertinent information concerning the person with the disability is stored in a single place and accessible for future reference. Many advocates use workbooks designed specifically for this purpose.[27] The workbooks will usually request background medical information, financial information, family history, community contacts, and recreational preferences of the person with the disability. The workbooks may also request that the parents and caregivers provide similar information about *their own* finances and family supports. This information can prove to be especially crucial for those who must step in and assist when the caregiver is seriously injured or dies unexpectedly.

It is difficult to overemphasize the importance of this step in the process. Consider asking the client with a severely disabled child the following questions: "If you were to get up and leave town today, right this minute, completely unexpectedly and without advance notice to *anyone*, including your disabled son or daughter, who would step in to handle your affairs? Does this person know where all of your pertinent financial information is stored? Have you provided her with the legal authority to access your funds and act on your behalf? Who breaks the news to the person with the disability? Who will step in to do what *you* have been doing all these years? Who stays in contact with the service coordinator or social worker? Who double checks to be sure that medication is being taken as prescribed? Who will make the emergency calls when no one has heard from your son or daughter in days, and who will they call? And if you have someone in mind, have you provided this person with the information he or she needs to carry out your wishes? Does this person know what you know about your son or daughter's needs, preferences and dislikes?"

To those people who will step in and assist a disabled family member when the parents are gone, a well written Life Care Plan will be worth its weight in gold. And as uncomfortable as it is for many parents to face the topic, completing this element of the future care planning process often provides the greatest amount of satisfaction and

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[27] A simple internet search using the terms “disability” and “letter of intent” will generate hundreds of sample forms that families can use for this purpose. One of the most well thought-out workbooks of this type that this author has seen is *A Life Planning Workbook*, produced by the Planned Lifetime Assistance Network ("PLAN") in conjunction with the National Association of the Mentally Ill ("NAMI"). The book is available from PLAN's executive office at (518) 587-3372.

relief. Certainly the legal and financial components are equally as critical, but in most circumstances, competent counsel will be able to preserve a portion of the family's funds for the person with the disability, even if no planning whatsoever has been completed prior to the disability or death of the caregiver. This "crisis intervention planning" is always more expensive, time consuming, and will be conducted before a court as a matter of public record, but it can be done.

Once the parents or primary caregivers are gone, however, the ability to prepare a comprehensive and detailed Life Care Plan becomes quite limited. There may be a case record or Service Plan to use as a reference, a dedicated service coordinator who might have some additional personal information, or some other family member or friend who could assist in compiling pertinent information, but none of these "fallback" references will ever replace the Life Care Plan prepared by a parent or caregiver who has taken care of the person with the disability all of his or her life.

V. Conclusion

Over the last several years Special Needs Estate Planning has become a recognizable practice area that stands apart from the traditional Estate Planning or Elder Law Practice. For children whose disabilities warrant the need for supports and services during their educational years, parents rarely have time to focus on anything other than ensuring their child is receiving the appropriate education they are entitled to under state and federal law. As a sibling and parent of family members' with disabilities respectively, the authors have a first hand understanding of the advocacy that is warranted during the school years.

What young parents don't often realize until it is upon them, is that their child reaching age 18 is a time of transition, their child leaving the school system is a time of transition, their own aging and the limitations that aging has on their ability to advocate and provide both emotional and financial support to their child is a time of transition. The last being the most gradual and sometimes unnoticed until it is too late meaningfully plan. In the arena of Special Needs Estate Planning our job as practitioners is to prepare families for the realities of these transitions and help to make them as smooth as possible.

ADMINISTRATIVE DIRECTIVE

TRANSMITTAL: 96 ADM-8

DIVISION: Health and Long Term Care

TO: **Commissioners of Social Services**

DATE: March 29, 1996

SUBJECT: OBRA '93 Provisions on Transfers and Trusts

SUGGESTED DISTRIBUTION:
Medical Assistance Staff
Public Assistance Staff
Legal Staff
Fair Hearing Staff
Staff Development Coordinators

CONTACT PERSON:
Transfers-Robin Johnson -1-800-343-8859, ext. 67454
Trusts-Barbara Crumb - 1-800-343-8859, ext. 32237
NYC: Call (212) 383-2512

ATTACHMENTS:

Attachment I	Sole benefit statement (available on-line)
Attachment II	Procedures for Monitoring Exception Trusts (available on-line)
Attachment III	Explanation of the Effect of Transfer of Assets on MA Eligibility (available on-line)
Attachment IV	Life Expectancy/Actuarial Tables (available on-line)
Attachment V	Life Estate and Remainder Interest Table (available on-line)

FILING REFERENCES

Previous ADMs/INFs	Releases Cancelled	Dept. Regs.	Soc. Serv. Law & Other Legal Ref.	Manual Ref.	Misc. Ref.
95 ADM-17					Section 13611 of
92 ADM-53		360-4.4(c)	SSL 366	MARG page, 356	OBRA'93
92 ADM-45		360-4.5	SSA 1915 (c) & (d)		GIS '94-MA/018
92 ADM-44					
91 ADM-37			Executive		GIS '94-MA/031
91 ADM-31			Law Sec 63		
90 ADM-29					GIS '95-MA/038
89 ADM-45					

TABLE OF CONTENTS

ATTACHMENT I, SOLE BENEFIT

ATTACHMENT II, SUGGESTED PROCEDURES FOR MONITORING EXCEPTION TRUSTS

ATTACHMENT III, EXPLANATION OF THE EFFECT OF TRANSFER OF ASSETS ON MEDICAL ASSISTANCE ELIGIBILITY

ATTACHMENT IV, LIFE EXPECTANCY/ACTUARIAL TABLES

ATTACHMENT V, LIFE ESTATE AND REMAINDER INTEREST TABLE

I. PURPOSE

This Administrative Directive (ADM) informs social services districts of changes in the treatment of transfers and trusts in the Medical Assistance (MA) program as a result of the Omnibus Budget Reconciliation Act of 1993 (OBRA '93).

II. BACKGROUND

Section 1917 of the Social Security Act (42 U.S.C. 1396p) requires a period of ineligibility for MA coverage of nursing facility services (penalty period) when the MA applicant/recipient (A/R) or his/her spouse transfers assets for less than fair market value within or after a specified look-back period. Prior to the enactment of OBRA '93, Section 1917(c): provided for a 30-month look-back period; provided for a maximum penalty period of 30 months; referred to transfers of "resources" rather than "assets"; and did not contain any exceptions for transfers of assets into trusts. OBRA '93 made a number of amendments to Section 1917(c).

Prior to the enactment of OBRA '93, Section 1902(k) of the Social Security Act (42 U.S.C. 1396a(k)) provided that in the case of a trust created by an A/R or his/her spouse, other than by will, the maximum amount of payments which the trustee had discretion to distribute to the A/R would be deemed available for purposes of determining MA eligibility. OBRA '93 repealed Section 1902(k) and amended Section 1917 to more fully address the availability of assets held in trust and the applicability of the transfer rule to assets transferred into trusts.

Chapter 170 of the Laws of 1994 amended Section 366 of the Social Services Law to conform to the aforementioned OBRA '93 amendments. In addition, the Department amended 18 NYCRR 360-4.4(c) and 360-4.5 to implement the provisions of Chapter 170.

III. PROGRAM IMPLICATIONS

As a result of the enactment of OBRA '93 and Chapter 170 of the Laws of 1994, a number of changes and clarifications are being made to the MA rules concerning transfers and trusts. These changes apply to MA applications and recertifications on or after September 1, 1994, and apply to transfers made and trusts created or funded on or after August 11, 1993.

A. Transfers:

- the transfer rules apply to both income and resources;
- the look-back period is increased from 30 to 60 months in the case of trust-related transfers, as described in Section IV.B of this ADM, and from 30 to 36 months for all other transfers;
- there is no 30 month cap on the length of the penalty period;
- there is no penalty for transferring assets to a trust established solely for the benefit of a person certified as disabled and under 65 years of age;
- when either spouse makes a prohibited transfer that results in a penalty period for the institutionalized spouse, the penalty period must be apportioned equally between the spouses if the community spouse subsequently becomes in need of nursing facility services;

- a penalty period is imposed for a partial month;
- clarification is provided concerning when a transfer by an individual to another is considered to be for the "sole benefit" of the individual's spouse;
- clarification is provided on the treatment of jointly held assets;
- the "Explanation of the Effect of Transfer of Assets on Medical Assistance Eligibility" has been revised to reflect the changes resulting from OBRA '93; and
- the penalty period will now begin on the first day of the month following the month of transfer.

B. Trusts:

- for a revocable trust, the total principal and income of the trust is considered available;
- for irrevocable trusts, payments actually made from the trust to or for the benefit of the A/R are available income in the month received; portions of the trust principal and income which can be paid to or for the benefit of the A/R are considered to be an available resource; and any portions of the trust principal and income which can never be paid to or for the benefit of the A/R under the terms of the trust are considered to be transferred assets for purposes of the transfer rule; and
- exceptions are made for certain trusts created for the benefit of disabled A/Rs using the A/R's assets.

IV. REQUIRED ACTION

A. Definitions

1. Assets

Assets include all income and resources of the individual and the individual's spouse. This includes income or resources which the individual or the individual's spouse is entitled to but does not receive because of any action or inaction by;

- the individual or the individual's spouse;
- a person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse; or
- any person, including a court or administrative body, acting at the direction of or upon the request of the individual or the individual's spouse.

Examples of actions which would cause income or resources not to be received are:

- irrevocably waiving pension income;
- renouncing an inheritance or refusing to assert one's right of election against an inheritance;
- not accepting or accessing injury settlements (however, A/Rs cannot be required to initiate litigation);

- settling a tort (personal injury) action so as to have the defendant place settlement funds directly into a trust or similar device to be held for the benefit of the A/R; or

- refusing without good cause to take action to obtain a court ordered payment that is not being paid, such as an alimony award or other judgment against an individual. In the case of alimony, good cause is defined in Department Regulation 369.2(b).

NOTE: The date of transfer is the date the asset was actually available and waived. In the case of a trust, the date of the transfer is the date the trust is actually funded, regardless of the date it was created.

2. Blind or disabled:

For purposes of this directive, the terms "blind" and "disabled" mean certified blind or certified disabled, according to the requirements of the Social Security Administration.

3. Fair Market Value

Fair market value (FMV) is the estimate of the value of an asset if sold at the prevailing price at the time it was actually transferred.

Fair market value of real property or other assets may be established by means of an appraisal by a real estate broker or other qualified dealer or appraiser.

4. Individual

When the ADM refers to the creation of a trust or to a transfer of assets, the term individual or A/R includes: the individual; the individual's spouse; any person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse; or any person, including a court or administrative body acting at the direction of or upon the request of the individual or the individual's spouse.

5. Nursing Facility Services

Nursing facility services means:

- nursing care and health related services provided in a nursing facility (including residential health care facilities, residential treatment facilities, intermediate care facilities, and intermediate care facilities for the developmentally disabled);

- a level of care provided in a hospital which is equivalent to the level of care provided in a nursing facility; and

- care, services, or supplies furnished pursuant to a waiver under section 1915(c) or (d) of the Social Security Act, including: the Long Term Home Health Care Program, the OMRDD Home and Community-Based Services Waiver, the Traumatic Brain Injury Waiver or the Care At Home Program.

6. Sole Benefit

A transfer by an individual or the individual's spouse to another is for the sole benefit of the individual's spouse if the terms and conditions of the transfer are specified in a written instrument of transfer (such as a trust document, deed, or other signed and acknowledged statement), which is executed at or about the time of transfer, clearly limiting the use and enjoyment of the transferred property to the individual's spouse.

In the absence of a written instrument of transfer, a transfer must be considered a transfer for the sole benefit of the individual's spouse only if, at the time of application:

- the person who transferred the assets signs a statement attesting that the transfer was intended for the sole benefit of the individual's spouse; (districts may develop their own form for this purpose, or use the sample form included as Attachment I to this ADM); and

- other evidence is presented (such as evidence of a continuous course of conduct by the person to whom the assets were transferred) which establishes that the use and enjoyment of the transferred property has in the past been limited to the individual's spouse.

In addition, in order for a transfer to be considered to be for the sole benefit of the individual's spouse (regardless of whether there is a written instrument of transfer), the social services district must conclude, based on the age of the individual's spouse, the amount of assets transferred, and the rate and amount of expenditures from the transferred assets for the benefit of the individual's spouse, that the transferred assets are likely to be totally expended within the spouse's lifetime.

The establishment of a trust for the benefit of a spouse will not be considered a transfer for the sole benefit of such spouse if: during the life of the trust, the trustee has the authority to make distributions for the benefit of anyone other than the spouse; or the trust provides that upon its termination, all or part of the remaining principal and income is to be distributed to someone other than the MA applicant/recipient, or the spouse's estate.

Note: Any subsequent action by the individual's spouse, or by the person to whom the assets were transferred for the spouse's benefit, which reduces or eliminates the spouse's beneficial use of the transferred property, or the ownership or control of the person to whom the assets were transferred, may be considered a transfer of assets by the individual's spouse on the date such action is taken. Such a transfer may affect the eligibility of either or both spouses, depending on the circumstances of the transfer.

Note: When assets are transferred by an individual or the individual's spouse to another for the sole benefit of the individual's spouse, the assets continue to be considered part of the couple's total resources for purposes of determining the amount of the community spouse resource allowance.

7. Trusts

In general, a trust is a legal instrument by which an individual gives control over his/her assets to another (the trustee) to disburse according to the instructions of the individual creating the trust. There are a number of different types of trusts, including escrow accounts and investment accounts.

a. Annuity - An annuity is an investment vehicle whereby an individual establishes a right to receive fixed periodic payments, either for life or a term of years. To the extent to which the anticipated return is commensurate with the money invested, the purchase of an annuity shall be considered a compensated transfer of assets; to the extent that the anticipated return is less than the amount invested, it shall be considered to be a trust-related transfer for less than fair market value.

b. Exception trusts - Exception trusts are trusts which are required to be disregarded as available income and resources for purposes of determining MA eligibility pursuant to the provisions of Section 366(2)(b)(2)(iii) of the Social Services Law and 18 NYCRR 360-4.5(b)(5). Exception trusts generally will conform to the definition of supplemental needs trusts found in Section IV.A.7.e of this ADM. There are two types of exception trusts.

i. One type of exception trust is a trust created for the benefit of a disabled person under the age of 65. It must:

- be created with the individual's own assets,

- be created by the disabled person's parent or grandparent, legal guardian of the individual, or by a court of competent jurisdiction, and

- include language specifying that upon the death of the disabled person, the social services district will receive all amounts remaining in the trust, up to the amount of MA paid out on behalf of the individual.

Once established, additional funds can be added to the trust until the person reaches age 65. However, any additions to the trust made after the person reaches age 65 would be treated as a transfer of assets, and would require the imposition of a penalty period. It is the Department's position that if a district has imposed a Social Services Law Section 104-b or Section 369 lien against assets to be used to establish an exception trust, the district should attempt to have the lien satisfied (or, in the district's discretion, compromised) before the trust is established. Litigation is pending on the issue of whether enforcing such liens is allowed when the assets are to be put into an exception trust; when this litigation is concluded, the Department will notify districts promptly of the outcome and of any necessary policy changes.

ii. The other type of exception trust is a trust created for the benefit of a disabled person of any age, and is a pooled trust, as described below:

- the trust is established and managed by a non-profit association per Section 1917 (d)(4)(C)(i) of the Social Security Act;

- the assets are pooled with other assets and are managed by a non-profit organization which maintains separate accounts for each person whose assets are included in the pooled trust;

- the disabled individual's account in the trust is established by the disabled individual, by the disabled individual's parent, grandparent, or legal guardian, or by a court of competent jurisdiction;

- the trust will be disregarded for MA purposes regardless of the age of the individual when the pooled trust account is established, or when assets are added to the pooled trust account; however, there is no exception to the transfer rules for transfers of assets to trusts created for the benefit of persons 65 years of age or older;

- upon the death of the individual, the district's right of recovery is limited to those funds not retained by the non-profit organization; and

- if the trust is subject to oversight by the Attorney General's office, no bonding (as specified in Section IV.F of this ADM) is required.

NOTE: Although exception trusts created in accordance with the criteria set forth above are exempt as resources in the eligibility determination process regardless of the disabled individual's age, for purposes of the transfer provisions, any additions to the trust after the individual becomes 65 years of age are subject to applicable transfer penalties.

It is the responsibility of the trustee of an exception trust to ensure that the funds are expended for the benefit of the chronically impaired or disabled person. In some cases, this disbursal of funds may indirectly benefit someone other than the beneficiary. Such disbursals are valid, as long as the primary benefit accrues to the chronically impaired or disabled person. For example, payment of travel expenses for a companion to a chronically impaired or disabled person going on vacation may be appropriate. Also, the abilities and capabilities of the person should be taken into account. The purchase of sophisticated computer equipment to assist a physically disabled person to communicate would be considered appropriate, while purchase of the same type of equipment for an individual who could not be trained to use it would not.

c. Irrevocable Trust - An irrevocable trust is a trust created by an individual, over which the individual may or may not be able to exercise some control, but which may not be cancelled under any circumstances.

d. Revocable Trust - A revocable trust is a trust created by an individual which the individual has the right to cancel.

e. Supplemental Needs Trust (SNT) - A supplemental needs trust, as defined in Section 7-1.12 of the Estates, Powers and Trusts Law, is a trust established for the benefit of an individual of any age with a severe and chronic or persistent impairment, designed to supplement government benefits for which the individual is otherwise eligible. Under the terms of such a trust:

   i. the beneficiary does not have the power to assign, encumber, direct, distribute, or authorize distributions from the trust; and

   ii. the trust document generally prohibits the trustee from expending funds in any way that would diminish the beneficiary's eligibility for or receipt of any type of government benefit.

f. Testamentary Trust - A testamentary trust is any trust established by will. Testamentary trusts are third party trusts, as defined below.

g. Third Party Trusts - A third party trust is a trust established with the funds of someone other than the A/R. A third party trust may or may not be a supplemental needs trust, as defined in Section 7-1.12 of the Estates, Powers and Trusts Law. For purposes of determining the eligibility of an A/R who is a beneficiary of a third party trust, the principal and accumulated income of the trust are not considered available to the A/R. However, any distributions of trust assets actually made to the A/R are counted as income in the month received.

   Social services districts are authorized, but not required, to commence court proceedings on behalf of A/Rs who are beneficiaries of third party trusts, seeking to compel the trustee to use trust assets to pay for necessary medical care. However, if the terms of the trust specifically prohibit the trustee from using trust assets for medical care, as will be the case with trusts conforming to Section 7-1.12 of the Estates, Powers and Trusts Law, it is extremely unlikely a court will order the trustee to do so.

8. Uncompensated Value

The uncompensated value is the difference between the FMV at the time of transfer (less any outstanding loans, mortgages, or other encumbrances on the asset) and the amount received for the asset.

If the client's resources are below the appropriate MA resource level, the amount by which the MA resource level exceeds the client's resources must be deducted from the uncompensated value of the transfer. Likewise, amounts specified in Department regulations for burial funds, but not for burial space items, also must be deducted.

Note: A transfer for "love and consideration" is not considered a compensated transfer. Also, while relatives and family members legitimately can be paid for care they provide to the individual, there is a presumption that services provided for free at the time were intended to be provided without compensation. Thus, a transfer to a relative for care provided for free in the past, normally is not a transfer of assets for FMV. However, an individual can rebut this presumption with tangible evidence. An example of acceptable evidence would be a promissory note executed at the time services were provided.

B. Look-Back Date

In the case of the transfer of assets by an individual in receipt of or applying for nursing facility services, the look-back date is **36 months** prior to the first day of the month in which the individual was:

- institutionalized; and
- submitted an application for full Medical Assistance coverage, including coverage of nursing facility services.

For trust-related transfers on or after August 11, 1993, the look-back period is 60 months. Funding a new trust is a trust-related transfer. Trust-related transfers also include transfers to already existing trusts, distributions from existing trusts to someone other than the A/R, and the foreclosure of a trustee's ability to distribute trust assets to the A/R due to a "trigger provision" in the trust agreement. Thus, even though a trust is established prior to August 11, 1993, subsequent trust-related transfers which occur on or after August 11, 1993 may be subject to the new transfer provisions.

EXAMPLE: Mrs. Jones created a revocable trust in 1988. She applies for MA in December 1994. The district determines that $10,000 was removed from the trust and given to Mrs. Jones' son in October 1993. In such a situation, even though the trust was created more than 60 months ago, the social services district would consider the $10,000 to be a transfer since the activity occurred after August 10, 1993, but within the 60 months preceding the month of application. In addition, because the trust is revocable, any balance remaining in the trust is considered an available resource.

When an individual has multiple periods of institutionalization, or multiple applications (whether or not they resulted in the provision of assistance), the look-back period begins 36 months (or 60 months in the case of trust-related transfers) prior to the first day of the month in which the individual both: is in receipt of nursing facility services **AND** has submitted an application for full MA coverage.
NOTE: As explained in 18 NYCRR 360-4.5, certain "trigger provisions" are null and void under State law. With respect to these provisions, the triggering event has no effect on the trustee's powers and thus no transfer of assets occurs; instead, the trust assets subject to the trigger provision continue to be considered an available resource.

C. Treatment of Revocable Trusts

In the case of revocable trusts established by the A/R, the entire value of the trust is considered as an available resource.

(1) All payments made from the trust to or for the benefit of the A/R are considered available income in the month received.

(2) All payments made from the trust to a person other than the A/R are considered to be assets transferred for less than FMV for purposes of the transfer of assets rule.

D. Treatment of Irrevocable Trusts

In the case of an irrevocable trust established by the A/R, any portion of the trust principal, and income generated by the trust principal, from which no payments may be made to or for the benefit of the A/R is considered to be an asset transferred for less than FMV for purposes of the transfer of assets rule.

(1) Payments made from the trust to or for the benefit of the A/R shall be considered available income in the month received.

(2) Any portion of the principal of the trust, or the income generated from the trust, which can be paid to or for the benefit of the A/R, is considered an available resource. If the language of the trust specifies that money can be made available for a specific event, that amount shall be considered an available resource, whether or not that event has occurred.

(3) Payments which are made from trust assets considered available to the A/R, as described in paragraph (2) above, and which are not made to or for the benefit of the A/R, are considered to be assets transferred for less than FMV for purposes of the transfer of assets rule.

Note: In the case of trusts, the date on which the penalty begins is the first day of the month following the month in which the trust was funded (or a revocable trust made irrevocable), or assets were transferred for less than FMV.

E. Treatment of Exception Trusts and Third Party Trusts

In the case of exception trusts and third party trusts, the principal and accumulated income are disregarded in determining MA eligibility. However, any trust assets actually distributed to the A/R are counted as income in the month received and as a resource if retained into subsequent months. In addition, as indicated in Section IV.A.7.g of this ADM, the social services district can go to court to compel the trustee of a third party trust to make trust assets available to a trust beneficiary, where the trustee is required or granted the discretion to make such distributions under the terms of the trust agreement.

With respect to a disabled person under age 65, a lump sum payment, such as a personal injury award or settlement, or an inheritance, will be disregarded as income or resources from the date the person has the right to take possession of the assets until the first day of the second month following that date, if the person intends to place such assets in an exception trust. In addition, assets of a disabled person under age 65 will be disregarded from the date of commencement of a court proceeding necessary to allow the assets to be placed in an exception trust until the resolution of such proceeding, assuming the disabled person or his or her representative promptly pursues the resolution of the proceeding.

In the case of a trust created from the proceeds of retroactive payments received as a result of a court settlement due the beneficiary under the SSI program, the Department shall first be entitled to reimbursement of any interim assistance paid out pending the court decision, and the representative payee shall be entitled to reimbursement of any expenses incurred in the pursuit of the settlement.

F. Oversight Responsibilities

Districts are responsible for notifying trustees of exception trusts of the information they need to maintain in order to monitor the trust activity, including but not limited to:

- providing notification to the district of the death of the beneficiary of a trust;

- providing notification to the district of any transactions made that would substantially deplete the value of the corpus (principal) of the trust;

- providing documentation to the district that there have been no transfers of assets from the trust nor any transactions from the corpus of the trust that involve transfers for less than fair market value;

- providing proof of bonding in all situations involving trusts of more than one million dollars, or when required by the court (pooled trusts subject to oversight by the Attorney General's Office do not require bonding);

- information ensuring, with respect to pooled trusts, that all trust activity is posted to the appropriate account.

Suggested procedures for meeting these responsibilities are included in Attachment II of this ADM.

In the event that a district considers any acts, omissions, or failures of the trustee to be contrary to the terms of the trust, applicable laws and regulations, or the trustee's fiduciary obligations, it can refer the matter to the Attorney General to commence a proceeding against the trustee under Section 63 of the Executive Law. It may do so by contacting:

NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES
OFFICE OF LEGAL AFFAIRS
BUREAU OF HEALTH AND LONG TERM CARE LAW
40 NORTH PEARL STREET
ALBANY, NEW YORK 12243-0001
Attn: Trust Review

G. Penalty Period

The penalty period is the period of time that an individual is ineligible for MA coverage of nursing facility services as a result of an uncompensated transfer of a non-exempt asset or homestead. As a result of the enactment of OBRA '93 and Chapter 170 of the Laws of 1994, there is no longer a maximum penalty period.

1. Calculation

The length of the penalty period is calculated by dividing the uncompensated value of all assets transferred during or after the look-back period (except as provided in Section IV.G.5. concerning multiple transfers) by the MA regional rate established for the region in which the person is institutionalized. The regional rates are revised by this Department annually in an Administrative Directive. In addition, social services districts must reduce the uncompensated value as necessary to take into account the appropriate MA resource level, any allowable burial funds, and any allowable income deductions or disregards as defined in Section IV.H.1. or 2. of this ADM.

NOTE: Except as provided in Section IV.G.2. concerning multiple transfers, the penalty period begins on the first day of the month following the month of transfer, provided that the date does not occur during an existing penalty period.

2. Multiple Transfers

For **multiple transfers** during the look-back period, where assets have been transferred in amounts and/or frequency that would make the calculated penalty periods overlap, add together the uncompensated value of all assets transferred, and divide by the MA regional rate. The period of ineligibility begins with the first day of the month following the month in which the first transfer occurred.

Example: An individual transfers $20,000 in January 1994, $20,000 in February, and $20,000 in March, all of which are uncompensated. Calculated individually, based on a regional rate for nursing facility care of $5,000 a month, the penalty period for the first transfer is from February through April (February is the first month following the month of transfer), the second transfer is from March through June, and the third is from April through July. Because these periods overlap, calculate the penalty period by adding the transfers together (a total of $60,000) and dividing by the nursing home cost ($5,000). The penalty period would run from February 1994 through January 1995.

When a penalty period ends at any time during a month and a subsequent transfer occurs at any time during that same month, the subsequent transfer is considered to have occurred in an overlapping penalty period and would be treated as a multiple transfer.

When multiple transfers are made in such a way that the penalty periods for each do not overlap, treat each transfer as a separate event with its own penalty period.

Example: An individual transfers $10,000 in January, $10,000 in May, and $10,000 in October. Assuming that the regional rate for nursing facility care is $5,000 a month, the penalty periods for transfers are, respectively, February through March, June through July, and November through December.

3. Partial Month

If the uncompensated value of the transferred assets is less than the regional rate, or the penalty period results in a partial month penalty, districts must count the uncompensated value attributable to the partial month as part of the Net Available Monthly Income (NAMI) or, in the case of a person receiving waivered services in the community, spenddown liability for the month.

4. Apportioning Penalty Periods Between Spouses

If either spouse transfers an asset (before eligibility is established) that results in a penalty for the institutionalized individual, the penalty must be apportioned equally between the spouses if the community spouse subsequently becomes in receipt of nursing facility services and applies for MA. If one spouse is no longer subject to a penalty (e.g., the spouse dies), the remaining penalty period for both spouses must be applied to the remaining spouse.

Example: Mr. Smith enters a nursing home and applies for MA, while Mrs. Smith remains in the community and is not in receipt of MA. Mrs. Smith transfers assets before Mr. Smith is determined eligible for MA and a 10-month penalty period is imposed on Mr. Smith's care. Four months into the penalty period Mrs. Smith enters a nursing home and applies for MA. The remaining 6 months of the penalty period must be divided equally between the two spouses.

In the above example, if Mr. Smith leaves the nursing home, but his wife remains, the remaining penalty period that had been apportioned to Mr. Smith must be imposed on Mrs. Smith. If Mr. Smith returns to the nursing home, any remaining penalty is again apportioned between the two spouses.

5. Continuity of Penalty

A penalty period imposed for a transfer of assets runs continuously from the first date of the penalty period regardless of whether the A/R continues to receive nursing facility services (except as noted above when a penalty is apportioned between spouses). Thus, if an A/R leaves a nursing facility, the penalty period nevertheless continues until the end of the calculated period.

If during the interview or clearance process it becomes known that the individual had previously applied for MA in another district, contact the former district to determine if it had any knowledge of a possible transfer or to determine whether the A/R is currently in a penalty period.

After the submission of a written application, but before the applicant is notified by the social services district of his/her eligibility determination, the applicant may withdraw his/her request for Medical Assistance. Once the applicant is notified in writing of the MA eligibility determination, the application may not be withdrawn, and any penalty period imposed will remain in effect, even if the applicant subsequently re-applies for MA.

H. Treatment of Income as an Asset

The transfer rules apply to transfers of income. Absent some reason to believe otherwise, districts should assume that ordinary household income of an A/R and his or her spouse during the look-back period was legitimately spent on the normal costs of daily living. However, districts should determine whether the A/R or the A/R's spouse transferred a lump sum income payment or a stream of income during the look-back period.

1. Lump Sum Income Payments

If a countable lump sum income payment is transferred in the month received, a penalty period must be imposed (if no exceptions apply). To calculate the uncompensated value of the transfer, the income deductions and disregards of the Supplemental Security Income (SSI) program must be applied. If the lump sum payment is transferred in the month after receipt, it is treated as a resource and the appropriate resource disregards (not income disregards) would be allowed.

2. Stream of Income

If a stream of income (i.e., income received on a regular basis, such as a pension) or the right to a stream of income is transferred, districts must treat it as a transfer of a resource. The amount transferred is the total amount of income expected to be received during the transferor's lifetime, based on an actuarial projection of the transferor's life expectancy. Districts must reduce the uncompensated value of the transfer as necessary to take into account the appropriate MA resource level and any allowable burial funds.

I. Jointly Held Assets. The general rule is that joint property held by an A/R is considered available to the A/R to the extent of his or her interest in the property. In the absence of documentation to the contrary, it is presumed that all joint owners possess equal shares. However, there are special rules for SSI-related A/Rs concerning the availability of financial institution accounts, which are described in paragraph 1 below. In addition, with respect to an A/R who converts his or her assets into joint assets, OBRA '93 and Chapter 170 of the Laws of 1994 indicate when such a conversion constitutes a transfer of assets, as explained in paragraph 2 below.

1. Financial Institution Account Owned by an SSI-Related A/R

In accordance with SSI regulations issued on May 31, 1994, ownership of financial institution accounts (including savings, checking, and time deposits or certificates of deposit) involving an SSI-related A/R must be determined as outlined below. There is no change in MA policy to determine ownership of other types of resources.

a. SSI-Related A/R is the Sole Owner

As long as an SSI-related A/R is designated as the sole owner by the account title, and can withdraw funds and use them for his or her support and maintenance, the A/R is presumed to own all of the funds in the account, regardless of their source. This presumption cannot be rebutted.

b. SSI-Related A/R is a Joint Owner

In the absence of evidence to the contrary, if an SSI-related A/R is a joint account holder, it is presumed that all of the funds in the account belong to the A/R. If there is more than one SSI-related A/R who is a holder of the joint account, it is presumed that the funds in the account belong to the A/Rs in equal shares. To rebut this presumption, the SSI-related A/R must:

i. submit a written statement, along with corroborating written statements from the other account holders, regarding who owns the funds, why there is a joint account, who has made deposits and withdrawals, and how withdrawals have been spent;

ii. submit account records for the months for which ownership of funds is at issue; and

iii. separate the funds owned by the SSI-related A/R from the funds of the other account holders.

2. Conversion of Individual's Assets to Jointly Held Assets

When an asset belonging to an individual is jointly held in common with another person or person in a joint tenancy, tenancy in common, or similar arrangement, the asset is considered to be transferred by the individual when any action is taken, either by the individual or any other person, that reduces or eliminates the individual's ownership or control of the asset. Merely placing another person's name on an account or asset as a joint owner does not necessarily constitute a transfer of assets. The individual may still possess ownership rights to the account or asset and have the right to withdraw all of the funds in the account at any time. However, actual withdrawal of funds from the account, or removal of the asset, by the other person would remove the funds or property from the control of the individual and so would constitute a transfer of assets. Also, if placing another person's name on the account or asset actually limits the individual's right to sell or otherwise dispose of the asset (e.g., the addition of another person's name requires that the person agree to the sale or disposal of the asset, where no such agreement was necessary before), such placement would constitute a transfer of assets.

J. Life Estates

1. Definitions

a. Life Estate

A life estate is a limited interest in real property. A life estate holder does not have full title to the property, but has the use of the property for his or her lifetime, or for a specified period. Generally, life estates are in the form of a life lease on property that the person is using, or has used, for a homestead.

b. Value of a Life Estate

Social services districts must use a reasonable method of calculating the value of a life estate, based on the current fair market value of the property and the age of the person. A life estate and remainder interest table published by the federal Health Care Financing Administration in its State Medicaid Manual is attached for districts' information (Attachment V). This table sets forth percentages of fair market value corresponding to the values of the life estate and the remainder interest, based on the age of the person possessing the life estate. Districts may, but are not required, to use this table in calculating the value of life estates and remainder interests.

c. Value of the Remainder Interest

The value of the remainder interest is the current market value of the property less the value of the life estate.

d. Remainderperson

A remainderperson is an individual who has the right to possession or ownership of the property after the life estate holder dies or surrenders the life estate.

2. Transfers

Transferring property while retaining a life estate within the look-back period is a partially uncompensated transfer. The uncompensated value of the transfer is the value of the remainder interest at the time the life estate is created. If the remainderperson of a life estate is an individual to whom the property could be transferred without penalty, the establishment of the life estate is not a prohibited transfer.

If the holder of a life estate transfers the life estate during the look-back period, it must be determined if FMV was received for the life use. If FMV was not received, a transfer penalty must be imposed.

When an individual both transfers property (retaining a life estate) and transfers the life estate interest within the look-back period, the uncompensated value of the transfers are the value of the remainder interest at the time the life estate is created plus the value of the life estate at the time it is transferred.

Examples (using table in Attachment V)

a. Transfer of a home:

$92,000 value of the home at the time the life estate was created
x.62086 age 69
$57,119.12 value of the life estate

$92,000.00
-$57,119.12
$34,880.88 (remainder interest) uncompensated value of transfer of the home

b. Transfer of a life estate (same situation as above, but two years later):

$94,000 value of the home at the time the life estate was transferred
x.58914 age 71
$55,379.16 value of the life estate at the time the life estate was transferred

3. Availability

For the purpose of determining an A/R's net available resources, a life estate will not be considered a countable resource, and no lien may be placed on the life estate. Social services districts cannot require an A/R possessing a life estate to try to liquidate the life estate interest or to rent the life estate property.

If an A/R possessing a life estate sells the life estate interest, the proceeds of this liquidation is a countable resource for purposes of the A/R's MA eligibility. If the A/R sells the life estate interest for less than fair market value, the uncompensated value of the life estate interest is the amount transferred for purposes of the MA transfer-of-assets rule.

If an A/R possessing a life estate rents the life estate property, any net rental income received is counted in determining eligibility. If under the terms of the life estate, the life estate holder must pay taxes and maintenance, these costs can be deducted from the rental income. On the other hand, if the life estate holder does not have to pay any taxes or maintenance, a gross rental figure must be used.

The provisions of this ADM supersede any previous instructions or policies issued by this Department with respect to the MA treatment of life estates.

K. New York State Partnership for Long Term Care

Under the New York State Partnership for Long Term Care, resources are exempt. Therefore, a transfer of resources by those individuals who have purchased policies under this program (and have received three years of nursing home coverage, or six years of home care services, or a combination of nursing home care and home care services where one nursing home day equals 2 home care days) will have no effect on their eligibility for nursing facility services. Since income is not exempt, a transfer of income must be treated as specified in this directive. However, when an exempt resource that generates income is transferred, no transfer penalty is imposed.

L. Exceptions

Exceptions to the application of transfer of asset penalties are:

1. The asset transferred is the individual's home, and title to the home is transferred to;

- the spouse of the individual;
- a child of the individual who is under age 21;
- a child of the individual who is certified blind or certified disabled, regardless of age;
- the sibling of the individual who has an equity interest in the home, and who has been residing in the home and using it as their primary lawful residence for a period of at least one year immediately before the date the individual becomes institutionalized (see 89 ADM-45 page 16, for a definition of equity interest); or
- a son or daughter of the individual (other than a child as described above) who was residing in the homestead, using it as their primary lawful residence for a period of at least two years immediately before the date the individual becomes institutionalized, and who provided care to the individual which permitted the individual to reside at home, rather than in an institution or facility.

2 An asset other than the individual's home was transferred:

- to the individual's spouse, or to another for the sole benefit of the individual's spouse;
- from the individual's spouse to another for the sole benefit of the individual's spouse;
- to the individual's child who is certified blind or certified disabled; or
- to a trust established solely for the benefit of an individual under 65 years of age who is disabled.

3. The individual or spouse intended to dispose of the assets either at FMV or for other valuable consideration.

In determining whether an individual or the individual's spouse intended to dispose of an asset for FMV, or for other valuable consideration, the individual must establish the circumstances which caused the asset to be transferred for less than FMV. An example would be the sale of a home when the realtor appraised the property and the home was subsequently sold based on that appraisal, which was less than FMV. Generally, the individual would be required to provide written evidence of attempts to dispose of the asset for FMV, as well as evidence to support the value at which the asset was disposed.

4. The assets were transferred exclusively for a purpose other than to qualify for MA.

The individual must establish that the asset was transferred for a purpose other than to qualify for MA coverage for nursing facility services. Factual circumstances supporting a contention that assets were transferred for a purpose other than to qualify for MA include, but are not limited to: the unexpected onset of a serious medical condition subsequent to the transfer; the unexpected loss, subsequent to the transfer, of income or resources which would have been sufficient to pay for nursing facility services; or the existence of a court order specifically requiring the transfer of a certain amount of assets.

At the time of the personal interview, the A/R must be given the opportunity to establish that the transfer was made for a purpose other than to qualify for MA coverage for nursing facility services. Social services districts must not take any adverse action on an MA-only A/R who has transferred assets without first advising the client in writing of his/her right to make such a showing. Attachment III must be used to meet this requirement.

5. All or part of the assets transferred for less than FMV have been returned to the individual.

If all transferred assets are returned to the individual prior to the MA eligibility determination, no transfer penalty is imposed. If a portion of the transferred assets is returned prior to the MA eligibility determination, the uncompensated value of the transfer is reduced by the amount of assets returned.

If all transferred assets are returned after the MA eligibility determination, the existing penalty period is rescinded and the individual's eligibility for MA during such period must be redetermined as though the assets were never transferred. If a portion of the transferred assets is returned after the MA eligibility determination, the existing penalty period is recalculated, reducing the uncompensated value of the transfer(s) by the amount of assets returned; if the recalculated penalty period has already elapsed, the individual's eligibility for MA subsequent to the penalty period must be redetermined as though the returned assets were never transferred.

For purposes of these rules, transferred assets shall be considered to be returned if the person to whom they were transferred: uses them to pay for nursing facility services for the MA applicant/recipient; or provides the MA applicant/recipient with an equivalent amount of cash or other liquid assets.

6. Imposition of a penalty would work an undue hardship.

Undue hardship exists when:

- the individual applying for nursing facility services is otherwise eligible for MA; **and**

- despite his/her best efforts, as determined by the social services district, the individual or the individual's spouse is unable to have the transferred asset(s) returned or to receive FMV for the asset or to void the trust; **and**

- the institutionalized individual is unable to obtain appropriate medical care such that the individual's health or life would be endangered without the provision of MA for nursing facility services or for home or community-based services furnished under a waiver granted under section 1915(c) or (d) of the Social Security Act.

  Undue hardship cannot be claimed:

  - if the client failed to fully cooperate, to the best of his/her ability, as determined by the social services district, in having all of the transferred assets returned or the trust declared void. Cooperation may include, but is not limited to, assisting in providing all legal records pertaining to the transfer or creation of the trust, assisting the district, wherever possible, in providing information regarding the transfer amount, to whom it was transferred, any documents to support the transfer or any other information related to the circumstances of the transfer; or

  - if after payment of medical expenses, the individual's or couple's income and/or resources is at or above the allowable MA exemption standard for a household of the same size; or

- if the only undue hardship that would result is the individual's or the individual's spouse's inability to maintain a pre-existing life style.

M. Community Coverage

Social Services districts may elect to offer community coverage only, in cases where an individual does not anticipate the need for nursing facility services. If the district elects to provide community coverage, they must provide it as an **option** to the client. If the client requests full coverage, the district must complete the resource investigation. If the client requests community coverage only, the district may make their determination based on the applicant's current resources only (see 95 ADM-17).

V. NOTICE REQUIREMENTS

Local districts must make Attachment III, "EXPLANATION OF THE EFFECT OF TRANSFER OF ASSETS ON MEDICAL ASSISTANCE ELIGIBILITY", available to all individuals who wish to establish that the transfer was made for a purpose other than to qualify for nursing facility services. In addition, this form must be given to all MA-only applicants at the time of (re)application. A copy of Attachment III must also be sent when an A/R's (re)application is denied/discontinued due to a prohibited transfer. The form must be enclosed with the appropriate mandated client notice. This notice must be reproduced by the social services district until such time as it becomes available from this Department. If a local district elects to provide community coverage, they must use the appropriate notice contained in 95 ADM-17, Community Coverage Option, along with Attachment III.

VI. SYSTEM IMPLICATIONS

Upstate: Currently, coverage code 10 (All Services Except Long-Term Care) is used in conjunction with an Anticipated Future Action (AFA) code of 505 (End of Property Transfer Prohibition) with a specific end date to indicate an individual for whom a penalty period has been established. Until a separate coverage code is established for persons electing community coverage, for all cases determined eligible for the community benefit package, enter coverage code 10, and do not make a corresponding entry into the AFA field. For those recipients who are currently in a penalty period, or receive one in the future, continue to use an AFA code 505. The presence of coverage code 10 in combination with the AFA code 505 will allow social services districts to track those recipients who are in a penalty period.

New York City: Currently, coverage code 10 (All Services Except Long-Term Care) is used to indicate an individual for whom a penalty period has been established. Until a separate coverage code is established for persons electing community coverage, for all cases determined eligible for the community coverage package, enter coverage code 10 for those persons, as well.

VII. EFFECTIVE DATE

For applications and recertifications for MA submitted on or after September 1, 1994, determine if any trust was created or a transfer occurred at any time after August 10, 1993. If so, then the provisions of this ADM must be utilized. However, the 36 month look-back period does not become fully effective until August 11, 1996 for non-trust-related transfers and August 11, 1998 for trust-related transfers, since prior to that date a full 36 month or 60 month look-back period could include a period of time prior to August 11, 1993. Any trusts created or transfers occurring prior to August 11, 1993, are to be treated in accordance with Department Regulation 360-4.4(c). However, in the case of trusts created before August 11, 1993, districts will look at any trust activity that occurred after that date.

_____

Richard T. Cody
Division of Health & Long Term Care

ATTACHMENT I

SAMPLE STATEMENT

SOLE BENEFIT

I, _____, transferred the following assets:

_____

_____

_____

_____

To _____, on _____
(transferee) (date)

At the time of this transfer, it was my intent, and it was the agreement of myself and the transferee, that the transferred assets henceforth would be used for the sole benefit of _____
(beneficiary)
Specifically, it was and is my intent that the assets be expended for the following purposes: _____

_____

_____

_____

I acknowledge that I have a responsibility to provide to the social services agency evidence of a continuous course of conduct by the transferee, consistent with this intent, since the time of the transfer.

I further acknowledge that, pursuant to regulations of the New York State Department of Social Services, any action by myself or the transferee which has the effect of reducing or eliminating the above-named beneficiary's beneficial use of the transferred property, or has the effect of reducing or eliminating the transferee's ownership or control of the transferred property, will be considered a transfer of assets (on the date such action is taken) which may affect my or my spouse's eligibility for Medical Assistance.

Signed: _____

Sworn to before me this

_____ day of _____, 19

SUGGESTED PROCEDURES FOR MONITORING EXCEPTION TRUSTS

1) The district should establish a file of all exception trusts identified within the district. This file can be created and maintained manually, or within a PC based system.

2) The file should contain, at a minimum, the name of the client, CIN and case number, name of the trustee, amount of the trust, and the expected annual payments to be made according to the terms of the trust. It should also include an area to record additions to and disbursements from the fund on an annual basis.

3) At the time that the agency is made aware of the existence of an exception trust, (generally at application or recertification) they should add the trust to the file and should request the trustee to provide copies of any accountings that he is required to produce.

4) Upon receipt of this information, the district should update their file, and should evaluate the activity to ensure that no monies have been inappropriately transferred.

5) Upon notification of the death of the client, the district should forward any information on exception trusts to their recovery unit for estate recovery evaluation.

EXPLANATION OF THE EFFECT OF TRANSFER OF ASSETS ON MEDICAL ASSISTANCE ELIGIBILITY

This explains how a transfer of assets may affect your eligibility for Medical Assistance. Assets include all of your and your spouse's income and resources, including any income or resource which you or your spouse are entitled to receive but do not receive because of any action or inaction by you or your spouse. A transfer is when property or assets are given or sold from one person to another. For Medical Assistance purposes, a **prohibited transfer** is the voluntary giving or sale of your property or assets to another person without receiving something of equal value in return, in order to qualify for:

- nursing facility services provided in hospitals, residential health care facilities or intermediate care facilities for the developmentally disabled;

- care, services, or supplies furnished pursuant to a waiver under section 1915(c) or (d) of the Social Security Act, including: the Long Term Care Program, the OMRDD Home and Community Based Waiver, the Traumatic Brain Injury Waiver or the Care At Home Program.

The information contained in this document is applicable to all transfers made after August 10, 1993. For information on transfers made prior to that date, ask your Medical Assistance Eligibility Examiner.
The Medical Assistance Program will not pay for any of the services listed below if a prohibited transfer of countable assets (the total value of property, resources and income that are in excess of the allowable Medical Assistance resource standard) for less than fair market value is made within the 36 months before your application for Medical Assistance, or at any time after you apply for Medical Assistance to pay for the services listed in the "limited coverage" section below. In the case of trusts, we will look back for a period of 60 months. (In most cases, once you are found to be eligible for these services, a transfer by your spouse does not affect your Medical Assistance coverage.) If we decide that a prohibited transfer has been made within this time period, **and you meet all other eligibility requirements**, your Medical Assistance coverage will be limited for a period of time.

What does limited coverage mean?

Limited coverage means that for a period of time you will **not** be able to receive Medical Assistance coverage for the following types of care and services:

- nursing facility services provided in hospitals, residential health care facilities or intermediate care facilities for the developmentally disabled;

- care, services, or supplies furnished pursuant to a waiver under section 1915(c) or (d) of the Social Security Act, including: the Long Term Care Program, the OMRDD Home and Community Based Waiver, the Traumatic Brain Injury Waiver or the Care At Home Program. Examples of some of these services are:

  Congregate/home delivered meals
  Home maintenance tasks
  Housing improvement
  Social transportation
  Respite care
  Social day care

Personal emergency response system services
Moving assistance
Medical social services
Respiratory therapy
Nutritional counseling/education services

How is the limited coverage period determined?

When you or your spouse make a transfer of assets for less than they are worth, you cannot get Medical Assistance for the services listed above for a period of time, depending upon the amount of transferred assets. We determine the number of months you are ineligible for these services by dividing the uncompensated value of the assets transferred by the average monthly rate for nursing facility services in the region where you live. The penalty period would begin the month following the month in which you made the transfer. Information on average monthly rates is available upon request from your social services district.

How do we determine the uncompensated value of the transferred assets?

We estimate the fair market value of the asset at the time it was transferred. We deduct any outstanding loans, mortgages or other encumbrances on the asset and the amount of compensation received in exchange for the asset. In addition, certain resource or income disregards may be deducted, if applicable.

What transfers do not affect your eligibility for Medical Assistance?

There are exceptions to the transfer rules. Your Medical Assistance coverage is **not** limited when a transfer has been made if:

1. the asset(s) was transferred to (or for the sole benefit of) your spouse, or from your spouse to you; or

2. the asset(s) was transferred from your spouse to another person for the sole benefit of your spouse; or

3. the asset(s) was transferred to your child of any age who is certified blind, or certified disabled, or to a trust established solely for the benefit of that child; or

4. the asset(s) was transferred to a trust established solely for the benefit of an individual under 65 years of age who is certified disabled.

5. the asset(s) transferred was your homestead (for example: a house or an apartment that you own), and the homestead was transferred to:

   - your spouse;

   - your minor child under age 21, or your child of any age who is certified blind or certified permanently and totally disabled;

   - your brother or sister who also has an equity interest in the home and who lived in the home for at least one year immediately before you entered a nursing facility;

- your child (other than a child who is under 21 or who is certified blind/disabled) who was living in your home for at least two years immediately before you entered a nursing facility **and** who provided care which permitted you to reside at home rather than in a nursing facility.

NOTE: Although the Department does not treat a life estate possessed by you as a countable resource for purposes of determining your Medical Assistance eligibility, a life estate has value and you may be subject to a transfer penalty if you transfer your life estate interest to another person.

What other transfers do not affect your eligibility for Medical Assistance?

If you or your spouse transferred assets for less than fair market value you can still get full Medical Assistance coverage if you can prove that:

1. you or your spouse intended to sell the asset(s) at fair market value or to receive other valuable consideration in exchange for the asset(s); or

2. the asset(s) was transferred **exclusively** for a purpose other than to qualify for nursing care and related services as described above;or

3. all of the transferred assets have been returned.

In the absence of the evidence described in 1. or 2. above, we will not limit your Medical Assistance coverage if we determine that despite your best efforts, as determined by the social services district, you are unable to have the transferred asset(s) returned or to receive fair market value for the asset.

We will not limit your Medical Assistance coverage if we determine that such limitation will result in **undue hardship** for you. We will consider undue hardship to exist if you: (a) meet all other eligibility requirements, and (b) are unable to obtain appropriate medical care without which your health or life would be in danger or if application of the transfer penalty would deprive you or your spouse of food, clothing, shelter or other necessities of life.

How can you prove the transfer was not made to qualify for these medical services?

We will presume that any prohibited transfer of assets made within 36 months (60 months for trusts), that occurred immediately before or when you became in need of nursing care and related services was made for the purpose of qualifying for Medical Assistance. If you disagree with this presumption, you should present evidence to your Medical Assistance eligibility examiner which proves that the transfer was made for some other purpose. Some factors which may establish that a transfer was made for a purpose other than to obtain Medical Assistance eligibility are:

1. sudden, unexpected onset of serious illness or disability **after** the transfer occurred;

2. unexpected loss of other resources or income which would have made you ineligible for Medical Assistance, **after** the transfer occurred;

These are examples only. All of the circumstances of the transfer will be considered as well as factors such as your age, health and financial situation at the time the transfer was made. It is important to note that you have the burden of providing this agency with complete information regarding all assets and any other relevant factors which may affect your eligibility.

What appeal rights do you have?

You will receive a written notice if we determine that your Medical Assistance coverage is to be limited based on a transfer of assets for less than fair market value. If you are in a nursing facility or require the services listed under the "limited coverage" section at the time we make our decision, the notice will tell you how long you will have limited coverage. This period will be based on the amount of assets you or your spouse has transferred for less than fair market value and the average rate for nursing facility services in the region in which you reside.

You have the right to appeal our decision to limit your coverage. Our written notice will provide you with information on how to request a conference with us to review our actions. Our notice will also provide you with information on your right to a State Fair Hearing if you believe our action is wrong.

IF YOU HAVE ANY QUESTIONS, PLEASE CONTACT YOUR MEDICAL ASSISTANCE ELIGIBILITY EXAMINER.

LIFE EXPECTANCY TABLE
FOR FEMALES

AGE	LIFE EXPECTANCY	AGE	LIFE EXPECTANCY	AGE	LIFE EXPECTANCY
0	78.79	40	40.61	80	9.11
1	78.42	41	39.66	81	8.58
2	77.48	42	38.72	82	8.06
3	76.51	43	37.78	83	7.56
4	75.54	44	36.85	84	7.08
5	74.56	45	35.92	85	6.63
6	73.57	46	35.00	86	6.20
7	72.59	47	34.08	87	5.79
8	71.60	48	33.17	88	5.41
9	70.61	49	32.27	89	5.05
10	69.62	50	31.37	90	4.71
11	68.63	51	30.48	91	4.40
12	67.64	52	29.60	92	4.11
13	66.65	53	28.72	93	3.84
14	65.67	54	27.86	94	3.59
15	64.68	55	27.00	95	3.36
16	63.71	56	26.15	96	3.16
17	62.74	57	25.31	97	2.97
18	61.77	58	24.48	98	2.80
19	60.80	59	23.67	99	2.64
20	59.83	60	22.86	100	2.48
21	58.86	61	22.06	101	2.34
22	57.89	62	21.27	102	2.20
23	56.92	63	20.49	103	2.06
24	55.95	64	19.72	104	1.93
25	54.98	65	18.96	105	1.81
26	54.02	66	18.21	106	1.69
27	53.05	67	17.48	107	1.58
28	52.08	68	16.76	108	1.48
29	51.12	69	16.04	109	1.38
30	50.15	70	15.35	110	1.28
31	49.19	71	14.66	111	1.19
32	48.23	72	13.99	112	1.10
33	47.27	73	13.33	113	1.02
34	46.31	74	12.68	114	0.96
35	45.35	75	12.05	115	0.89
36	44.40	76	11.43	116	0.83
37	43.45	77	10.83	117	0.77
38	42.50	78	10.24	118	0.71
39	41.55	79	9.67	119	0.66

LIFE EXPECTANCY TABLE
FOR MALES

AGE	LIFE EXPECTANCY	AGE	LIFE EXPECTANCY	AGE	LIFE EXPECTANCY
0	71.80	40	35.05	80	6.98
1	71.53	41	34.15	81	6.59
2	70.58	42	33.26	82	6.21
3	69.62	43	32.37	83	5.85
4	68.65	44	31.49	84	5.51
5	67.67	45	30.61	85	5.19
6	66.69	46	29.74	86	4.89
7	65.71	47	28.88	87	4.61
8	64.73	48	28.02	88	4.34
9	63.74	49	27.17	89	4.09
10	62.75	50	26.32	90	3.86
11	61.76	51	25.48	91	3.64
12	60.78	52	24.65	92	3.43
13	59.79	53	23.82	93	3.24
14	58.82	54	23.01	94	3.06
15	57.85	55	22.21	95	2.90
16	56.91	56	21.43	96	2.74
17	55.97	57	20.66	97	2.60
18	55.05	58	19.90	98	2.47
19	54.13	59	19.15	99	2.34
20	53.21	60	18.42	100	2.22
21	52.21	61	17.70	101	2.11
22	51.38	62	16.99	102	1.99
23	50.46	63	16.30	103	1.89
24	49.55	64	15.62	104	1.78
25	48.63	65	14.96	105	1.68
26	47.72	66	14.32	106	1.59
27	46.80	67	13.70	107	1.50
28	45.88	68	13.09	108	1.41
29	44.97	69	12.50	109	1.33
30	44.06	70	11.92	110	1.25
31	43.15	71	11.35	111	1.17
32	42.24	72	10.80	112	1.10
33	41.33	73	10.27	113	1.02
34	40.23	74	9.27	114	0.96
35	39.52	75	9.24	115	0.89
36	38.62	76	8.76	116	0.83
37	37.73	77	8.29	117	0.77
38	36.83	78	7.83	118	0.71
39	35.94	79	7.40	119	0.66

LIFE ESTATE AND REMAINDER INTEREST TABLE

AGE	LIFE ESTATE	REMAINDER	AGE	LIFE ESTATE	REMAINDER
0	.97188	.02812	35	.93868	.06132
1	.98988	.01012	36	.93460	.06540
2	.99017	.00983	37	.93026	.06974
3	.99088	.00992	38	.92567	.07433
4	.98981	.01019	39	.92083	.07917
5	.98938	.01062	40	.91571	.08429
6	.98884	.01116	41	.91030	.08970
7	.98822	.01178	42	.90457	.09543
8	.98748	.01252	43	.89855	.10145
9	.98663	.01337	44	.89221	.10779
10	.98565	.01435	45	.88558	.11442
11	.98453	.01547	46	.87863	.12137
12	.98329	.01671	47	.87137	.12863
13	.98198	.01802	48	.86374	.13626
14	.98066	.01934	49	.85578	.14422
15	.97937	.02063	50	.84743	.15257
16	.97815	.02185	51	.83674	.16126
17	.97700	.02300	52	.82969	.17031
18	.97590	.02410	53	.82028	.17972
19	.97480	.02520	54	.81054	.18946
20	.97365	.02635	55	.80046	.19954
21	.97245	.02755	56	.79006	.20994
22	.97120	.02880	57	.77931	.22069
23	.96986	.03014	58	.76822	.23178
24	.96841	.03159	59	.75675	.24325
25	.96678	.03322	60	.74491	.25509
26	.96495	.03505	61	.73267	.26733
27	.96290	.03710	62	.72002	.27998
28	.96062	.03938	63	.70696	.29304
29	.95813	.04187	64	.69352	.30648
30	.95543	.04457	65	.67970	.32030
31	.95254	.04746	66	.66551	.33449
32	.94942	.05058	67	.65098	.34902
33	.94608	.05392	68	.63610	.36390
34	.94250	.05750	69	.62086	.37914

LIFE ESTATE AND REMAINDER INTEREST TABLE (cont.)

AGE	LIFE ESTATE	REMAINDER	AGE	LIFE ESTATE	REMAINDER
70	.60522	.39478	90	.28221	.71779
71	.58914	.41086	91	.26955	.73045
72	.57261	.42739	92	.25771	.74229
73	.55571	.44429	93	.24692	.75308
74	.53862	.46138	94	.23728	.76272
75	.52149	.47851	95	.22887	.77113
76	.50441	.49559	96	.22181	.77819
77	.48742	.51258	97	.21550	.78450
78	.47049	.52951	98	.21000	.79000
79	.45357	.54643	99	.20486	.79514
80	.43659	.56341	100	.19975	.80025
81	.41967	.58033	101	.19532	.80468
82	.40295	.59705	102	.19054	.80946
83	.38642	.61358	103	.18437	.81563
84	.36998	.63002	104	.17856	.82144
85	.35359	.64641	105	.16962	.83038
86	.33764	.66236	106	.15488	.84512
87	.32262	.67738	107	.13409	.86591
88	.30859	.69141	108	.10068	.89932
89	.29526	.70474	109	.04545	.95455

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TESTAMENTARY THIRD PARTY TRUST

Joan Lensky Robert, Esq.

FIFTH: The Trust so established by paragraph FOURTH shall be known as the _____ TRUST" and shall be administered subject to the following instructions:

A) **Testamentary Purpose**: Because of the nature of the disability of my child, _____, hereinafter referred to as "the beneficiary", at the time of the execution of this Will, it is my intent that the special provisions of this Trust be strictly enforced. It is my intent that the beneficiary shall receive all government entitlements for which the beneficiary would otherwise be entitled but for the bequests hereunder. I recognize that in view of the vast costs involved in caring for a disabled person, a direct bequest to the beneficiary would be rapidly dissipated. It is in awareness of this reality that I create this testamentary trust. I intend this Trust to conform with the requirements set forth in Matter of Escher, 52 N.Y.2d 1006 and EPTL 7-1.12. I intend that this Trust supplement rather than supplant government entitlements.

It is my intent to create a supplemental needs trust which conforms to the provisions of section 7-1.12 of the New York Estates, Powers and Trusts Law. I intend that the trust assets be used to supplement, not supplant, impair or diminish, any benefits or assistance of any federal, state, county, city, or other governmental entity for which the beneficiary may otherwise be eligible or which the beneficiary may be receiving. Consistent with that intent, it is my desire that, before expending any amount from the net income and/or principal of this trust, the trustee consider the availability of all benefits from government or private assistance programs for which the beneficiary may be eligible and that, where appropriate and to the extent possible, the trustee endeavor to maximize the collection of such benefits and to facilitate the distribution of such benefits for the benefit of the beneficiary.

The beneficiary shall not have the power to assign, encumber, direct, distribute or authorize distributions from the trust.

B) **Income**: The Trustee shall hold, invest and reinvest the Trust estate, collect the income therefrom, and pay or apply so much of the net income therefrom **to or for the use of** the beneficiary as the Trustee in his sole discretion shall determine is beneficial to the beneficiary. In using such income, the Trustee, in his sole discretion, may pay or apply the same to or for the use of the beneficiary in such manner as he shall from time to time deem advisable taking into consideration the best interest and welfare of the beneficiary. Any net income not distributed shall be added to the principal.

However, the Trustee is strictly prohibited from distributing income to the beneficiary if such distribution would serve to reduce or eliminate any government entitlement or payment which the beneficiary would otherwise receive **unless the trustee, in his sole and absolute discretion determines such use of income to be beneficial to the beneficiary by providing goods and services which are not identical with those provided through government entitlements.** The income shall thus be used for those items of need of the beneficiary that will not be paid for by government entitlements. It is my intent that the beneficiary enjoy the maximum advantages of life and at the same time receive government entitlements. It is my intent to supplement rather than supplant government entitlements.

Income shall include any and all payments made to this Trust from any Individual Retirement Account or moneys held in Qualified Plans, whether pursuant to the Minimum Distribution Rules under Section 401(a)(9) of the Internal Revenue Code of 1986, as amended (the "Code") or such greater amount as the Trustee may elect to receive.

C) **Principal:** If the income from the Trust, together with any other income and resources possessed by the beneficiary, including all government benefits, is insufficient to provide for the needs of the beneficiary, in the sole opinion of the Trustee, the Trustee is authorized to invade the principal for the beneficiary to the extent necessary to meet such needs. The Trustee is strictly prohibited from invading the principal of the Trust if such act will serve to deny, discontinue or reduce a government benefit which the beneficiary would otherwise receive **unless the trustee, in his sole and absolute discretion determines such use of income to be beneficial to the beneficiary by providing goods and services which are not identical with those provided through government entitlements**. **No judge of any Court shall have the power to order the invasion of principal in contravention of this provision. This provision is intended to negate and eliminate any discretion granted to any Court by §7-1.6 of the Estates Powers and Trusts Law (E.P.T.L.).**

None of the income or principal of this trust shall be applied in such a manner as to supplant, impair or diminish benefits or assistance of any federal, state, county, city, or other governmental entity for which the beneficiary may otherwise be eligible or which the beneficiary may be receiving **unless the trustee, in his sole and absolute discretion determines such use of income to be beneficial to the beneficiary by providing goods and services which are not identical with those provided through government entitlements**.

D) **Additions to Income and Principal**: With the Trustee's consent, any person may, at any time, from time to time, by assignment, gift, transfer, Deed or Will, provide income or add to the principal of the Trust created herein, and any property so added shall be held, administered and distributed under the terms of this Trust.

E) **Housing**: It should be a priority of the Trustee to ensure proper housing for the beneficiary. The Trustee shall have discretion to invade the principal or distribute income for the purpose of securing appropriate housing, subject to the restrictions set forth herein. My Trustee is encouraged to invest in property in whatsoever form as will maintain _____ in a "homestead" (as the same is currently defined in applicable Social Services Law and Regulations), or in a home-like environment. If an appropriate home-like environment cannot be established for _____, the homestead in which _____ resides at the time of my death shall, if possible, be retained as a home until an appropriate homestead or home-like environment can be established.

F) **Other Needs and Luxuries**: It is my intent that the beneficiary enjoy the therapeutic benefits of education, vocational training, hobbies, vacations, modes of transportation, equipment, and any other need and/or luxury the beneficiary may have to enjoy life to the fullest. The Trustee shall use income and/or principal for these purposes, subject to the restrictions set forth herein.

G) **Visitation to and by Family Members**: The Trustee shall, in his discretion, provide income and/or principal to _____and/or to any member of the family who needs payment for travel arrangements in order to visit _____. It is my wish that family members visit with _____ at least once a year, and the Trustee is instructed to encourage family members by providing travel expenses for_____and by providing reasonable reimbursement, if necessary, for payment of travel arrangements for this purpose.

H) **Purchase of Insurance:** The Trustee has discretion to use income to purchase whatever insurance is necessary to make _____ financially secure, including purchasing private health insurance, life insurance, liability insurance, homeowner's insurance, renter's insurance and automobile insurance. The private health insurance may be purchased if it will result in providing for payment to those medical professionals or medical providers who would otherwise not accept government entitlements.

Life insurance may be purchased by the Trust on the life of an insured person who chooses to provide financial support for _____ in a manner consistent with the provisions of this Trust. Any insurance purchased with premiums paid from this Trust Fund shall be an asset of the Trust.

I) **Employment of Professionals and Other Caregivers:** The Trustee shall, if necessary, use income from the Trust to hire professionals to assist _____. It is contemplated that the class of professionals that may be needed to assist _____ will be social workers, custodians, medical professionals who would not otherwise accept government entitlements, legal counsel, accounting professionals, investment counsel, physical therapists, occupational therapists, recreational therapists, feeders, housekeepers, attendants, and aides.

J) **Trustee's Fee**: The Trustee shall be entitled to receive for services rendered as Trustee hereof, the commissions to which the sole Trustee is entitled under the laws of the State of New York in effect at the time such commissions become payable, or,

in the case of a corporate fiduciary, its normal and customary fee. At the Trustee's discretion, the fee may be waived. All annual commissions shall be payable without the approval of any Court.

K) **Termination upon Death**: This Trust shall terminate upon the death of _____, and after all funeral and other expenses of the beneficiary are paid, the Trust principal and all accumulated income shall be **distributed to the issue of _____, or if there are no issue, to _____.**

L) **Partial Termination Prior to Death:** The Trust may be partially terminated prior to the death of the beneficiary under the following circumstances:

1) _____ is substantially gainfully employed for a continuous period of two years and,

2) HIS/HER attending physician certifies in writing that the disability no longer limits him/her from being substantially gainfully employed and,

3) The Trustee, in his sole discretion, determines that the facts warrant early termination.

The above factors "1" and "2" shall be considered conditions precedent and the Trustee may not partially terminate the Trust unless both conditions shall have been fulfilled. Nevertheless, the Trustee is not obligated to partially terminate the Trust if the conditions have been met; the Trustee is merely granted sole discretion in such case. The decision of the Trustee as to whether or not to terminate the Trust shall be final and binding upon _____.

If the Trustee chooses to exercise his discretion, said discretion shall be further limited as follows:

At the time the Trustee so elects, 10% of the then existing principal shall be distributed absolutely to the beneficiary. For each consecutive year of substantial gainful employment, an additional 10% of the original amount of principal may, at the Trustee's discretion, be distributed absolutely to the beneficiary. If there is a break in consecutive employment, this distribution test will be reinvoked and the requirements of paragraphs L 1) and 2) must be met anew. If there is no break in consecutive employment, in the last distribution year, the Trust shall terminate with the distribution of all accumulated income and principal to the beneficiary, as the purposes of the Trust will have been fulfilled.

M) COORDINATION OF USE OF TRUST ASSETS WITH ASSETS HELD IN SPECIAL NEEDS TRUST ESTABLISHED PURSUANT TO COURT ORDER: If assets remain in the Special Needs Trust for _____ established pursuant to Order of the Supreme Court, ____ County, the trustee of the testamentary trust created hereunder for the benefit of _____ shall, to the extent possible, use trust assets for the benefit of _____ after the assets in the court-ordered Supplemental Needs Trust have been exhausted or for goods and services that the trustee of the court-ordered Supplemental Needs Trust is not authorized to provide for the beneficiary.

AR 90-2(2)

EFFECTIVE/PUBLICATION DATE: 07/16/90

AR 90-2(2): *Ruppert v. Bowen*, 871 F.2d 1172 (2d Cir. 1989) -- Evaluation of a Rental Subsidy as In-Kind Income for Supplemental Security Income (SSI) Benefit Calculation Purposes -- Title XVI of the Social Security Act

ISSUE:

Whether the Secretary may charge an SSI applicant or recipient who receives a rental subsidy with in-kind income in all cases or whether the Secretary must first determine that the applicant or recipient received an "actual economic benefit" from the rental subsidy.

STATUTE/REGULATION/RULING CITATION:

Sections 1611 and 1612(a)(2) of the Social Security Act (42 U.S.C. Sections 1382 and 1382a); 20 C.F.R. Sections 416.1130, 416.1140, and 416.1141.

CIRCUIT:

Second (Connecticut, New York, Vermont)

Ruppert v. Bowen, 871 F.2d 1172 (2d Cir. 1989)

APPLICABILITY OF RULING:

This Ruling applies to determinations or decisions at all administrative levels (i.e., initial, reconsideration, administrative law judge hearing and Appeals Council).

DESCRIPTION OF CASE:

Multiple SSI recipients filed a joint action challenging the methods used by the Social Security Administration (SSA) to calculate their benefits. Thus ruling related to the claims of Rose and Edward Faicco, Cheryl Karnett, and Alan Green, who alleged that the Secretary's treatment of the difference between the current market rental value of their housing and the rent actually paid for the housing as in-kind income was erroneous.

The facts for the pertinent claims are as follows:

FAICCOS

Rose and Edward Faicco were both over age sixty-five. They rented a house from their daughter. Although the monthly expenses for the house were $951, the Faiccos paid rent of $350 per month, which was reduced to $250 per month when their daughter's variable rate mortgage decreased.

An administrative law judge (ALJ) found that each of the Faiccos was overpaid $262.20 between November 1982 and March 1983. The ALJ found that they had been overpaid either because they had received subsidized rent or, because they did not pay their *pro rata* share of household expenses and therefore lived in their daughter's household. The ALJ also found that they were not without fault in causing the overpayment and that the overpayment could not be waived. This became the final decision of the Secretary and suit was filed in the United States District Court for the Eastern District of New York. The court affirmed the Secretary's decision. The decision was appealed to the United States Court of Appeals for the Second Circuit.

KARNETT

Cheryl Karnett, who is mentally retarded and autistic, lived with her parents. Her mother executed a rental agreement as both Cheryl's agent and her landlord. The rental agreement called for Ms. Karnett to pay her mother rent of $169 per month and food payments of $120 per month.

An ALJ found that Mr. Karnett had unearned income of $36 per month, $11 per month because her room's market value was $180 and $25 per month because of occasional meals provided by her parents. The ALJ's decision became the final decision of the Secretary. A civil action was filed in the United States District Court for the Eastern District of New York. The court affirmed the Secretary's decision. This decision was appealed to the United States Court of Appeals for the Second Circuit.

GREEN

Alan Green lived with his parents. Mr. Green and his mother had a written agreement, under which he was to pay her $100 per month in rent and $125 per month for food. There was evidence that his mother stated to SSA that she would have charged a stranger $135 for lodging. An ALJ determined that Mr. Green had received in-kind income of $35 per month, the difference between the current market rental value and the rent he agreed to pay. This became the final decision of the Secretary and a civil action was filed. The United States District Court for the Eastern District of New York affirmed the Secretary's decision. The decision was appealed to the United States Court of Appeals for the Second Circuit.

HOLDING:

The United States Court of Appeals for the Second Circuit held that, although the statute and regulations concerning in- kind income and rental subsidies are facially valid, if the proportion of income that an SSI recipient expends on housing is "so great that it flies in the face of reality" to conclude that unearned income in the form of subsidized housing is actually available to the recipient, the unearned income should be disregarded.

The court remanded the subject cases to the district court for a determination of whether any SSI recipients had received an "actual economic benefit" from their rental subsidies. However, the court did not state how "actual economic benefit" is to be established.

STATEMENT AS TO HOW *RUPPERT* DIFFERS FROM SOCIAL SECURITY POLICY:

Under 20 C.F.R. Section 416.1130(b), SSI applicants and recipients are found not to be receiving in-kind support and maintenance in the form of subsidized rent, if they are paying the amount charged under a business arrangement. A business arrangement exists when the amount of monthly rent required to be paid equals the current market rental value. In situations where the landlord/tenant relationship is other than a parent/child relationship, we presume that the amount of monthly rent required to be paid equals the current market rental value.

When there is a parent/child relationship between landlord and tenant, SSA determines whether a rental subsidy exists. Generally, SSA views any difference between the current market rental value and the actual amount of rent paid as being in-kind income, up to the presumed maximum value established under 20 C.F.R. Section 416.1140(a)(1) (one-third of the Federal benefit rate plus the $20 general income exclusion). SSA generally considers this difference to be an "actual economic benefit" to the applicant or recipient.

The Second Circuit's decision in *Ruppert* found that the difference between the current market rental value and the actual rent paid does not always constitute an "actual economic benefit" to the SSI applicant or recipient. The Court directed that a determination be made as to whether an applicant or recipient received an "actual economic benefit" from a rental subsidy, before charging the applicant or recipient with in-kind support and maintenance.

EXPLANATION OF HOW SSA WILL APPLY THE DECISION WITHIN THE CIRCUIT:

This Ruling applies only in cases in which the applicant or recipient resides in Connecticut, New York, or Vermont at the time of the determination or decision at any administrative level, i.e., initial, reconsideration, administrative law judge hearing, or Appeals Council.

In cases where SSA determines that an applicant or recipient has received a rental subsidy, SSA will determine whether the applicant or recipient received an "actual economic benefit" from the rental subsidy. If SSA determines that the applicant or recipient received an "actual economic benefit," he or she will be imputed to have received in-kind support and maintenance. If SSA determines that the applicant or recipient did not receive an "actual economic benefit", the rental subsidy will be disregarded for purposes of determining eligibility for and the amount of Supplemental Security Income benefits.

Although the court required there to be a determination of "actual economic benefit" in rental subsidy cases, it did not specify the test to be used in making that determination. SSA has decided that it will determine that an applicant or recipient did not receive an "actual economic benefit" from a rental subsidy when the monthly amount of rent required to be paid equals or exceeds the presumed maximum value described in 20 C.F.R. Section 416.1140(a)(1) (one-third of the Federal benefit rate plus the $20 general income exclusion). If the required amount of rent is less than the presumed maximum value, we will impute as in-kind support and maintenance the difference between the required amount of rent and either the presumed maximum value or the current market rental value, whichever is less.

Back to Table of Contents

ATTN: JANN LENSKEY ROBERTS

G.E.7 Builders

P.O.Box 681

Valley Stream Ny, 11582-0681

Phone (646) 417-2452

Work to be perform at :

Name - Moshe Nimirovski

Address - 155 Oceana Drive East, Apartment PH2A,

Brooklyn , NY 11235

Construction work responsibility:

Demolish and remove rubbish	$2,100
Installation subfloor in the bedroom	$3,200
Straighten ceiling	$3,600
straighten all walls	$2,990
Modifying existing interior framing for doors and walk-in closet	$3,850
Installation interior doors	$2,700
Installation drywall on walls and ceiling	$4,400
Taping, prime and paint all walls and ceiling	$5,300
Plumbing works in the bathroom	$3,500
Electrical works in the bathroom , Replace outlets	$1,300
Installation tiles in the bathroom	$3,900
Install new shower cabin , seat + safety bar for disable person,Glass doors	$5,800
Installation bathroom appliances,vanities,toilet,,	$3,900
Installation bathroom accessories	$1,100
Installation hardwood floor and finished	$7,500
Installationfloor molding	$1,990
Installation ceiling fixture, new dimmers,switches	$1,655
Installation of granit steps in the living room	$5,900
Total	$64,685
NY tax 8.875%	$5,740
Total	$70,425

Ballston Spa
CENTRAL SCHOOL DISTRICT
Educating Everyone Takes Everyone

Clinic Contact Information:
Stacey Morales
Supervisor of Special Education
518.884.7290 ext. 3395

Kathleen Chaucer
Principal
Milton Terrace North
Elementary School
518.884.7210 ext. 3353

The clinic is located in the
Milton Terrace North
Elementary School:
200 Wood Road
Ballston Spa, NY 12020

Ballston Spa
Central School District
Ballston Spa, New York

SCHOOL-BASED CLINIC

Supporting Healthy Families
Ballston Spa School District

Ballston Spa
CENTRAL SCHOOL DISTRICT
Educating Everyone Takes Everyone

Parsons
CHILD & FAMILY CENTER

Supporting Healthy Families in the Ballston Spa School District

What will the school-based clinic do?

Parsons Child and Family Center and the Ballston Spa Central School District are partners in the development of a wrap around clinic to support families within our school district. This clinic is designed to provide a variety of services to school-aged students and their families who have social, emotional, or behavioral needs (at no cost to families). The clinic will allow for increased family access to mental health services, including:

- On-site family counseling and care coordination
- Linking families to needed community resources
- Support child achievement
- Support school functioning
- Family connectedness
- Family involvement in caring for children
- Medication Management

Who is eligible for support at the clinic?

Services can be accessed by any family who has a child attending the Ballston Spa Central School District, any of the four elementary schools, middle, and high school. Transportation from secondary schools located off campus will be provided before or after school hours.

Who do I contact about setting up services?

Services are accessed through school personnel including the building principal, school social worker, or guidance counselor. At the time of contact the school personnel will discuss concerns and complete a referral form that will be reviewed to determine services and level of need.

What services are available?

- Individual Counseling
- Family or group counseling
- Behavioral support for home and school
- Psychiatric evaluations
- Medication management

Where is the clinic located?

The clinic is located within the Milton Terrace North Elementary School. The clinic is staffed with two mental health counselors and a licensed psychiatrist. We are excited to support students and their families in a location that is close to home and where students feel comfortable and supported within their community.

New York State Bar Association
Special Education Law Update - 2013

November 13, 2013
New York City

Mental Health Issues and Obligations of School Districts Under Child Find

Presented by:

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I. Introduction

A. Mental Health In School [1] [2]

1. Students with emotional disturbance (ED) classification
   a. Have the poorest outcomes of students in special education
   b. Over half drop out (highest rate for any disability category)
   c. Earn lower grades
   d. Fail more courses
   e. Are subjected to discipline at a very high rate
      (1) 47% of elementary and middle school students with ED have been suspended or expelled
      (2) 73% all students with ED subject to disciplinary action.
   f. 61% score in the bottom quartile on standardized reading measure
2. Fewer than 40% are receiving any type of mental health services - in school or out
   a. Schools are the primary providers of mental health services to children, accounting for 70-80% of the

delivery of mental health services.

3. 8.3 million children (14.5%) aged 4 - 17 have parents who have spoken to a mental health professional or school about their children's behavioral or emotional difficulties.
4. 2.9 million children have been prescribed medication to treat mental or emotional conditions.
5. Characteristics of Mental Illness may include long term:
    a. Hyperactivity (short attention span, impulsiveness)
    b. Aggression or self-injurious behavior (acting out, fighting)
    c. Withdrawal (social or excessive fear or anxiety)
    d. Immaturity (inappropriate crying, tantrums, poor coping skills)
    e. Learning difficulties (performing below grade level)
    f. In more severe cases, distorted thinking, excessive anxiety, bizarre motor acts, abnormal mood swings

B. Stigma[3]
1. Children with mental health issues are perceived to be
    a. dangerous
    b. incompetent
    c. disruptive
2. demand a high level of attention and threaten to take time from instruction
    a. They might be bullies or clowns or oppositional
    b. They also might be shy, sullen or targets of bullying

C. Cases illustrate difficulties of establishing eligibility and obtaining appropriate public school interventions for students – especially for those who do not manifest overt, significant behavioral dysfunction that has a direct impact on the school community.

II. Determination of Eligibility

- *To qualify under the IDEA there must be a demonstration of need for some form of educational intervention.*
    - *"life problem" versus "school problem"*
- *Least Restrictive Placement*
  To 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 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 of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.
20 U.S.C. § 1412(a)(5)(A)

A. To be eligible, students must fit into a category under the Individuals with Disabilities Act Education (20 U.S.C. § 1400 et. seq.):

- Autism - does not apply if a child's educational performance is adversely affected **primarily because the child has an emotional disturbance**
- Deaf-blindness
- Deafness
- **Emotional Disturbance**
- Hearing impairment
- Mental retardation
- Multiple disabilities
- Orthopedic impairment
- Other health impairment
- Specific learning disability
- Speech or language impairment
- Traumatic brain injury
- Visual impairment

34 C.F.R. §300.8(c)

(4) (i) Emotional disturbance means a condition exhibiting one or more of the following characteristics over a **long period of time** and to a **marked degree** that **adversely affects a child's educational performance**:

(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
(C) Inappropriate types of behavior or feelings under normal circumstances.
(D) A general pervasive mood of unhappiness or depression.
(E) A tendency to develop physical symptoms or

fears associated with personal or school problems.

(ii) Emotional disturbance includes schizophrenia. The term **does not apply to children who are socially maladjusted,** unless it is determined that they have an emotional disturbance under paragraph (c)(4)(I) of this section.

A. .New York State Regulation - 8 NYCRR 200.1 *almost identical to Federal list*[4]

B. Section 504 of the Rehabilitation Act of 1973[5]

1. School districts provide a free appropriate public education (FAPE) to qualified students in their jurisdictions who have a physical or mental impairment that substantially limits one or more major life activities.
2. Applies to qualified students attending schools receiving federal financial assistance.
   a. Student determined to:
      (1) have a physical or mental impairment that substantially limits one or more major life activities; or
      (2) have a record of such an impairment; or
      (3) be regarded as having such an impairment.
3. Individual inquiry:
   "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. 34 C.F.R. 104.3(j)(2)(I)
   Major life activities includes caring for self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 34 C.F.R. 104.3(j)(2)(ii).

II. **Child Find**

A. Local Educational Authorities (LEAs) are required to determine whether all children with disabilities or those "who are suspected of being a child with a disability" and in need of special education, even if the student is advancing

from grade to grade.
34 C.F.R. § 300.111(c)(1).

1. Public and private school students.
2. Obligation is triggered when the LEA has reason to suspect a disability, and reason to suspect that special education services may be needed to address that disability.
3. Determination must be made within a reasonable time.

B. Emotional disturbance or social maladjustment?
   1. Often, time is needed to assess.

C. LEA may not require a student to obtain a prescription for a drug or other substance identified as a condition for obtaining an evaluation or of receiving services. 8 NYCRR 200.4

D. *J.S. v. Scarsdale Union Free Sch. Dist.*, 826 F. Supp. 635 (S.D.N.Y. 2011)
   1. **Child Find** - Court analyzed statutory language by looking at each element:
      a. Inappropriate type of behavior - in her suicide attempt and psychiatric hospitalization, but
      b. Should the district have reasonably known that the she suffered emotional difficulties **to a marked degree**?
      c. Did they **adversely affect** her educational performance?
      d. Did she suffer from these problems **over a long period of time?**
   2. Determination: No. Though repeated, they were temporary and not uncommon
   3. CAVEAT: District refused to test when parents first requested
      a. Parent request triggered obligation to do initial evaluation. 20 U.S. C. § 1414(a)(1)(B); 8 NYCRR 200.5
   4. Award: 25 % of tuition expenses awarded (from time of finding of eligibility)
      a. 75% reduction reflected Parents' unilateral placement, their delayed notice to District and mixed evidence of Parent's cooperativeness and their predisposition to view skeptically any placement other than their own choice.

E. *W.G. v. New York City Dep't of Educ.,* 801 F. Supp. 2d 142 (S.D.N.Y. 2011)

1. **FAPE:** Procedural irregularities were not solely the fault of the district; in part were attributed to parents' unilateral placement in out of state that rendered student unavailable.
    a. The IDEA does not require school districts to undertake the responsibility of, for instance, forcing a child physically to attend school when the child is neither unable to attend nor impeded by an emotional condition **to a marked degree** to following through on ability to attend.
    b. Citing *Springer v. Fairfax Co. Sch. Bd.*, 124 F.3d 659, 664 (4th Cir. 1998): the exclusion of "'socially maladjusted' behavior from the definition of serious emotional disturbance... makes perfect sense when one considers the population targeted by the statute. Teenagers, for instance, can be a wild and unruly bunch. Adolescence is, almost by definitions, a time of social maladjustment for many people . . . . Any definition that equates simple bad behavior with serious emotional disturbance would exponentially enlarge the burden IDEA places on LEAs. Among other things, such a definition would require the schools to dispense criminal justice rather than special education."
2. **Eligibility Finding:** preponderance of evidence indicated academic problems were result of truancy and refusal behavior, the product of a conduct disorder, narcissistic personality tendencies and substance abuse rather than depression.
    a. Record shows K.G. was at risk of academic failure, not clear that special education and related services were required.

III. What do kids with emotional or mental health issues need from school?

A. Not necessarily specialized instruction
    1. Supportive services are still available in general education.
    2. Might have demonstrated academic skill.

B. Some Suggested Interventions
    1. Emotional and behavioral support
    2. Mastery of academics
    3. Developing social skills
    4. Increase self-awareness, self-control and self-esteem
    5. Use of Positive Behavioral Systems
    6. Extra time and/or separate location for tests
    7. Preferential seating

8. Organizational Assistance
9. Reminders
10. Tutoring
11. Crisis counseling
12. Safe place
13. Modified schedule

C. 504 (Accommodation) Plans

New York City: School staff shall initiate a request for an evaluation by a §504 Team for any student who is reasonably believed to be disabled and in need of accommodations...
Regulation of the Chancellor: No. A-710 Section 504 Policy and Procedures for Students

http://schools.nyc.gov/RulesPolicies/ChancellorsRegulations/default.htm

D. Individualized Educational Programs

IV. What's a school to do?

A. Progressive Intervention?

Omidian v. Bd. of Educ., 2009 U.S. Dist. LEXIS 19016; 2009 WL 890625 (6:05-CV-0398 (N.D.N.Y. 5/31/09)

1. **Free Appropriate Public Education.** IEPs were defective by failing to incorporate treatment recommendations and poor placement recommendation. Residential placement was determined to be appropriate.
2. **Tuition Reimbursement Claim.** Parent did not prevail on tuition claim because the residential program in question did not include adequate emotional supports.
3. **Rehabilitation Act (Section 504) Claim** survived Summary Judgment
   a. To prove violation, parent needed to show
      (1) student was an individual with a disability
      (2) was otherwise qualified for benefits and
      (3) was denied benefits because of his disability
   b. There was a question of fact as to whether the District should have done an evaluation before it formulated an instructional

support plan and made PINS diversion referrals before considering whether student had a disability impacting education.

B. Behavioral Classroom?[6]

1. Continuum: The learning characteristics of students in the group must be "sufficiently similar" to assure that this range of academic or educational achievement is at least maintained, considering four factors:
   a. social development
   b. physical development
   c. Management needs must be determined in accordance with the factors identified for a student in relation to the areas of academic achievement, functional performance and learning characteristics, social development and physical development.
   d. The environmental modifications or adaptations and the human or material resources provided may not consistently detract from the opportunities of other students in the group to benefit from instruction.

2. *J.P. v. N.Y. City Dep't of Educ.*, 2012 U.S. Dist. LEXIS 12762; 2012 WL 35997, CV 10-2078 (E.D.N.Y. Feb . 2, 2012)
   a. **Tuition Reimbursement.** Recognizing tension between IDEA's goal of providing education suited to student's need, including opportunities for mainstreaming, the placement recommendation of a 12:1:1 classroom was appropriate given the students' high level of need for close attention and disruptive classroom behavior, even considering strong cognitive abilities and retrospective evidence of his success in a general education setting. At the time, the public school placement was appropriate. Equitable factors did not favor the parent.[7]

C. Pull Out Services?

D. Positive Behavioral Support?

1. Movement away from isolation and into school-wide

behavioral programs that do not target kids with established diagnoses or history of trouble

a. Integrate education and mental health in schools
b. Premium on social-emotional learning in classroom and in school environment
c. Parent involvement
d. Better training

V. Discipline - Child Find and the Functional Behavioral Assessment

9% of students in special education in New York between the ages of six and twelve have diagnoses of ADHD, ODD, Bipolar Disorder, Anxiety or Depression, and there are many more who are undiagnosed.[8]

1. Two types of Students subject to discipline
   a. Presumed to have a disability
      (1) District deemed to have knowledge. 8 NYCRR 201.2
         (a) prior to time the behavior occurred parent expressed concern
         (b) requested an evaluation
         (c) teacher or other district personnel, expressed specific concerns about a pattern of behavior.
      (2) Parent refusal or finding of ineligibility are exceptions. 8 NYCRR 201.5
   b. No basis for knowledge of disability,
      (1) student may be subjected to ordinary disciplinary measures
      (2) expedited evaluation (15 day) on request

B. Functional Behavioral Analysis and Behavioral Intervention Plan
   1. BIP - plan based on results of the functional behavioral assessment (FBA) at minimum description of the problem behavior, global and specific hypotheses as to why it occurs and intervention strategies that include positive behavioral supports and services to address the behavior.

VI. **Litigation Thought: Hurry Up and Slow Down, But Don't Wait!**

A. Experts should be consulted regularly and consistently

B. Parents should cooperate with and remain in contact with the District in writing and in person
    1. Though not all suggestions must be tried, all *reasonable* suggestions should be considered and discussed at school and reviewed with treating medical and mental health providers
C. What is least restrictive?
    1. Do the continuum analysis - what interventions can keep the student in an environment with positive role models, structure and control?
    2. Is the choice safe?
D. Insist upon a thorough school-based evaluation
    1. have all expert recommendations and perscriptions available at the meetings;
    2. If possible, arrange for treating professionals to be on call when you have your meetings
E. Have an advocate at the very first meeting.

ENDNOTES

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1. *Toward the Integration of Education and Mental Health in School*, Adm Policy Ment Health, 2010 March, NIH Public Access Author Manuscript, http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2874625

2. National Dissemination Center for Children with Disabilities Fact Sheet: Emotional Disturbance (June 2010; links updated May 2013), http://nichcy.org/disability/specific/emotionaldisturbance

3. *The stigma of childhood mental disorders: A conceptual framework,* J Am Acad Child Adolesc Psychiatry, 2010 February: 49(2); 92-198, NIH Public Access Author Manuscript, http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2904965

4.

- Autism
- Deafness
- Deaf-blindness
- Emotional disturbance
- Hearing impairment
- Learning disability
- Intellectual disability
- Multiple disabilities
- Orthopedic impairment
- Other health-impairment
- Speech or language impairment
- Traumatic brain injury
- Visual impairment

(zz) Student with a disability means a student with a disability as defined in section 4401(1) of the Education Law …

(4)(i) Emotional disturbance means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a student's educational performance:

A. an inability to learn that cannot be explained by intellectual, sensory, or health factors.

a. an inability to build or maintain satisfactory interpersonal relationships with

peers and teachers;

b. inappropriate types of behavior or feelings under normal circumstances;

c. a generally pervasive mood of unhappiness or depression; or

d. a tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) Emotional disturbance includes schizophrenia. The term does not apply to children who are **socially maladjusted**, unless it is determined that they have an emotional disturbance under paragraph (c)(4)(I) of this section.

5. Office for Civil Rights Guidance: *Protecting Students with Disabilities*, http://www2.ed.gov/about/offices/list/ocr/504faq.html

6. http://www.p12.nysed.gov/specialed/publications/policy/schoolagecontinuum.html

7. LRE Cases Discussed:

Bd. Of Educ. v. Rowley, 458 U.S. 176 (1982)
P. ex rel. Mr. & Mrs. P. v. Newington Bd. Of Educ. 546 F.3d 111 (2d Cir. 2008)
Oberti v. Bd. of Educ. Of Clementon Sch. Dist., 995 F.2d 1204 (3d Cir. 1993)

8. http://www.wnyc.org/story/report-using-ers-troubled-students-strikes-nerve/

Mental Health & Child Find

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NYSBA CLE: Special Education Law Update 2013
Mount Kisco Holiday Inn in Westchester, NY
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MENTAL HEALTH & CHILD FIND

I. INTRODUCTION

Children and adolescents suffer from a wide range of mental illnesses. In some circumstances mental illness in children may be readily apparent to parents and school staff, but for some children, mental illness remains a hidden illness. Some children suffer silently through the school day, trying to contain explosive feelings and erupt upon walking through the front door a 3:00 PM. Other students experience paralyzing anxiety that prevents them from walking out the front door in the morning, never even making it to the school building or classroom. And there are students who are frequent flyers at the nurse's office, somatic complaints barely camouflaging anxiety and depression. Students with mental illness are at risk for being the target of bullying or being bullies themselves. Sadly, some adolescents attempt suicide, and some students drape clothing over scars to conceal repeated "cutting". **What is the school district's obligation to identify and evaluate students with mental illness?**

Federal and New York State laws and regulations impose an affirmative duty on school districts to seek out, identify and evaluate students who have emotional disabilities or are suspected of having emotional disabilities and need special education as a result. This **"child find"** obligation is challenging and critically important as it relates to students with mental illness who may experience adverse impact on their educational performance and require specialized instruction in order to derive meaningful educational benefits.

II. MENTAL HEALTH DISORDERS IN CHILDREN

Many children and adolescents have mental health issues that interfere with normal development and manifest themselves in difficulty in the school setting. Children with emotional disorders are reportedly the most under-identified category of all students with disabilities.[1] Mental disorders in children are a significant concern for families, educators and society as a whole.

[1] Dori Barnett, Ed.D., *A Grounded Theory for Identifying Students with Emotional Disturbance: Promising Practices for Assessment, Intervention, and Service Delivery*, Contemporary school Psychology, Vol. 16 at p. 21 (2012).

A. MENTAL HEALTH FACTS & STATISTICS

1. National Alliance on Mental Illness (NAMI)

- Approximately 50% of students age 14 and older that are living with a mental illness drop out of high school.[2]

- Youth with unidentified mental disorders also tragically end up in jails and prisons.[3]

2. National Institute of Mental Health (NIMH)

- About 11 percent of adolescents have a depressive disorder by age 18. Girls are more likely than boys to experience depression. The risk for depression increases as a child gets older.[4]

- Children who are depressed may complain of feeling sick, refuse to go to school, cling to a parent or caregiver, or worry excessively that a parent may die. Older children and teens may sulk, get into trouble at school, be negative or grouchy, or feel misunderstood.[5]

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[2] *See* National Alliance on Mental Illness (NAMI) website *Facts on Children's Mental Health in America (*July 2010) at http://www.nami.org/Template.cfm?Section=federal_and_state_policy_legislation&template=/ContentManagement/ContentDisplay.cfm&ContentID=43804.

[3] *See* National Alliance on Mental Illness (NAMI) website *Facts on Children's Mental Health in America (*July 2010) at http://www.nami.org/Template.cfm?Section=federal_and_state_policy_legislation&template=/ContentManagement/ContentDisplay.cfm&ContentID=43804 ("According to a study funded by the National Institute of Mental Health—the largest ever undertaken—an alarming 65 percent of boys and 75 percent of girls in juvenile detention have at least one mental illness. We are incarcerating youth living with mental illness, some as young as eight years old, rather than identifying their conditions early and intervening with appropriate treatment.").

[4] *See* NIMH website at *http://www.nimh.nih.gov/health/publications/anxiety-disorders-in-children-and-adolescents/index.shtml.*

[5] *See http://www.nimh.nih.gov/health/publications/depression-in-children-and-adolescents/index.shtml.*

3. Centers for Disease Control and Prevention (CDC)[6]

- A total of 13%–20% of children living in the United States experience a mental disorder in a given year, and surveillance during 1994–2011 has shown the prevalence of these conditions to be increasing. Morbidity and Mortality Weekly Report (MMWR), May 17, 2013, Vol. 62, No. 2 at p. 1.

- Suicide, which can result from the interaction of mental disorders and other factors, was the second leading cause of death among children aged 12–17 years in 2010. *Id.* at p. 1.

- All demographic groups are affected by mental disorders in childhood, although the prevalence estimates vary by all demographic groups. *Id.* at p. 15.

- Based on self-reported data for the 2005–2010 data cycles, 8.3% of adolescents aged 12–17 years reported ≥14 mentally unhealthy days in the past month, representing nearly 2 million adolescents. *Id.* at p. 14.

- The prevalence of all conditions and indicators increased with age, with the exception of ASD, which was highest in the group aged 6–11 years. *Id.* at p. 15.

- Boys were more likely than girls to have most of the disorders, including ADHD, behavioral or conduct problems, ASD, anxiety, Tourette syndrome, and cigarette dependence, and boys were more likely than girls to die by suicide. *Id.*

- Girls were more likely to have an alcohol use disorder, and adolescent girls were more likely to have depression. *Id.*

- NHIS data indicate that parents of 8.5% of children aged 3–17 years in 2009–2010 and 8.4% in 2011 had ever been told their child had ADHD. *Id.* at p. 9.

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[6] *See* Centers for Disease Control and Prevention (CDC) report published in Morbidity and Mortality Weekly Report (MMWR), May 17, 2013, Vol. 62, No. 2. *See also* U.S. Department of Health and Human Services' (DHHS), *Mental Health: A Report of the Surgeon General* (1999). CDC findings were drawn from "independent federal surveillance systems and surveys that collect data on mental disorders and mental health indicators among children in the United States." MMWR, May 17, 2013, Vol. 62, No. 2, p. 8.

For the purposes of the report, CDC described mental disorders in children as "'serious deviations from expected cognitive, social, and emotional development' and include conditions meeting criteria described by the *Diagnostic and Statistical Manual of Mental Disorders, 4th edition, Text Revision* (DSM-IV-TR) or the *International Classification of Diseases* (ICD). Note that the DSM was updated and revised recently. The American Psychiatric Association released the DSM-5 at its Annual meeting in May 2013. *See* DSM-5 website at www.dsm5.org.

B. MOST COMMON MENTAL DISORDERS IN CHILDREN

NIMH lists the following mental disorders occurring in children[7]:

- Anxiety Disorders[8]
- Panic Disorders[9]
- Attention Deficit Hyperactivity Disorder (ADHD)[10]
- Autism Spectrum Disorders
- Bipolar Disorder[11]
- Depression[12]
- Dysthymia[13]
- Eating Disorders
- Schizophrenia

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[7] *See* http://www.nimh.nih.gov/health/publications/treatment-of-children-with-mental-illness-fact-sheet/index.shtml.

[8] Anxiety disorders are characterized by excessive worry about everyday problems for at least 6 months. *See* http://www.nimh.nih.gov/statistics/1gad_child.shtml. Examples of anxiety disorders are obsessive-compulsive disorder, post-traumatic stress disorder, social phobia, specific phobia, and generalized anxiety disorder. *See* http://www.nimh.nih.gov/health/publications/anxiety-disorders-in-children-and-adolescents/index.shtml.

[9] In an article entitled *Anxiety: Panic Disorder* (Jan. 19, 2005), Steve Bressert, Ph.D. explains that people with panic disorders begin to avoid situations where they fear an attack may occur, and children may be reluctant to go to school or be otherwise separated from their parents. http://psychcentral.com/disorders/anxiety/panic.html.

[10] ADHD is thought to be a neurological impairment that affects a child's ability to control impulses and is characterized by short attention spans, difficulty sitting still or wait turns. http://psychcentral.com/lib/the-abcs-of-adhd.

[11] Bipolar disorder, also known as manic-depressive illness, causes unusually intense shifts in mood or emotional states. "Extreme highs and lows of mood are accompanied by extreme changes in energy, activity, sleep, and behavior." Bipolar disorder symptoms can damage relationships and can cause poor school performance and suicide. *See* NIMH booklet, *Bipolar Disorder in Children and Adolescents,* http://www.nimh.nih.gov/health/publications/bipolar-disorder-in-children-and-adolescents/bipolar_children_adolescents_cl508.pdf.

[12] Depression in children and adolescents is characterized by feelings of sadness or anxiety. Adolescents and teens suffering with a major depressive disorder (also referred to as major depression) experience symptoms that are disabling and interfere with daily activities such as studying, eating and sleeping. *See* http://www.nimh.nih.gov/health/publications/depression-and-high-school-students/index.shtml. According to the NIMH, children who are depressed may "complain of feeling sick, refuse to go to school, cling to a parent or caregiver, or worry excessively that a parent may die. Older children and teens may sulk, get into trouble at school, be negative or grouchy, or feel misunderstood." *See* http://www.nimh.nih.gov/health/publications/depression-in-children-and-adolescents/index.shtml.

[13] The DSM-5 has replaced dysthymia (Depressed mood most of the day for more days than not, for at least 2 years along with symptoms such as poor appetite, fatigue and feelings of hopelessness) with "persistent depressive disorder" which includes both chronic major depressive disorder and the previous dysthymic disorder. http://pro.psychcentral.com/2013/dsm-5-changes-depression-depressive-disorders/004259.html#; http://www.ncbi.nlm.nih.gov/books/NBK64063/.

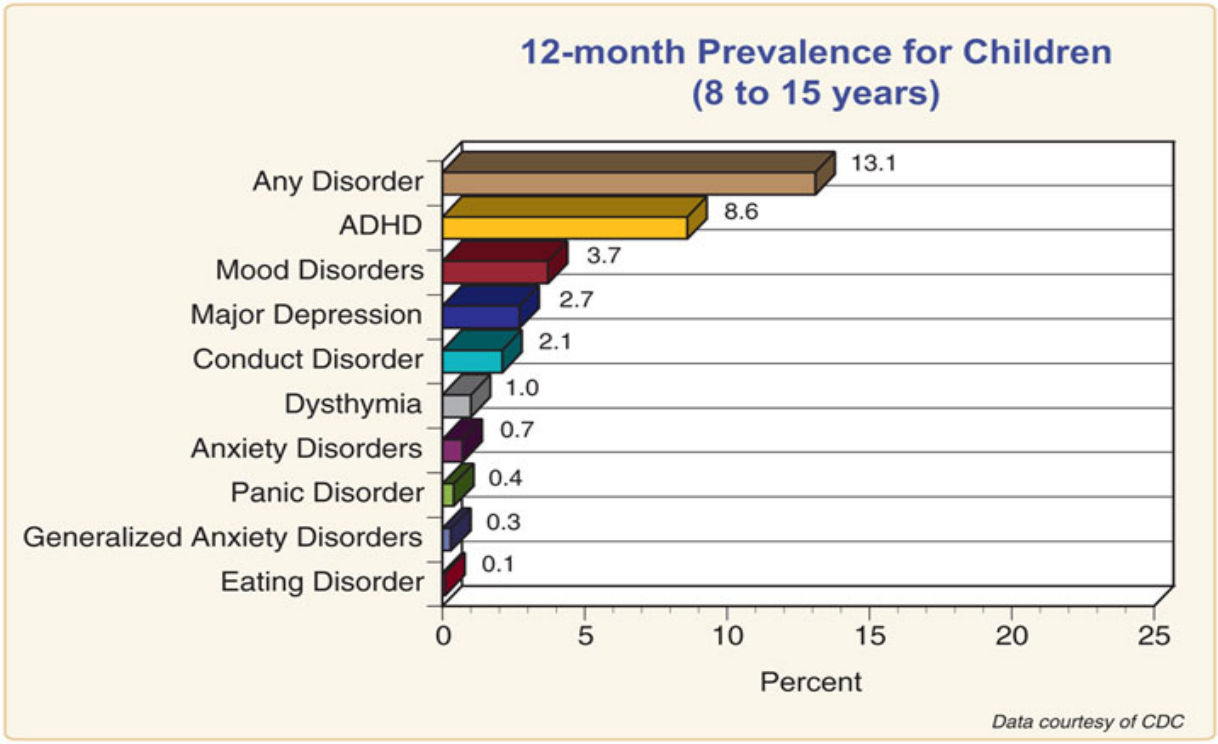

Chart from NIMH website at http://www.nimh.nih.gov/statistics/1anydis_child.shtml.

C. DSM DIAGNOSIS v. EMOTIONAL DISTURBANCE CLASSIFICATION

1. The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders DSM-IV TR and DSM-5[14] set forth criteria for the diagnosis and classification of mental disorders. The ICD is also standard diagnostic tool, and it is used to classify diseases and other health problems.

2. It is important to note that the federal and state special education laws lay out disability classifications and definitions[15] that are not aligned with the DSM or the ICD. *See infra* Sec. II, A, 2.

3. For purposes of school districts identifying children with mental disorders, it is critical to focus on the statutory disability classifications and definitions while keeping in mind that private professional evaluations (i.e., psychiatrists' letters, psycho-educational evaluations, neuropsychological evaluations, and neurologists' reports) provided to the school district that specify DSM or ICD diagnoses may be relevant to the process of identifying students with mental illness and related disabilities. DSM Diagnoses may trigger the school district's

[14] The American Psychiatric Association released the DSM-5 at its Annual meeting in May 2013. *See* DSM-5 website at www.dsm5.org.

[15] IDEA, 20 U.S.C. §1401(3)(A)(i); 34 C.F.R. § 300.8(c); New York Regulations of the Commissioner of Education (Commissioner's Regulations) Part 200, 89 N.Y.C.R.R. §200.1(zz); and Rehabilitation Act of 1973, 34 C.F.R. §104.3(j).

child find obligation to identify and evaluate a student, but a DSM diagnosis is not dispositive of the issue of whether the student meets IDEA criteria for a disability classification.

4. Typically, school psychologists employed by public schools do not list DSM diagnoses in their evaluations.

5. Compare DSM-5's criteria for Autism Spectrum Disorders, Attention Deficit Disorder and Depression and Anxiety disorders to Commissioner's Regulations disability classifications of Autism, Other Health Impairment, and Emotional Disturbance. *See* Commissioner's Regulations §200.1(zz)

6. Think about DSM diagnoses in the context of Section 504 of the Rehabilitation Act of 1973 that defines a disability as "a physical or mental impairment which substantially limits one or more major life activities." 34 C.F.R. §104.3(j) and *see infra* Sec. II, B.

D. IMPACT OF MENTAL ILLNESS ON THE SCHOOL ENVIRONMENT AND EDUCATIONAL PERFORMANCE

1. Common Behaviors

- Absenteeism
- Difficulty remaining in class
- Aggression
- Bullying
- Disciplinary Code violations

2. According to the NIMH, children who are depressed may "complain of feeling sick, refuse to go to school, cling to a parent or caregiver, or worry excessively that a parent may die. Older children and teens may sulk, get into trouble at school, be negative or grouchy, or feel misunderstood." http://www.nimh.nih.gov/health/publications/depression-in-children-and-adolescents/index.shtml.

3. In a June 2012 National Association of School Psychologists summary entitled *Research on the Relationship Between Mental Health and Academic Achievement* (http://www.nasponline.org/advocacy/Academic-MentalHealthLinks.pdf), Jeffrey L. Charvat, Ph.D NASP Director of Research, reported:

- In summarizing studies on the relationship between children's emotional distress and achievement behavior, researchers found that students with frequent feelings of internalized distress (e.g., sadness, anxiety, depression) show diminished academic functioning and those with externalized distress (e.g., anger, frustration, and fear) exhibit school difficulties including learning delays and poor achievement (Roeser, Eccles, & Strobel, 1998).

- Adolescents with depression are at increased risk for impairment in school and educational attainment (Asarnow, Jaycox, Duan, LaBorde, et al., 2005).

E. PUBLIC PERCEPTION OF MENTAL DISORDERS

1. The social stigma of mental illness persists to some degree.[16]

2. Parents and school staff may be concerned that a student with mental illness or suspected of having an emotional disability may be stigmatized by an Emotional Disturbance classification.

F. TRIGGERS FOR SCHOOL DISTRICTS TO CONSIDER CHILD FIND OBLIGATIONS TO IDENTIFY AND EVALUATE STUDENTS SUSPECTED OF HAVING EMOTIONAL DISABILITIES

1. **Receipt of parents' private evaluation reports documenting student's mental illness and/or listing diagnostic formulations and other parental input regarding mental illness**

2. **Report of student as the target of bullying or as the perpetrator of bullying**

3. **Disciplinary Code violations**

4. **Absenteeism[17] and difficulty remaining in classes**

5. **Difficulty with social relationships**

6. **Withdrawal, unhappiness, or depression**

7. **Inappropriate behavior in classroom**

8. **Precipitous decline in grades or erratic educational performance**

9. **Inability to work with peers in pairs (i.e., lab partners) or in groups**

10. **Expression of angry or violent feelings**

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[16] *See* National Alliance on Mental Illness (NAMI) website *Facts on Children's Mental Health in America (*July 2010) at http://www.nami.org/Template.cfm?Section=federal_and_state_policy_legislation&template=/ContentManagement/ContentDisplay.cfm&ContentID=43804; s*ee also The stigma of child mental disorders: A conceptual framework*, NIH Public Access, Abraham Mukolo, Ph.D., Craig Anne Heflinger, Ph.D., and Kenneth A. Wallston, Ph.D., http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2904965/ ("In child mental health services research, the role of stigma has not been well-conceptualized though it is presumed to be significant.").

[17] In *Application of a Student with a Disability*, Appeal No. 10-009 (March 29, 2010), the State Review Officer found that the student's cutting of classes was not necessarily evidence that the student was a student with an emotional disturbance.

11. **Violent or aggressive behavior**

12. **Signs of cutting (scars) or other self-harm**

13. **Suicidal ideation relayed or reported to school staff**

14. **Suicide attempts**

G. CHALLENGES OF IDENTIFYING STUDENTS WITH MENTAL ILLNESS

1. **Mental illness can be a "hidden illness" – students and/or parents may attempt to conceal illness for fear of social stigma.**

2. **Mental illness symptoms may be more apparent in the student's home than in the school setting, yet mental illness may impact educational performance.**

3. **Some school staff may be unfamiliar with symptoms of mental illness and may inadvertently attribute declining educational performance to causes other than mental illness.**

II. DISABILITY CLASSIFICATIONS & DEFINITIONS

A. IDEA REGULATIONS & NY COMMISSIONER'S REGULATIONS

1. **IDEA Regulations, 34 C.F.R. § 300.8**
   Child with a disability.
   (a) *General.* (1) *Child with a disability* means a child evaluated in accordance with §§ 300.304 through 300.311 as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as "emotional disturbance"), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services.

2. **New York Regulations of the Commissioner of Education Updated July 2013 (Commissioner's Regulations)**
   8 N.Y.C.R.R. § 200.1(zz)
   Student with a disability means a student with a disability as defined in section 4401(1) of the Education Law, who has not attained the age of 21 prior to September 1st and who is entitled to attend public schools pursuant to section 3202 of the Education Law and who, because of mental, physical or emotional reasons, has been identified as having a disability and **who requires special services** and programs approved by the department. The terms used in this

definition are defined as follows (*emphasis added*):

(1) *Autism* means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age 3, that adversely affects a student's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. The term does not apply if a student's educational performance is adversely affected primarily because the student has an emotional disturbance as defined in paragraph (4) of this subdivision. A student who manifests the characteristics of autism after age 3 could be diagnosed as having autism if the criteria in this paragraph are otherwise satisfied.

(2) *Deafness* . . .

(3) *Deaf-blindness* . . .

(4) *Emotional disturbance* means a condition exhibiting one or more of the following characteristics **over a long period of time** and **to a marked degree** that **adversely affects a student's educational performance** *(emphasis added)*:

(i) an inability to learn that cannot be explained by intellectual, sensory, or health factors.

(ii) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers;

(iii) inappropriate types of behavior or feelings under normal circumstances;

(iv) a generally pervasive mood of unhappiness or depression; or

(v) a tendency to develop physical symptoms or fears associated with personal or school problems.

The term includes schizophrenia. The term does not apply to students who are **socially maladjusted**, unless it is determined that they have an emotional disturbance.

See also 34 C.F.R. § 300.8(c)(4)

(5) *Hearing impairment* . . .

(6) *Learning disability* . . .

(7) *Intellectual disability* . . .

(8) *Multiple disabilities* . . .

(9) *Orthopedic impairment . . .*

(10) *Other health-impairment* means having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that is due to chronic or acute health problems, including but not limited to a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, diabetes, attention deficit disorder or attention deficit hyperactivity disorder or tourette syndrome, which adversely affects a student's educational performance.

(11) *Speech or language impairment . . .*

(12) *Traumatic brain injury . . .*

(13) *Visual impairment including blindness . . .*

3. Consider the elements of IDEA's Emotional Disturbance classification

(a) What constitutes "a long period of time"? Several days, months, or years?

(b) What constitutes "a marked degree"?

(c) What constitutes an adverse affect on educational performance?

(d) Does a child find obligation exist where the student displays emotional difficulties at home and not at school?

(e) Under what circumstances is a student considered "socially maladjusted"?

B. SECTION 504 OF THE REHABILITATION ACT OF 1973

Person with a Disability is defined as follows:
34 C.F.R. § 104.3
(j) *Handicapped person* –(1) *Handicapped persons* means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.
(2) As used in paragraph (j)(1) of this section, the phrase:
(i) *Physical or mental impairment means* (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any ***mental or psychological disorder***, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.
[*emphasis added*]

(ii) *Major life activities* means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.
(iii) *Has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

III. CHILD FIND FRAMEWORK UNDER IDEA & COMMISSIONER'S REGULATIONS

A. WHAT IS CHILD FIND?

1. ***"Child find"*** is a statutory mandate requiring school districts to identify, locate and evaluate students with disabilities who have or are suspected of having disabilities and need special education in order to address those disabilities. 34 C.F.R. § 111.

2. Child find relates to school districts' **affirmative obligations**; therefore, school districts may not wait for parents or other professionals to request that a child be identified and evaluated or to refer a student for special education services.

3. Note that a child who is identified though the child find process is not automatically classified as a student with a disability and eligible for special education services; rather, children who are identified through the child find process must be evaluated in order to determine eligibility for services. 34 C.F.R. § 300.301.

4. Child find includes the obligation to identify, locate and evaluate students suspected of having disabilities even if they are advancing from grade to grade. 34 C.F.R. § 300.8.

5. Child find requires school districts to have in place procedures in place that will enable them to find children suspected of having disabilities and in need of special education. *Application of a Student with a Disability*, Appeal No. 10-009 (March 29, 2010).

B. WHAT IS THE PURPOSE OF CHILD FIND?

The purpose behind the child find provisions is to locate children with disabilities who are eligible for special education services who might otherwise go undetected. *Handberry v. Thompson,* 436 F.3d 52, 65 (2d Cir. 2006).

C. WHICH STUDENTS MUST BE IDENTIFIED?

1. School district's child find obligations extend to:

(a) children residing within the school district's boundaries, including students who are homeless or wards of the state;[18] and

(b) students with disabilities who are attending private schools, including religious elementary and secondary schools, located within a school district's boundaries.[19]

2. Obligation to students who reside out-of-state

(a) The child find obligation extends to students who reside **outside of the state** where the private school is located. 34 C.F.R. § 300.131(f).

(b) This obligation exists in order to ensure equitable participation of parentally placed private school students as well as an accurate count of these students.

D. WHICH SCHOOL DISTRICTS ARE CHARGED WITH CHILD FIND DUTIES?

Child find obligations may exist in both the District of Location and the District of Residence

(a) Where a parent places their child in a private school outside the state of residence, the parent may request that the district of residence evaluate the child. In this instance the district of residence may not refuse to conduct the evaluation and make an eligibility determination for FAPE because the child attends a private school in another state or school district. *Letter to Eig*, Office of Special Education Programs, 52 IDELR 136, 109 LRP 14258 (January 28, 2009); *see also J.S. v. Scarsdale UFSD*, 826 F. Supp. 2d 635, 58 IDELR 16 (S.D.N.Y. 2011), *infra* Sec. VII, 3.

(b) While the U.S. Department of Education "generally discourages parents from requesting evaluations from two LEAs, if a parent chooses to request

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[18] *See Handberry v. Thompson*, 436 F.3d 52, 45 IDELR 2 (2d. Cir. 2006) ("Indeed, the IDEA's apparent purpose in requiring screening is to find eligible inmates who might otherwise not be identified – without an effective screening mechanism in place, it is impossible for the City defendants, or anyone else, to identify inmates who should be referred for evaluation.")

[19] *See Letter to Eig*, Office of Special Education Programs, 52 IDELR 136, 109 LRP 14258. (January 28, 2009); *see also Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools*, Office of Special Educations and Rehabilitative Services, 111 LRP 32532 (April 1, 2011) (clarifying that child find obligations require that school districts, "after timely and meaningful consultation with private school representatives, conduct a thorough and complete child find process to determine the number of parentally placed children with disabilities attending private schools located within the LEA regardless of where those students live.")

evaluations from the LEA responsible for providing the child with a program of FAOE and a different LEA that is responsible for considering the child for the provision of equitable services, bot LEAs are required to conduct an evaluation." *Letter to Eig.*

E. RELEVANT STATUTES

1. IDEA Regulations

34 C.F.R. § 300.111[20]
Child Find

(a) *General.* (1) The State must have in effect policies and procedures to ensure that—

(i) All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State, and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated; and

(ii) A practical method is developed and implemented to determine which children are currently receiving needed special education and related services.

. . .

(c) *Other children in child find.* Child find also must include—

(1) Children who are suspected of being a child with a disability under § 300.8 and in need of special education, even though they are advancing from grade to grade; and

(2) Highly mobile children, including migrant children.

(d) *Construction.* Nothing in the Act requires that children be classified by their disability so long as each child who has a disability that is listed in § 300.8 and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under Part B of the Act.

See also 20 U.S.C. §1412(a)(3)(A).

34 C.F.R. § 300.131
Child find for parentally-placed private school children with disabilities.

(a) *General.* Each LEA must locate, identify, and evaluate all children with disabilities who are enrolled by their parents in private, including religious, elementary schools and secondary schools located in the school district served by the LEA, in accordance with paragraphs (b) through (e) of this section, and §§ 300.111 and 300.201.

(b) *Child find design.* The child find process must be designed to ensure—

[20] Note that 34 C.F.R. § 300.111 is broader than 34 C.F.R. § 300.131. Section 300.111 addresses the child find responsibilities relating to all children in the state, including children residing in the state and those attending private schools while section 300.131 is limited to child find responsibilities relating to students enrolled by their parents in private elementary and secondary schools. *Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools*, Office of Special Educations and Rehabilitative Services, 111 LRP 32532 (April 1, 2011) at Question B-9.

(1) The equitable participation of parentally-placed private school children; and

(2) An accurate count of those children.

(c) *Activities.* In carrying out the requirements of this section, the LEA, or, if applicable, the SEA, must undertake activities similar to the activities undertaken for the agency's public school children.

(d) *Cost.* The cost of carrying out the child find requirements in this section, including individual evaluations, may not be considered in determining if an LEA has met its obligation under § 300.133.

(e) *Completion period.* The child find process must be completed in a time period comparable to that for students attending public schools in the LEA consistent with § 300.301.

(f) *Out-of-State children.* Each LEA in which private, including religious, elementary schools and secondary schools are located must, in carrying out the child find requirements in this section, include parentally-placed private school children who reside in a State other than the State in which the private schools that they attend are located.

See also 20 U.S.C. §1412(a)(10(A)(i)-(ii).

34 C.F.R. § 300.301

Initial evaluations.

(a) *General.* Each public agency must conduct a full and individual initial evaluation, in accordance with §§ 300.304 through 300.306, before the initial provision of special education and related services to a child with a disability under this part.

(b) *Request for initial evaluation.* Consistent with the consent requirements in § 300.300, either a parent of a child or a public agency may initiate a request for an initial evaluation to determine if the child is a child with a disability.[21]

(c) *Procedures for initial evaluation.* The initial evaluation—

(1)(i) Must be conducted within 60 days of receiving parental consent for the evaluation; or

(ii) If the State establishes a timeframe within which the evaluation must be conducted, within that timeframe; and

(2) Must consist of procedures—

(i) To determine if the child is a child with a disability under § 300.8; and

(ii) To determine the educational needs of the child.

(d) *Exception.* The timeframe described in paragraph (c)(1) of this section does not apply to a public agency if—

(1) The parent of a child repeatedly fails or refuses to produce the child for the evaluation; or

(2) A child enrolls in a school of another public agency after the relevant timeframe in paragraph (c)(1) of this section has begun, and prior to a determination by the child's previous public agency as to whether the child is a child with a disability under § 300.8.

[21] *See also* 20 U.S.C. § 1414(a)(1)(B).

(e) The exception in paragraph (d)(2) of this section applies only if the subsequent public agency is making sufficient progress to ensure a prompt completion of the evaluation, and the parent and subsequent public agency agree to a specific time when the evaluation will be completed.

See also 20 U.S.C. § 1414 for corresponding IDEA provision.

2. Commissioner's Regulations §200.2(a)(7) is similar to 34 C.F.R. § 300.131 and provides:

> Procedures to locate, identify, and evaluate all nonpublic private elementary and secondary school students with disabilities, including religious-school children as required by the Education Law must be established to ensure the equitable participation of parentally placed private school students with disabilities and an accurate count of such students. The child find activities must be similar to activities undertaken for students with disabilities in public schools and must be completed in a time period comparable to that for other students attending public schools in the school district. The school district shall consult with representatives of private schools and representatives of parents of parentally placed private school students with disabilities on the child find process.

3. New York Education Law, 89 Ed. L. § 3602-c(2)(a) provides:

> Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent or person in parental relation of any such student. . . . In the case of education for students with disabilities, such a request shall be filed with the trustees or board of education of the school district of location on or before the first of June preceding the school year for which the request is made, or by July first, two thousand seven for the two thousand seven--two thousand eight school year only, provided that where a student is first identified as a student with a disability after the first day of June preceding the school year for which the request is made, or thirty days after the chapter of the laws of two thousand seven which amended this paragraph, takes effect where applicable, and prior to the first day of April of such current school year, such request shall be submitted within thirty days after such student is first identified. For students first identified after March first of the current school year, any such request for education for students with disabilities in the current school year that is submitted on or after April first of such current school year, shall be deemed a timely request for such services in the following school year.

IV. CHILD FIND OBLIGATIONS UNDER SECTION 504 OF THE REHABILITATION ACT OF 1973

A. COMPARE CHILD FIND OBLIGATIONS UNDER §504 TO IDEA

1. Section 504 includes a child find provision that varies somewhat from the IDEA child find obligations.

2. Pursuant to §504, school districts must **identify** students with disabilities who are not receiving a public education and **notify** their parents. Therefore, the §504 child find obligation applies to students who are parentally placed in private schools, students residing in hospitals, and children who are homeless[22] who are residing within the school district's boundaries.

   (a) The district in which the private school is located is not responsible for evaluating students pursuant to §504.

   (b) "The regulation does not specify the manner in which a district must meet its location and notification responsibility. There are many means available including notices to private schools, state and local agencies, and notices placed in newspapers." *Letter to Veir*, 20 IDELR 864, 20 LRP 2622 (OCR 1993).

   (c) While IDEA requires the school district in which the private school is located to conduct evaluations, there is no such requirement under §504.

3. Pursuant to §504, the school district of residence must **evaluate** students who are believed to need special education and related services. *See West Seneca (NY) Sch. Dist.*, 53 IDELR 237, 109 LRP 76695 (OCR 2009).

B. LOCATION AND NOTIFICATION

34 C.F.R. § 104.32 provides:

> A recipient that operates a public elementary or secondary education program or activity shall annually:
> (a) Undertake to identify and locate every qualified handicapped person residing in the recipient's jurisdiction who is not receiving a public education; and
> (b) Take appropriate steps to notify handicapped persons and their parents or guardians of the recipient's duty under this subpart.

[22] *See* Questions and Answers on Special Education and Homelessness, 110 LRP 212 (OSERS 2008) (Section 504's requirement that public elementary and secondary schools identify annually and locate every qualified individual with a disability resident in the school district's jurisdiction who is not receiving a public education applies to students "regardless of whether the student has an official place of residence or is homeless"); *see also* 34 C.F.R. §§ 104.32(a)-(b).

C. EVALUATION AND PLACEMENT

34 C.F.R. § 104.35 provides:

> (a) *Preplacement evaluation.* A recipient that operates a public elementary or secondary education program or activity shall conduct an evaluation in accordance with the requirements of paragraph (b) of this section of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement.
> (b) *Evaluation procedures.* A recipient to which this subpart applies shall establish standards and procedures for the evaluation and placement of persons who, because of handicap, need or are believed to need special education or related services . . .

V. POTENTIAL CONSEQUENCES FOR VIOLATIONS OF CHILD FIND OBLIGATIONS

Failure to satisfy child find obligations may expose a school district to subsequent FAPE violations and may entitle a student to compensatory education or tuition reimbursement. In order for a school district to satisfy its FAPE obligations, it must first satisfy its child find responsibilities.

VI. STUDENT DISCIPLINE & CIRCUMSTANCES UNDER WHICH STUDENT PRESUMED TO HAVE A DISABILITY

Commissioner's Regulations § 201.5 Students presumed to have a disability for discipline purposes.

(a) *General provision.* The parent of a student who has violated any rule or code of conduct of the school district and was not identified as a student with a disability at the time of such behavior may assert any of the protections set forth in this Part, if the school district is deemed to have had knowledge as determined in accordance with subdivision (b) of this section, that the student was a student with a disability before the behavior that precipitated the disciplinary action occurred. Where the school district is deemed to have had knowledge that the student was a student with a disability before such behavior occurred, such student is a "student presumed to have a disability for discipline purposes."

(b) *Basis of knowledge.* Except as otherwise provided in subdivision (c) of this section, a school district shall be deemed to have knowledge that such student had a disability if prior to the time the behavior occurred:

(1) the parent of such student has expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency or to a teacher of the student that the student is in need of special education, provided that such expression of concern may be oral if the parent does not know how to write or has a disability that prevents a written statement; or

(2) the parent of the student has requested an evaluation of the student pursuant to section 200.4 or 200.16 of this Title; or

(3) a teacher of the student, or other personnel of the school district, has expressed specific concerns about a pattern of behavior demonstrated by the student, directly to the director of special education of the school district or to other supervisory personnel of the school district.

(c) Exception. A student is not a student presumed to have a disability for discipline purposes if, as a result of receiving the information specified in subdivision (b) of this section:

(1) the parent of the student has not allowed an evaluation of the student pursuant to section 200.4 of this Title; or

(2) the parent of the student has refused services under this Part; or

(3) it was determined that the student is not a student with a disability pursuant to section 200.4 or 200.16 of this Title.

(d) *Responsibility for determining whether a student is a student presumed to have a disability.* If it is claimed by the parent of the student or by school district personnel that the school district had a basis for knowledge, in accordance with paragraph (b) of this section, that the student was a student with a disability prior to the time the behavior subject to disciplinary action occurred, it shall be the responsibility of the superintendent of schools, building principal or other school official imposing the suspension or removal to determine whether the student is a student presumed to have a disability.

(e) *Conditions that apply if there is no basis for knowledge.* If the superintendent of schools, building principal or other school official imposing the disciplinary removal determines that there is no basis for knowledge that the student is a student with a disability prior to taking disciplinary measures against the student, the student may be subjected to the same disciplinary measures as any other nondisabled student who engaged in comparable behaviors. However, if a request for an individual evaluation is made while such nondisabled student is subjected to a disciplinary removal, an expedited evaluation shall be conducted in accordance with 201.6 of this Part.

201.6 CSE responsibilities for expedited evaluations.

(a) If a request for an individual evaluation is made during the period that a nondisabled student, who is not a student presumed to have a disability for discipline purposes, is suspended pursuant to Education Law section 3214 or is subjected to a removal as defined in section 201.2(l) of this Part if imposed on a student with a disability, the evaluation must be conducted in an expedited manner in accordance with this section.

(b) An expedited evaluation shall be completed no later than 15 school days after receipt of parent consent for evaluation, and shall be conducted in accordance with the procedural requirements of sections 200.4 and 200.5 of this Title. The CSE shall make a determination of eligibility of such student in a meeting held no later than five school days after completion of the expedited evaluation.

(c) Until the expedited evaluation is completed, the nondisabled student shall remain in the educational placement determined by the school district, which can include suspension.

(d) If, as a result of an expedited evaluation, the student is determined to be a student with a disability, the school district shall provide special education to the student pursuant to Part 200 of this Title and the provisions of this Part relating to students with disabilities shall apply.

VII. CASE LAW, AMINISTRATIVE REVIEW DECISIONS, OCR[23] OPINIONS, AND OSERS[24] LETTERS

A. CHILD FIND RESPONSIBILITIES FOR DISTRICT OF RESIDENCE AND DISTRICT OF LOCATION

1. In ***J.S. v. Scarsdale UFSD*, 826 F. Supp. 2d 635, 58 IDELR 16 (S.D.N.Y. 2011),** the court recognized dual obligations on the part of the district of location and the district of residence where a student was withdrawn from the local school district and parentally placed in an out-of-state residential placement. The court concluded that "the IDEA's child find provisions did not divest the District [of residence] of its responsibility to classify J.G. and provide her with services after she was unilaterally withdrawn from the District in January 2008." *Id.* The court further explained that "The few cases discussing this or similar situations suggest that a district-of-residence's obligations do not simply end

[23] The U.S. Department of Education's Office for Civil Rights' (OCR) mission is "to ensure equal access to education and to promote educational excellence throughout the nation through various enforcement of civil rights." http://www2.ed.gov/about/offices/list/ocr/aboutocr.html. Specifically, OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 that prohibit discrimination on the basis of disability in programs or activities receiving financial assistance form the U.S. Department of Education. OCR is responsible for resolving complaints of discriminations.

[24] The U.S. Department of Education's Office of Special Education and Rehabilitation Services (OSERS) develops, implements and monitors policy and legislation that impact individuals with disabilities and their families. *See* http://www2.ed.gov/about/offices/list/osers/policy.html.

because a child has been privately placed elsewhere, as the District argues -- rather, the IDEA's obligations may be shared." *Id.* The court noted that

> The U.S. Department of Education apparently takes the same view: Under the IDEA, parents may seek equitable services from the district of location, and a FAPE from the district of residence. See Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, 71 Fed. Reg. 46540, 46593 (Aug. 14, 2006) (noting that "because most States generally allocate the responsibility for making FAPE available to the LEA in which the child's parents reside, and that could be a different LEA from the LEA in which the child's private school is located, parents could ask two different LEAs to evaluate their child for different purposes at the same time," and that "nothing in this part ... would prohibit parents" from doing so) . . . *Id.*

2. In ***Application of Student with a Disability*, Appeal Nos. 11-092, 11-094, 111 LRP 71932 (October 25, 2011), *affd.* 60 IDELR 195**, the SRO affirmed the impartial hearing officer's determination that the school district of residence "retained the child find obligation for the student because the district of location had not identified and evaluated the student, nor had the parent made clear their intent to keep her in the private school in the district of location. . ." *Id.*

B. CHILD FIND RESPONSIBILITIES OF DISTRICT OF RESIDENCE AND DISTRICT OF LOCATION UNDER §504 OF THE REHABILITATION ACT

In ***West Seneca (NY) School District Office for Civil Rights (OCR)*[25], *Eastern Division New York*, 02-09-1173, 53 IDELR 237, 109 LRP 76695 (October 15, 2009)** OCR explained that pursuant to the regulation implementing Section 504, at 34 C.F.R § 104.32, a student's district of residence is responsible for locating and evaluating any person who, because of a disability, needs or is believed to need related aids and services. Accordingly, where a student with migraine headaches who attended school in District 1 and resided in District 2, OCR concluded that District 1 was not obligated to evaluate the student pursuant to Section 504.

C. CHILD FIND DUTY FOR OUT-OF-STATE DISTRICT OF LOCATION

In ***J.S. v. Scarsdale UFSD*, 826 F. Supp. 2d 635, 58 IDELR 16 (S.D.N.Y. 2011),** where the student was parentally placed in an out-of-state residential school, the court noted that "local school districts must engage in child find activities with respect to children placed in private schools located within the district in order to ensure '[t]he equitable participation' of such children in the services the district provides, and to get an 'accurate count of those children' for determining the correct amount of funds to be expended. § 1412(a)(10)(A)(ii)(II)." *Id.*

[25] OCR has jurisdictional authority to investigate complaints under §504.

D. TRIGGERS FOR CHILD FIND

1. Poor performance in absence of need for special education services does not trigger child find duty

In ***New Paltz Cent. Sch. Dist. V. St Pierre*, 307 F. Supp. 2d 394, 40 IDELR 211 (N.D.N.Y. 2004)**, the court found that the school district should have referred the student to the Committee on Special Education (CSE) after the parent informed the school district staff that the student was experiencing difficulties including uncontrollable behavior at home, academic performance that was substantially declining and drug use. The school psychologist had also noticed that the student's academic performance was "substandard" and his school attendance was poor. The school district delayed a referral to the CSE and evaluations of the student. The court noted that the child find duty "'is triggered when the [state …] has reason to suspect that special education services may be needed to address that disability.'" *Id.* at fn. 13*, quoting Dep't of Educ., State of Haw. V. Cari Rae S.*, 158 F. Supp. 2d 1990, 1194 (D. Haw. 2001).

2. Parental Request for Evaluation

(a) In ***J.S. v. Scarsdale UFSD*, 826 F. Supp. 2d 635, 58 IDELR 16 (S.D.N.Y. 2011),** while the court did not find a child find obligation, the court was troubled by the parents' allegation that in response to their request that the school district test the student, the school district psychologist told the parents that "based on [student's] grade average and the fact that she would be a junior the next year, testing was not necessary. [citation to transcript omitted]. A parent's request triggers a [school district's] obligation to do an initial evaluation. 20 U.S.C. § 1414(a)(1)(B). But the evidence on what happened at this conversation is unclear in terms of what was asked of [the psychologist] and even who participated in the conversation and when."

(b) In ***Application of Student with a Disability*, Appeal Nos. 11-092, 11-094, 111 LRP 71932 (October 25, 2011), *affd.* 60 IDELR 195**, SRO found that the school district violated its child find obligations:

> I note that notwithstanding that the district may have had appropriate procedures in place for identifying students suspected of having a disability, the evidence shows in this case that the parents affirmatively requested that the district evaluate the student and determine whether she was eligible for special education under the IDEA, and the district still failed to follow procedures and either (1) evaluate the student and convene the CSE or (2) inform the parents that it was denying their request to evaluate the student for eligibility under the IDEA and provide prior written notice to the parents explaining why the district refused to conduct an initial evaluation and the information that was used as the basis for the decision (34 CFR § 300.503[a], [b]; 8 NYCRR 200.5[a]; *Letter to Zirkel,* 56 IDELR 140 [OSEP 2011]).

E. EMOTIONAL DISTURBANCE CLASSIFICATION

1. Adverse Impact on Educational Performance

(a) In ***J.S. v. Scarsdale UFSD*, 826 F. Supp. 2d 635, 58 IDELR 16 (S.D.N.Y. 2011),** prior to the student's January 2009 removal from the public school and placement in an out-of-state residential program, the student exhibited: (a) an academic decline; (b) evolving homework problems; (c) attendance issues; (d) difficulty getting out of bed; (e) and increased negativity (according the director of the alternative school located in the public school). In addition, the student acknowledged in October 2006 that she consumed "a large amount of Tylenol, in her words . . . 'because I wanted to kill myself'". The court found that "A suicide attempt and repeated truancy might qualify as 'inappropriate types of behavior or feelings under normal circumstances.' [citations omitted] But, besides the fact that J.G. did not, so far as the District reasonably should have known, suffer from her emotional difficulties 'to a marked degree' adversely affecting her educational performance, J.G. also did not suffer from these problems over a 'long period of time.'" Accordingly, the school district (district of residence) did not violate its child find prior to the parents' removal of the student from the school district.

(b) In ***Application of Student with a Disability*, Appeal No. 10-106, 56 IDELR 148, 111 LRP 12772 (January 24, 2011)**, the SRO focused on the 11th grade student's academic success, including straight As in a therapeutic residential placement, and found that her depression, anxiety, anorexia, and suicide attempts did not adversely affect her educational performance. The SRO reversed the IHO's finding that the student was eligible for services under IDEA as a student with an emotional disturbance.

> The greater weight of the testimonial and documentary evidence contained in the hearing record demonstrates that the student's medical/psychiatric conditions, although extremely serious, did not adversely affect her educational performance to the extent that the student required special education and related services in order to learn, or that the student was unable to attend school and access the general curriculum without modification of the content, methodology, or delivery of instruction *(C.B. v. Dep't of Educ.,* 2009 WL 928093 [2d Cir. Apr. 7, 2009]; *N.C. v. Bedford Cent. Sch. Dist.,* 2008 WL 4874535 [2d Cir. Nov. 12, 2008]; *Maus v. Wappingers Cent. Sch. Dist.,* 688 F. Supp. 2d 282, 297-98 [S.D.N.Y. Feb. 9, 2010]; *E.D. v. Bd. of Educ.,* 679 F. Supp. 2d 299, 308-11 [E.D.N.Y. Jan. 8, 2010]). Furthermore, the evidence contained in the hearing record establishes that under the circumstances present in this appeal, a residential placement was not intended or designed to be responsive to the student's learning needs, but rather, was designed to address medical and social/emotional problems severable from the student's learning process *(see Mary T. v. Sch. Dist. of Philadelphia,* 575 F.3d 235, 246 [3d Cir. 2009] *[discussing Kruelle v. New Castle County Sch. Dist.,* 642 F.2d 687, 694 [3d Cir. 1981]]; *Mrs. B. v. Milford Bd. of Educ.,* 103 F.3d 1114, 1120 [2d Cir. 1997] [noting that district's may be responsible to pay for

residential placement when medical needs are created by or intertwined with an educational problem]).

2. Drug Use

In ***Mr. and Mrs. N.C. v. Bedford Cent. Sch. Dist.*, 51 IDELR 149, 108 LRP 65077 (2d. Cir. 2008)**, the Second Circuit affirmed the Southern District of New York determination that a student with behavior problems was not eligible for special education as a student with an emotional disturbance pursuant to IDEA since his behavioral problems stemmed from drug use and there was no evidence that his inappropriate behaviors had an adverse effect on his educational performance. The Second Circuit relied on: (1) the district court's finding that that the parents had not produced sufficient evidence of an "'accompanying emotional disturbance beyond bad conduct'. [*N.C ex rel. M.C. v. Bedford Cent. School Dist.*, 473 F. Supp. 2d 532, 545 (S.D.N.Y. 2007)]."; and (2) insufficient evidence that student's behaviors had an adverse affect on his educational performance, despite a ten point decline in his GPA. Finally, the Second Circuit concluded that record did not support that parents' position that the GPA decline was attributable to an emotional disturbance as opposed to [student's] drug use."

3. "Socially Maladjusted"

In ***W.G. v. New York Cty. Dept. of Educ.*, 801 F. Supp. 2d 142, 111 LRP 35770 (S.D.N.Y. 2011)**, the court found that the record did not support the presence of an emotional disturbance where student's academic problems were found to be the result of truancy and his school refusal was the product of "a conduct disorder, narcissistic personality tendencies and substance abuse rather than of depression." The court explained:

> Some courts have focused on conduct disorder as opposed to mood disorder diagnoses in drawing the distinction; some use the nomenclature of "juvenile delinquency." However it is parsed, the distinction between emotional disturbance and other underlying social or behavior problems is significant -- the IDEA does not require school districts to undertake the responsibility of, for instance, forcing a child physically to attend school when the child is a neither unable to attend nor impeded by an emotional condition to a marked degree in following through on his ability to attend As the Fourth Circuit explained in *Springer v. Fairfax Co. Sch. Bd.,* 134 F.3d 659, 664 (4th Cir. 1998):
>
> > Courts and special education authorities have routinely declined ... to equate conduct disorders or social maladjustment with serious emotional disturbance ... . Indeed, the regulatory framework under IDEA pointedly carves out "socially maladjusted" behavior from the definition of serious emotional disturbance. This exclusion makes perfect sense when one considers the population targeted by the statute. Teenagers, for instance, can be a wild and unruly bunch.

> Adolescence is, almost by definition, a time of social maladjustment for many people ... . Any definition that equated simple bad behavior with serious emotional disturbance would exponentially enlarge the burden IDEA places on state and local education authorities. Among other things, such a definition would require the schools to dispense criminal justice rather than special education. (citations omitted.)

4. Student Discipline

In ***Application of Student with a Disability*, Appeal No. 09-117 (December 4, 2009)**, the SRO found that a student with a history of angry outbursts and a long list of disciplinary violations who was suspended for threatening to kill a student did not satisfy the criteria for classification as a student with an emotional disturbance because he did not meet one of the requisite criteria; the SRO noted that even if the student had met one of the necessary criteria, he not require special education services as a result.

F. BULLYING & CHILD FIND OBLIGATION

In a recent ***Dear Colleague Letter***, the Office of Special Education and Rehabilitative Services (OSERS), Office of Special Education Programs, 113 LRP 33753 (August 20, 2013) wrote:

> Due to the characteristics of their disabilities, students with intellectual, communication, processing, or emotional disabilities may not understand the extent to which bullying behaviors are harmful, or may be unable to make the situation known to an adult who can help. In circumstances involving a student who has not previously been identified as a child with a disability under the IDEA, **bullying may also trigger a school's child find obligations under the IDEA**. 34 C.F.R. §§ 300.111, 300.201. *(emphasis added)*.

G. LENIENCY WITH RESPECT TO CHILD FIND OBLIGATIONS TO STUDENTS WITH EMOTIONAL DISTURBANCES

1. In ***Huntsville City Bd. of Educ.*, 22 IDELR 931, 22 LRP 3238 (SEA AL 1995)**, the high school student's behaviors and academic performance fluctuated, and heightened anxiety which was apparent in the home, was not communicated the school district. Finding that the school district did not violate its child find obligations, the administrative officer wrote:

> While it is true that under IDEA a local education agency is required to "identify, locate and evaluate handicapped children" that principle does not require that it 'guess' which children suffer from a handicap that renders them incapable of progressing in their education. Nor does that principle eliminate the obligation of parents and others to assist school officials in identifying children in need of special services. *Id.*

2. Similarly, in ***Montgomery Cty. Pub. Schools*, 110 LRP 28793 (MSDE-MONT-OT-09-42208 January 22, 2010)**, the administrative law judge found that the school district did not violate its child find obligations, determining that the school district had no reason to suspect that the student had anxiety that caused extensive absences from class.