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) tailored to meet the unique needs of children with disabilities and “prepare them for further education, employment, and independent living.” All services provided under the IDEA are to be at no cost to the parents or student. The right to a FAPE extends to all students in the state between the ages of 3 and 21 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.

1. Termination of FAPE

The right to a FAPE ends when a student graduates with a regular high school diploma. 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. Graduation with a high school diploma is considered a change of placement, requiring notice and the right to an impartial hearing. It does not require a reevaluation of the student.

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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).
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(c)(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.” 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. Procedural violations will render an IEP invalid only if it impeded the child’s right to a free appropriate public education. 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.

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 is *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley.*

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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.”

Accordingly, students with disabilities are entitled to a “basic floor of opportunity” 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.” However, the educational benefit provided to the student must be more than “trivial”. Most of the courts addressing this issue have found that the IDEA requires that the educational benefit be “meaningful”.

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.” 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.
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.”

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. The IDEA currently directs that students with disabilities must be prepared “for further education, employment and independent living.” Students covered by the Act are expected to meet, to the “maximum extent possible,” “the challenging expectations that have been established for all children.”

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:

[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 [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

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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.


the use of supplementary aids and services cannot be achieved satisfactorily."

Students with disabilities cannot be removed from “age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.”

“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.”

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.”

Therefore, students must be “educated in the school [they] would attend if nondisabled,” unless the IEP “requires some other arrangement.”

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.”

Also, schools must ensure that supplementary services are available “to be provided in conjunction with regular class placement.”

The statute defines supplementary aids and services 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

26 34 C.F.R. § 300.116(e).
29 34 C.F.R. § 300.116(c).
30 34 C.F.R. § 300.115.
31 Id.
with nondisabled children to the maximum extent appropriate.”

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.

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.*, when determining whether a student proposed placement meets the least restrictive environment requirement. 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.

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.

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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. 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.

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. The continuum must include instruction in regular classes, special classes, special school, home instruction and instruction in hospitals and institutions. A state’s funding mechanism must not favor placements that result in a denial of the LRE requirement.

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. 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 or a person designated by a school district

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.\textsuperscript{46} The referral must be made in writing to the administrator in charge of the Committee on Special Education (CSE),\textsuperscript{47} “or to the building administrator [the principal] of the school where the student attends.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{51} The purpose of the evaluation is to assess the relative contribution of cognitive, behavioral,
physical and developmental factors and to obtain information about the student’s prospects for participating in the general curriculum.\textsuperscript{52}

New York’s regulations mandate specific assessments be completed for the comprehensive evaluation.\textsuperscript{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.\textsuperscript{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.\textsuperscript{55}

The results of the evaluation are to be provided to the parents in their “native language or mode of communication.”\textsuperscript{56} An initial evaluation must be completed within 60 calendar days of receiving a parent’s consent to the evaluation,\textsuperscript{57} and procedures must be in place to expeditiously complete an evaluation for a student who moves into a school district.\textsuperscript{58} Further, the CSE cannot delegate the evaluation to personnel at a proposed site after placement has been effected.\textsuperscript{59}

\textsuperscript{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.

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{55}8 N.Y.C.R.R. § 200.4(b)(2).

\textsuperscript{56}8 N.Y.C.R.R. § 200.4(b)(6)(i)(d)(xii).

\textsuperscript{57}8 N.Y.C.R.R. § 200.4(b)(7).

\textsuperscript{58}8 N.Y.C.R.R. § 200.4(b)(6)(i)(d)(xvii).

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. The notice has specific requirements. Federal and New York State regulations provide that a parent’s consent is voluntary and may be revoked at any time. 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.” For a student previously identified, the district must seek parental consent prior to any reevaluation. 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.

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. In New York, the CSE fulfills this function for school-age students. Each school district must establish “committees and/or subcommittees on special education as necessary to ensure timely evaluation and placement of students.” The CSE is responsible for evaluating and

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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).


63 8 N.Y.C.R.R. § 200.1(f)(3); 34 C.F.R. § 300.300(c)(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

\(^{69}\) 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

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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).


77 8 N.Y.C.R.R. § 200.3(f).

78 8 N.Y.C.R.R. § 200.3(f)(1)-(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. 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.

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 from the date that the parent signed the consent to evaluate the student to implement the placement on the IEP.

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.” New York State regulations require that the parent receives notice at least five days prior to the meeting. The notice must list the people expected to attend the meeting, invite the parent “to participate as a member of the [CSE]” and inform the parent of his or her rights.

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. 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.

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. 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, 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; lack of appropriate instruction in math; or limited English proficiency. 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.\textsuperscript{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.\textsuperscript{93} The parent must be given notice of this determination.\textsuperscript{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).\textsuperscript{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).\textsuperscript{96} According to NYS Education Department, the IEP must be developed in a particular sequence:\textsuperscript{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;\textsuperscript{98}
   - (4) Identify measurable postsecondary goals and transition needs;\textsuperscript{99}

\textsuperscript{92} Educ. Law § 4401(2)(k); 8 N.Y.C.R.R. § 200.6(e)(5).

\textsuperscript{93} 8 N.Y.C.R.R. § 200.4(d)(1)(i).

\textsuperscript{94} 8 N.Y.C.R.R. § 200.4(d)(1)(ii).

\textsuperscript{95} 8 N.Y.C.R.R. § 200.4(d)(1)(i).

\textsuperscript{96} See CPSE.

\textsuperscript{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.).

\textsuperscript{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.”


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;\textsuperscript{110}

(16) Review and if appropriate revise IEP;\textsuperscript{111}

(17) Conduct Reevaluation.\textsuperscript{112}

Starting in 2012, all public schools must use a model IEP form created by the New York State Department of Education.\textsuperscript{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.\textsuperscript{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.\textsuperscript{115} The parents must also be given a copy of the IEP at no charge.\textsuperscript{116}

2. \textbf{Annual Review}

Federal and state regulations require that the IEP be reviewed at least annually.\textsuperscript{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.\textsuperscript{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.\textsuperscript{119}

\begin{footnotesize}
\begin{enumerate}
\item See infra III.F., “Placement Requirements.”
\item 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.
\item See infra III.E.3.e.3. and 4.
\item 8 N.Y.C.R.R. § 200.4(d)(2)(i)–(xii). See also infra III.a.3., “Reevaluation.”
\item 34 C.F.R. § 300.323(d)(1).
\item 34 C.F.R. § 300.323(d)(2).
\item 34 C.F.R. § 300.322(f).
\item 34 C.F.R. § 300.343(c)(1); 8 N.Y.C.R.R. § 200.4(f).
\item 8 N.Y.C.R.R. § 200.4(e)(4).
\item 8 N.Y.C.R.R. § 200.4(d).
\end{enumerate}
\end{footnotesize}
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.” 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

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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.


123 *Id.*


options that the IEP Team considered and the reasons why those options were rejected.”\footnote{127} When the parent’s primary language is not English, the notice must be in the dominant language spoken in the home.\footnote{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.\footnote{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.\footnote{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.”\footnote{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.\footnote{132} In addition, districts must provide students with disabilities with free transportation to and from special classes or programs.\footnote{133}

\begin{footnotes}
\item[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).
\item[128] 8 N.Y.C.R.R. § 200.5(a)(4).
\item[129] Educ. Law § 4402(2)(b)(2).
\item[130] 8 N.Y.C.R.R. § 200.4(e).
\item[131] Educ. Law § 4401(2)(a).
\item[132] Educ. Law § 4401(2)(a)–(n).
\item[133] Educ. Law § 4402(2)(d)(4)(a).
\end{footnotes}
A school district is responsible for securing an appropriate placement and may not delegate this responsibility to the parents or BOCES. 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.”

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. 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.

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. All teachers and supervisors in such programs must be certified in appropriate areas of special education. 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.

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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.”

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.” The pupil’s functioning level, individual needs and annual goals in each of these four areas must be included on the IEP. 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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142 8 N.Y.C.R.R. § 200.6(f)(4), (h)(2).

(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].

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.

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(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

145 8 N.Y.C.R.R. § 200.6(a)(3).
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. 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. “The composition of the instructional groups . . . [must] be based on the similarity of the individual needs of the students” in the resource room. Students may also receive both consultant teacher and resource room services.

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 operating on a period basis, the maximum cannot exceed 25. A district may apply to the commissioner for a variance from the maximum sizes of the instructional groups.

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). 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(b)(4).
extra adult in the classroom, the maximum is 12 students with one teacher and at least one aide (12:1+1).\textsuperscript{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).\textsuperscript{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).\textsuperscript{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.\textsuperscript{161}

The chronological age range in self-contained classes for students under 16 years of age cannot exceed 36 months.\textsuperscript{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).\textsuperscript{163} A district may receive a variance from the commissioner of education for both the class size and age limitations upon “documented educational justification.”\textsuperscript{164}

Children in self-contained special classes must be placed on the basis of similar individual needs.\textsuperscript{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

\begin{itemize}
\item \textsuperscript{158} 8 N.Y.C.R.R. § 200.6(h)(4)(i).
\item \textsuperscript{159} 8 N.Y.C.R.R. § 200.6(h)(4)(ii)(b).
\item \textsuperscript{160} 8 N.Y.C.R.R. § 200.6(h)(4)(ii)a.
\item \textsuperscript{161} 8 N.Y.C.R.R. § 200.6(h)(4)(iii).
\item \textsuperscript{162} 8 N.Y.C.R.R. § 200.6(h)(5).
\item \textsuperscript{163} Id.
\item \textsuperscript{164} 8 N.Y.C.R.R. § 200.6(h)(6).
\item \textsuperscript{165} 8 N.Y.C.R.R. § 200.6(h)(2).
\end{itemize}
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 days170) 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).
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).
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,\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{177} The student is first evaluated at a school designated by the Commissioner.\textsuperscript{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.\textsuperscript{179} For state-supported schools, the results are forwarded to the CSE in the district in which the parents reside, which makes the

\textsuperscript{173} 8 N.Y.C.R.R. § 200.6(j)(3)(ii).
\textsuperscript{174} 8 N.Y.C.R.R. § 200.6(j)(3)(iii), (iv).
\textsuperscript{175} 8 N.Y.C.R.R. § 200.6(j)(4).
\textsuperscript{176} 8 N.Y.C.R.R. § 200.6(j)(5).
\textsuperscript{177} 8 N.Y.C.R.R. § 200.7(d)(1).
\textsuperscript{178} Id.
\textsuperscript{179} 8 N.Y.C.R.R. § 200.7(d)(1)(i).
recommendation as to whether the student should be appointed. The parents may appeal the recommendations of the school or CSE or the decision of the Commissioner.

6. Transition Services

The IDEA requires that school districts plan for students’ transition from school to adulthood. 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.” 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.

In New York, commencing when a student is age 15 (or younger, if appropriate), the district must conduct comprehensive transition planning. 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

180 8 N.Y.C.R.R. § 200.7(d)(1)(ii).
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).
post-school adult living objectives, and, if appropriate, acquisition of daily living skills and functional vocational adult evaluation.\textsuperscript{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.\textsuperscript{188}

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.\textsuperscript{189}

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.\textsuperscript{189} 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.\textsuperscript{190}

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

\textsuperscript{188} Educ. Law § 4401(9); 8 N.Y.C.R.R. § 200.1(fff).
\textsuperscript{189} Educ. Law § 4401(2)(n).
\textsuperscript{190} 8 N.Y.C.R.R. § 200.4(d)(2)(ix)(c).
\textsuperscript{191} 8 N.Y.C.R.R. § 200.4(d)(4)(i)(c).
\textsuperscript{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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194 Id.

195 Id. at 36.

196 Id.

197 Id. at 37.
H. Special Education Services for Children From Birth Through five years

1. Early Intervention Services

All Infants and toddlers with disabilities, from birth age through two years, are eligible for early intervention services under part C of IDEA. Disabled toddlers and infants are entitled to a wide range of services from qualified personnel 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. The individualized family service plan is required to have specific content such as the child’s current levels of development, and a statement of goals the child is expected to achieve. The plan is evaluated once per year, and the family is provided with a review at least every six months. Parental consent is needed before the implementation of any early intervention service. 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.

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.

204 20 U.S.C. § 1436(d).
administrative decision in state or federal court. 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.

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

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. A child is eligible to receive preschool special education services on or before his or her third birthday. The process begins with a written referral to the administrator in charge of special education services. Upon receipt of the referral, the school district must contact the parent to obtain consent to evaluate the student. After receiving consent, the school district is required to provide the parent with a list of approved evaluators within their geographic region. Following the parents’ selection, the district has to arrange for the evaluation to take place. 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

214 8 N.Y.C.R.R. § 200.1(mm)(2).
216 See supra note 99.
218 Educ. Law § 4410(4)(b).
special education services to the board of education.\textsuperscript{220} Parents are entitled to receive a copy of the evaluation\textsuperscript{221} and the recommendation.\textsuperscript{222} If the parents disagree with the evaluation, they may seek an independent educational evaluation (IEE) at the public’s expense.\textsuperscript{223}

The IEP is developed at a meeting of the CPSE,\textsuperscript{224} and any services provided to the child in the IEP have to be administered in the LRE.\textsuperscript{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.\textsuperscript{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.\textsuperscript{227} The IEP has to be reviewed no less than once a year.\textsuperscript{228}

\begin{itemize}
\item \textsuperscript{220} 8 N.Y.C.R.R. § 200.16(e)(1).
\item \textsuperscript{221} 8 N.Y.C.R.R. § 200.16(d)(2).
\item \textsuperscript{222} 8 N.Y.C.R.R. § 200.16(e)(2).
\item \textsuperscript{223} 8 N.Y.C.R.R. § 200.16(d)(3) see supra III.E.3.e.7., “Independent Evaluation at District Expense.”
\item \textsuperscript{224} 8 N.Y.C.R.R. § 200.16(e)(4).
\item \textsuperscript{225} 8 N.Y.C.R.R. § 200.16(e)(3)(i).
\item \textsuperscript{226} 8 N.Y.C.R.R. § 200.16(f)(1). II.E.2., “Least Restrictive Environment.”
\item \textsuperscript{227} 8 N.Y.C.R.R. § 200.16(f).
\item \textsuperscript{228} 8 N.Y.C.R.R. § 200.16(g).
\end{itemize}