



TO: The Honorable the Members of the Board of Regents

FROM: Angelica Infante-Green *A. Infante - Green*

SUBJECT: Revised Proposed Amendment of Sections 200.4, 200.16 and 200.20 of the Commissioner's Regulations Relating to Recommendations for One-to-One Aides for Preschool and School-Age Students with Disabilities and Preschool Special Education Programs and Services

DATE: June 6, 2016

AUTHORIZATION(S): *Margaret E. Eis*
SUMMARY

Issue for Decision (Consent Agenda)

Should the Board of Regents adopt the revised proposed amendment of sections 200.4, 200.16 and 200.20 of the Regulations of the Commissioner of Education relating to recommendations for one-to-one aides for preschool and school-age students with disabilities and preschool special education programs and services?

Reason(s) for Consideration

Review of policy.

Proposed Handling

The revised proposed amendment will be submitted to the full Board for adoption at the June 2016 meeting.

Procedural History

In October 2015, the Board discussed a proposed amendment to sections 200.4, 200.9, 200.16 and 200.20 of the Regulations of the Commissioner of Education that would improve programs and outcomes for students with disabilities. A Notice of Proposed Rule Making was published in the State Register on November 10, 2015, for a 45-day public comment period.

The proposed amendment was revised in response to public comment, and a Notice of Revised Proposed Rulemaking was published in the State Register on April 6, 2016 for a 30-day public comment period. A copy of the revised proposed amendment and an Assessment of the 30-day Public Comment are attached. Supporting materials are available upon request from the Secretary to the Board of Regents.

Background Information

Policy changes to improve outcomes for preschool students with disabilities were first introduced to the P-12 Education Committee at the April 2015 meeting of the Board of Regents. Stakeholder input on the suggested policy changes were sought and proposed regulation were discussed at the October 2015 meeting of the Board of Regents. After a 45-day public comment period, proposed regulations were revised and published for an additional 30-day public comment period. Upon review of public comment, no further changes to the revised proposed amendment are recommended.

The proposed amendment submitted for approval by the Board of Regents:

- Amends section 200.4(d)(3) to require both Committees on Special Education (CSE) and Committees on Preschool Special Education (CPSE) to make certain considerations prior to determining that a student needs a one-to-one aide; clarifies that the assignment of shared one-to-one aides is allowable at the discretion of the school, and the duties of the individual assigned as a student's one-to-one aide are consistent with the duties of teacher aides or teaching assistants consistent with section 80-5.6 of the Regulations of the Commissioner of Education.
- Amends section 200.16(i)(3)(ii)(a) to require the CPSE recommendation included in a student's individualized education program (IEP) to identify the setting where special education itinerant services (SEIS) will be delivered; specify the frequency, duration, intensity and location of direct SEIS; and for students who attend a regular early childhood program, specify the frequency, duration, and location of indirect SEIS, if any.
- Amends section 200.16(i)(3)(iii) to ensure that a special class shall include instructional and related services, as specified in the student's individualized education program (IEP).
- Amends sections 200.20(b) relating to the responsibilities of approved preschool providers to:
 - Ensure that SEIS is provided, consistent with the student's IEP, as an itinerant service at a regular early childhood program or the student's home or other child care location identified by the parent;
 - Establish qualifications for an educational director of an approved preschool program hired on or after September 1, 2016 and clarify that an approved preschool program is not required to hire an educational director in addition to the executive director when the executive director provides on-site direction of the program;

- Require that each approved preschool provider ensure the make-up of missed services occurs, consistent with the duration and location specified in the IEP, within 30 days of the missed session unless there is a child-specific reason that the make-up cannot be provided within 30 days;
- Establish program standards for the instruction of preschool students with disabilities, including standards for instruction in the New York State Prekindergarten Learning Standards and program standards for positive behavioral supports, which includes a prohibition on the suspension or expulsion of preschool students with disabilities from their approved special education programs;
- Ensure that approved preschool providers have procedures implemented to promote the active engagement of parents and/or guardians in the education of their children and that include support to children and their families for a successful transition into kindergarten; and
- Require approved preschool special education programs to conduct regular progress monitoring of student achievement data over time to adjust, as appropriate, the student's instructional program.

Recommendation

It is recommended that the Board of Regents take the following action:

VOTED: That paragraph (3) of subdivision (d) of section 200.4; subparagraph (ii) of paragraph (3) of subdivision (i) of section 200.16; subparagraph (iii) of paragraph (3) of subdivision (i) of section 200.16; and subdivision (b) of section 200.20 be amended, as submitted, effective June 29, 2016.

Timetable for Implementation

If adopted at the June Regents meeting, the revised proposed amendment will generally become effective June 29, 2016, with certain requirements delayed to provide sufficient time for required implementation.

Attachments

AMENDMENT TO THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to Education Law sections 101, 207, 305, 308, 3214(3), 4402, 4403 and 4410.

1. Paragraph (3) of subdivision (d) of section 200.4 of the Regulations of the Commissioner of Education is amended, effective June 29, 2016, to read as follows:

(3) Consideration of special factors. The CSE shall:

(i) . . .

(ii) . . .

(iii) . . .

(iv) . . .

(v) consider whether the student requires assistive technology devices and services, including whether the use of school-purchased assistive technology devices 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; [and]

(vi) include a statement in the IEP if, in considering the special factors described in this paragraph, 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; and

(vii) prior to the IEP recommendation of assignment of additional supplementary school personnel (or one-to-one aide) to meet the individualized needs of a student with a disability, consider:

(a) the management needs of the student that would require a significant degree of individualized attention and intervention;

(b) the skills and goals the student would need to achieve that will reduce or eliminate the need for the one-to-one aide;

(c) the specific support (e.g., assistance with personal hygiene or behaviors that impede learning) that the one-to-one aide would provide for the student;

(d) other supports, accommodations and/or services that could support the student to meet these needs (e.g., behavioral intervention plan; environmental accommodations or modifications; instructional materials in alternate formats; assistive technology devices; peer-to-peer supports);

(e) the extent (e.g., portions of the school day) or circumstances (e.g., for transitions from class to class) the student would need the assistance of a one-to-one aide;

(f) staff ratios in the setting where the student will attend school;

(g) the extent to which assignment of a one-to-one aide might enable the student to be educated with nondisabled students and, to the maximum extent appropriate, in the least restrictive environment;

(h) any potential harmful effect on the student or on the quality of services that he or she needs that might result from the assignment of a one-to-one aide; and

(i) the training and support that shall be provided to the one-to-one aide to help the one-to-one aide understand the student's disability-related needs, learn effective strategies for addressing the student's needs, and acquire the necessary skills to support the implementation of the student's individualized education program.

Nothing in this subparagraph shall be construed to prohibit or limit the assignment of shared one-to-one aides at the discretion of the school to meet the individualized needs of students whose IEPs include the recommendation for one-to-

one aides. The duties of a teacher aide or teaching assistant providing individualized support to a student with a disability shall be consistent with the duties prescribed pursuant to section 80-5.6 of this Title.

2. Subparagraph (ii) of paragraph (3) of subdivision (i) of section 200.16 of the Regulations of the Commissioner of Education is amended, effective June 29, 2016, to read as follows:

(ii) Special education itinerant services as defined in section 4410(1)(k) of Education Law are services provided by a certified special education teacher of an approved program on an itinerant basis at a site determined by the board including but not limited to an approved or licensed prekindergarten or head start program; the student's home; a hospital; a State facility; or a child care location as defined in section 4410 of the Education Law. If the board determines that documented medical or special needs of the preschool student indicate that the student should not be transported to another site, the student shall be entitled to receive special education itinerant services in the preschool student's home. Such services shall be for the purpose of providing specialized individual or group instruction and/or indirect services to preschool students with disabilities. Indirect services means consultation provided by a certified special education teacher to assist the child's teacher in adjusting the learning environment and/or modifying their instructional methods to meet the individual needs of a preschool student with a disability who attends an early childhood program. An *early childhood program*, for purposes of this paragraph, means a regular preschool program or day care program approved or licensed by a governmental agency in which a child under the age of five attends. Special education itinerant services shall be provided to a

preschool student with a disability for whom such services have been recommended as follows:

(a) the service shall be recommended by the Committee on Preschool Special Education and shall be included in the student's individualized education program. Such recommendation shall identify the setting where such services would be delivered; specify the frequency, duration, intensity and location of direct special education itinerant services; and, for students who attend a regular early childhood program, specify, if any, the frequency, duration and location for the provision of indirect special education itinerant services as such term is defined in this subparagraph;

- (b) . . .
- (c) . . .
- (d) . . .
- (e) . . .

3. Subparagraph (iii) of paragraph (3) of subdivision (i) of section 200.16 is amended, effective June 29, 2016, as follows:

(iii) Special classes shall be provided on a half-day or full-day basis pursuant to section 200.1(p), (q), and (v) of this Part and in accordance with section 200.6(h)(2) and (3) or section 200.9(f)(2)(x) of this Part and shall assure that:

- (a) . . .
- (b) . . .
- (c) such services shall be provided for not less than two and one half hours per day, two days per week; and

(d) consistent with the requirements of section 200.20(a)(9) of this Part, the special class shall include instructional services and related services, as specified in the student's individualized education program.

4. Subdivision (b) of section 200.20 is amended, effective June 29, 2016, as follows:

(b) Preschool programs funded pursuant to section 4410 of the Education Law shall also meet the following additional requirements:

(1) . . .

(2) . . .

(3) Each approved preschool program shall ensure that:

(i) . . .

(ii) the executive director or person assigned to perform the duties of a chief executive officer shall reside within a reasonable geographic distance from the program's administrative, instructional and/or evaluation sites to ensure appropriate oversight of the program; and

(iii) if paid as a full time executive director, the executive director shall be employed in a full-time, full-year position and shall not engage in activity that would interfere with or impair the executive director's ability to carry out and perform his or her duties, responsibilities and obligations.

(4) Each program approved to provide special education itinerant services shall ensure that such service is provided, consistent with the recommendations in the students' individualized education programs, as an itinerant service to the preschool student at a regular early childhood program or the student's home or other child care

location identified by the parent, consistent with the requirements of section 200.16(i)(3)(ii) of this Part.

(5) Each approved preschool program shall ensure that the educational director, if hired on or after September 1, 2016, shall possess a NYS teaching certificate pursuant to section 80-3.3 of this Title valid for classroom teaching services to students with disabilities, birth-grade 2, or certification in early childhood education, or possesses New York State certification or licensure in speech-language pathology, psychology, occupational or physical therapy or another related services field as such term is defined in section 200.1(qq) of this Part; and, consistent with the requirements of section 80-3.10 of this Title, shall hold New York State certification as a School Building Leader or School District Leader or School Administrator/Supervisor. Nothing in this paragraph shall require that an approved preschool program hire an educational director in addition to the executive director, when the executive director otherwise provides the on-site direction of the program.

(6) Make-up of missed services. Each preschool provider shall, consistent with Department guidelines, ensure the make-up of missed services occurs, consistent with the duration and location specified in the IEP, within 30 days of the missed session unless there is a documented child-specific reason why the make-up session could not be provided within 30 days.

(7) Program standards for instruction of preschool students with disabilities. Each approved provider shall, as applicable, ensure that preschool students with disabilities receive instruction and positive behavioral supports that are based on peer-reviewed or evidence-based practices and consistent with the standards in this paragraph.

(i) Instructional standards for approved preschool special class programs.

(a) By not later than September 1, 2017, providers shall adopt and implement curricula aligned with the New York State Prekindergarten Learning Standards, which ensures continuity with instruction in the early elementary grades; and shall provide early literacy and emergent reading programs based on developmentally appropriate, effective and evidence-based instructional practices.

(b) The instructional program for preschool students with disabilities shall be based on the ages, interests, strengths and needs of the children.

(c) Procedures shall be implemented to promote the active engagement of parents and/or guardians in the education of their children. Such procedures shall include support to children and their families for a successful transition into kindergarten.

(ii) Program standards for positive behavioral supports for approved preschool special class programs.

(a) By not later than September 1, 2017, providers shall establish and implement a program-wide system of positive evidence-based practices to support social-emotional competence and teach social-emotional skills to preschool students, which shall include:

(1) universal supports for all children through nurturing and responsive relationships and high quality environments;

(2) practices that are targeted social-emotional strategies to prevent problem behaviors; and

(3) practices related to individualized intensive interventions.

(b) Except as provided pursuant to section 201.8 of this Title, no preschool student with a disability may be suspended, expelled or otherwise removed by the provider from an approved preschool special education program or service because of the student's behavior prior to the transfer of the student to another approved program recommended by the committee on preschool special education.

(iii) Progress Monitoring. Approved preschool special education programs shall conduct regular progress monitoring of student achievement data over time to adjust, as appropriate, the student's instructional program and, as necessary, to request meetings of the CPSE to consider changes to the student's individualized education program. The program shall provide regular written reports of student progress to the student's parent and committee on preschool special education, consistent with frequency or timetable for such periodic reports on the progress the student is making toward the annual goals as identified in the student's individualized education program.

ASSESSMENT OF PUBLIC COMMENT

Since publication of a Notice of Revised Rule Making in the State Register on April 6, 2016, the State Education Department (SED) received the following comments on the proposed amendment.

One-to-One Aides

COMMENT:

Commenters supported the revised amendment to add considerations of the extent to which a 1:1 aide might enable a student to be educated with nondisabled students and in the least restrictive environment, behaviors that impede learning and training needed by the 1:1 aides. Recommendations were made that NYSED provide training to special education administrators to understand their responsibilities.

DEPARTMENT RESPONSE:

Comments are supportive and therefore no response is necessary.

COMMENT:

One commenter recommended that the rule be revised to replace the term 1:1 aide with "IEP-recommended assistant or aide" because the term "one-to-one aide" is not consistent with the concept of a shared assistant or aide.

DEPARTMENT RESPONSE:

The proposed regulation clarifies that the term "1:1 aide" means the assignment of supplementary school personnel to meet the individualized needs of a student with a disability. Supplementary school personnel are defined in section 200.1(hh) of the Regulations of the Commissioner of Education and mean a teacher aide or a teaching assistant as described in section 80-5.6(a) through (d). Nothing in the proposed rule would prohibit an individual school district from using another term to describe this

service such as “IEP-recommended assistant or aide”. Moreover, a school may determine that the same 1:1 aide can meet the individualized needs of more than one student, provided that such shared services are consistent with each student’s IEP.

COMMENT:

Require that the IEP specify the maximum number of students that can be shared simultaneously with the aide/assistant, so long as the needs of the students can be adequately met, and document ratios in the IEP.

DEPARTMENT RESPONSE:

The school must implement the IEP recommendation to meet a student’s individualized needs. A school may determine that the same 1:1 aide can meet the individualized needs of more than one student, provided that such shared services are consistent with each student’s IEP.

COMMENT:

Regulations contemplate only select instances during the school day when a 1:1 aide would be warranted. Reaffirm that all factors listed must be considered.

DEPARTMENT RESPONSE:

There is nothing in the proposed rule that would contemplate that 1:1 aide services only be available for portions of the school day.

The proposed rule requires that each of the considerations outlined in the rule be made.

COMMENT:

Unclear whether the provisions of the proposal extend to preschool, as section 200.4 applies to school-age students.

DEPARTMENT RESPONSE:

Section 200.4 applies to all students with disabilities, including preschool students with disabilities, except where such requirements are inconsistent with the requirements in section 200.16. Section 200.16(e)(3) states that the IEP recommendation shall be developed in accordance with section 200.4(d)(2), (3) and (4). The proposed rule relating to 1:1 aides is in section 200.4(d)(3), and therefore applies to preschool students with disabilities.

Provision of SEIS

COMMENT:

Authorize providers to bill for indirect SEIS in 30-minute intervals based on a cumulative weekly total, as general education teachers aren't available for a full 30-minute session during the school day.

DEPARTMENT RESPONSE:

Comment is beyond the scope of proposed regulations and therefore no comment is warranted.

COMMENT:

Committee on Preschool Special Education (CPSE) chairpersons should receive training on indirect SEIS and new requirements regarding the IEP. Recommend NYSED encourage use of indirect SEIS when promoting integration.

DEPARTMENT RESPONSE:

The Department will issue guidance on the proposed regulations when approved by the Board of Regents. Moreover, the availability of indirect SEIS is not new and is part of the new CPSE chairperson training delivered by the State's special education technical assistance providers.

COMMENT:

The proposed rule should be revised to further define what type of setting is included under each possible location (regular early childhood program, student's home, other child care location chosen by the parent) in 200.20(b)(4). CPSE chairs have inconsistent interpretations of "other child care location" and the difference between site and setting. Provide sufficient phase in time so that current IEPs would not be required to be amended to meet this requirement.

DEPARTMENT RESPONSE:

The settings listed in the regulations are self-explanatory or, in the case of "child care location", clearly defined in section 4410 of the Education Law to mean "a child's home or a place where care for less than twenty-four hours a day is provided on a regular basis and includes, but is not limited to, a variety of child care services such as day care centers, family day care homes and in-home care by persons other than parents." When adopted, the regulations will become effective for IEPs developed on or after the effective date of the proposed regulation. Retroactive changes to IEPs will not be required.

COMMENT:

Include a statement authorizing CPSE chairs to identify an alternate location, mutually agreed upon by the parent, where SEIS could be provided only when the regular early childhood program is closed.

DEPARTMENT RESPONSE:

There is nothing in the proposed amendment that would prohibit the CPSE from designating on a student's IEP an alternate location for SEIS to be provided when the regular early childhood program is closed.

COMMENT:

Require that SEIS only be provided during the regular school day.

DEPARTMENT RESPONSE:

The Department declines to make the recommended revision because, if a student's IEP requires extended day services, a student may need SEIS beyond the regular school day. However, most students with disabilities can and should receive their special education services during the school day.

Special Class and Related Services

COMMENT:

Some related services, such as parent counseling and training, may not be able to occur during the school day. The provision of both home-based and school-based services is appropriate for some children.

DEPARTMENT RESPONSE:

Comments are supportive in nature and no response is necessary.

COMMENT:

The proposed rule does not clarify that all instructional and related services specified in IEP must be provided during the school day by the special class program. Allow for exceptions where documentation demonstrates that extenuating circumstances prevent delivery of services during the school day and document in IEP.

DEPARTMENT RESPONSE:

The proposed rule requires that each preschool student with a disability be provided with the extent and duration of services described in the IEP and that a student's special class program include both instruction and related services specified in

the IEP. Therefore, unless the IEP indicates otherwise, instructional and related services would be provided during the hours of the student's special class program.

Educational Directors

COMMENT:

Clarify if requirement applies to educational directors who supervise both approved preschool programs and approved private schools, and have no direct responsibility for school building leadership.

DEPARTMENT RESPONSE:

For preschool program educational directors hired on or after September 1, 2016, such individuals must meet the qualifications as prescribed in the proposed amendment. These requirements would only apply to those individuals providing direct on-site oversight of the preschool special education program (i.e., school building leadership).

Make Up Missed Services

COMMENT:

Clarify that 30-day make-up requirement applies to missed related services and provide field guidance. Clarify that missed sessions refers to SEIS and not special class or special class in an integrated setting.

DEPARTMENT RESPONSE:

The proposed amendment applies to all preschool providers approved by the Department. For special class programs, the provisions would apply to related services for students enrolled in such classes. Special class and SCIS programs must have substitute teachers when a student's special education teacher is absent and there is no requirement that if a student is absent from his/her special class program that the

program provides a make-up session for that student. While the proposed rule does not apply to related services provided by individuals on the list maintained by the municipality, it is expected that make up sessions also be provided for related service sessions missed because of provider unavailability as appropriate.

COMMENT:

Time limit of 30 days is too short for students who do not attend program full-time.

DEPARTMENT RESPONSE:

The time limit of 30 days should be sufficient to provide most make-up sessions. If there is a documented child-specific reason why a make-up cannot be provided within 30 days, the provider should discuss with the CPSE how timely make-up sessions can be provided for the student.

COMMENT:

Restore proposed requirement for substitute teachers, as they reduce the need for make-ups.

DEPARTMENT RESPONSE:

Providers are encouraged to use substitute teachers to the maximum extent possible to provide SEIS services, but are not required to do so.

COMMENT:

Clarify that make-ups are only required when provider caused missed service. Require make-up only after provider caused missed service and CPSE determines that it will interfere with student opportunity to meet goals. Have CPSE determine the number of make-ups needed. Require provider to notify CPSE when it is unable to implement IEP due to unavailability of staff.

DEPARTMENT RESPONSE:

Consistent with Department guidance, providers must arrange to provide students with make-up sessions when the missed sessions were due to staff absence and, as appropriate to the individual student's needs, any excused student absences. Providers may, but are not required to, make up sessions for unexcused student absences. Students must have services delivered as indicated in their IEPs; therefore, it would be not only burdensome, but unnecessary for CPSEs to determine the number of make-ups needed. The Department agrees that the CPSE should be notified immediately if a student's IEP is unable to be implemented due to unavailability of staff. There is no need to add this requirement to the proposed regulations, as it is an implicit provider responsibility.

Program Standards: Instructional

COMMENT:

Current rate setting methodology does not support additional funds for staff training and the substitutes needed to provide coverage.

DEPARTMENT RESPONSE:

The proposed amendment does not require that staff attend professional development. Additional resources, including web-based guidance will be considered to provide no-cost access to information necessary to implement the proposed amendment.

Program Standards: Active Engagement of Parents

COMMENT:

Clarify if the Early Childhood Direction Centers and Parent Centers (ECDC) will provide assistance with this requirement or if an alternative plan is in place.

DEPARTMENT RESPONSE:

ECDCs and Special Education Parent Centers are available to provide technical assistance to families and providers relating to this proposed requirement.

Program Standards: Behavioral Supports

COMMENT:

Clarify if prohibiting suspension also applies to students in private preschools who receive related services.

DEPARTMENT RESPONSE:

Program standards for positive behavioral supports, including prohibiting suspension, are requirements for approved preschool special class programs. The proposed amendment does not govern policies and practices in regular early childhood programs.

COMMENT:

Preschools may delay referral for assessment in order to avoid readmission. Providers may be reluctant to accept students that have a history of difficult behaviors. Clarify if a program is obligated to readmit a student that is expelled from preschool and subsequently becomes classified as a preschooler with a disability. Clarify if there will be a provision to provide interim services for a student that has been expelled and is waiting for an opening in a different placement.

DEPARTMENT RESPONSE:

If a current program is not appropriate to meet the needs of a student, the CPSE must act in a timely manner to secure an alternate program/placement consistent with the timelines currently in regulation. The proposed amendment would prohibit suspension or expulsion from the student's special education program or services and

therefore, there would be no need for ‘interim’ services; however, if the location for the delivery of such services is a regular early childhood program from which the student was suspended, the CPSE would need to revise the location for the delivery of the student’s special education services.

Program Standards: Progress Monitoring

COMMENT:

“Regular” is open to interpretation. Unclear how inconsistent practices regarding reporting of progress notes will addressed.

DEPARTMENT RESPONSE:

The proposed amendment requires regular progress monitoring of student achievement data, which must be consistent with frequency or timetable for such periodic reports on the progress the student is making toward the annual goals as identified in the student’s individualized education program.