



# Advocates for Children of New York

Protecting every child's right to learn

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Special Education Office  
New York State Education Department  
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Via e-mail: [Spedpubliccomment@nysed.gov](mailto:Spedpubliccomment@nysed.gov)

## Attention: Draft LRE Policy

Advocates for Children of New York (AFC) appreciates the opportunity to submit comments regarding the State Education Department's draft Least Restrictive Environment policy. AFC's mission is to ensure a high-quality education for New York students who face barriers to academic success, focusing on students from low-income backgrounds. Each year, we help thousands of families of students with disabilities navigate the education system in New York City. As such, we are well positioned to comment on this policy.

We were pleased to see NYSED's proposed policy on the Least Restrictive Environment (LRE). We enthusiastically support developing new regulations in order to strengthen access to high-quality inclusive placements for students with disabilities and to guarantee that those students receive all the supports and services necessary and appropriate to succeed in those less restrictive placements. At the same time, we believe that NYSED must do more to support school districts to develop and implement plans to improve inclusion. We have a number of suggestions to strengthen the proposal. We believe the addition of the points below will further the State's goal to "ensure that students with disabilities are being provided with opportunities to receive high-quality instruction in the LRE."

We recommend that any policy put forth by NYSED to improve access to high-quality inclusive settings build on the draft memo to explicitly include:

- A discussion of behavioral supports, specifically the increased use of Functional Behavior Assessments and Behavior Intervention Plans, to counter the role of discipline as a doorway to segregation.

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- An emphasis on the need for time for teachers in inclusive settings – not just classrooms, but across grade levels and in coordination with other service providers - to work together and plan to meet the needs of all students.
- Further guidance on providing supports and services for students with disabilities in inclusive settings through the use of paraprofessionals, assistive technology, accessible educational materials, Universal Design for Learning principles, and classroom accommodations.
- The use of flexible scheduling as a means for meeting the needs of students with disabilities in less restrictive settings whenever appropriate for parts of the school day depending on the individual needs of students.
- Stronger language to emphasize the need to provide students with disabilities with evidence-based instruction in order to ensure academic success in the LRE.
- Discussion of the training that teachers need to meet the individual needs of students with disabilities in their classrooms including training in specialized reading instruction and behavior management.
- A more expansive definition of the LRE that includes a student’s full day from the time he or she gets on the bus until the time he or she returns home from after-school activities. A student who needs specialized instruction in a self-contained classroom during the day may benefit from interaction with typically developing peers through inclusive activities after school.

Additionally, we agree with the language in the “LRE Federal and State Requirements” section of the December 2015 Special Education Advisory Memo that accompanied the draft LRE policy that states, “in selecting the LRE, consideration must be given to any potential harmful effect on the student or on the quality of services that he or she needs.” We would suggest that to ensure this consideration, the State consider amending the IEP form to include an explicit narrative that explores services considered and tried and the decision-making process behind any services not attempted. In that same section of the State’s memo, we’d suggest editing the language in the last bullet to read, “a student with a disability must not be removed from education in age-appropriate regular classrooms *without first considering whether the student can remain with all appropriate supports, service, accommodations, and modifications.*”



In addition, for any subsequent LRE policy document, we recommend making a slight edit to the language in the opening paragraph of the Special Education Advisory Memo accompanying the draft policy. Under federal law, students should only be removed from general education classes for reasons related to their disability when it is not possible to provide the students with a satisfactory education in that setting and not, as the memo currently reads, “when the student’s individualized education program (IEP) cannot be satisfactorily implemented in that setting.” We recommend that NYSED edit this language accordingly.

### ***Preschool Students with Disabilities***

While the recommendations above apply to all students, we have additional recommendations with respect to preschool students. We are pleased that NYSED is addressing the need to promote inclusion among preschoolers with disabilities. We agree that districts with low percentages of preschoolers with disabilities receiving services in “regular early childhood programs”<sup>1</sup> should develop and implement plans to ensure that Committees on Preschool Special Education (CPSEs) are knowledgeable about the benefits of inclusion and take action to increase opportunities for inclusion of preschool students with disabilities. However, we do not think it is sufficient for NYSED to ask districts to take these steps. Rather, NYSED must play a leadership role in addressing barriers to inclusion and promoting inclusion for preschoolers with disabilities. The preschool special education system was designed before New York had the prekindergarten program it has today. As such, there is great potential for NYSED to change the way preschool special education services are delivered and drive inclusive practices for preschoolers. A statewide, concerted effort could have a significant impact. We recommend that NYSED convene a short-term task force to make recommendations for changes to legislation, regulations, guidance, and practice. The task force should examine challenges to inclusion for preschoolers with disabilities and solutions, including, but not limited to, the following topics.

#### ***Challenge: Lack of Access to Regular Early Childhood Programs***

While the number of children with access to full-day public prekindergarten programs has increased dramatically in recent years, the lack of public early childhood education programs accessible to children from low-income backgrounds serves as a barrier to inclusion. AFC has worked with families living in poverty or with low incomes who could not find seats in free or low-cost early childhood education programs for their children with disabilities, especially for children who are three

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<sup>1</sup> We use this term because it is the term used in the New York IDEA regulations and in the draft policy.



years old. We have also worked with families who have had difficulty navigating the available public early childhood programs. In such cases, CPSE district representatives have stated that it is not their responsibility to assist in connecting preschoolers with disabilities to prekindergarten or early childhood education programs. As a result, these children did not receive their services in regular early childhood settings. However, the U.S. Department of Education's Office of Special Education Programs (OSEP) made clear in a 2012 "Dear Colleague Letter" and in its 2015 statement on inclusion that LEAs that do not have a public preschool program for a child with a disability "must explore alternative methods to ensure the LRE requirements are met for that child," including "providing opportunities for the participation of preschool children with disabilities in preschool programs operated by public agencies other than LEAs (such as Head Start or community based child care)," "enrolling preschool children with disabilities in private preschool programs for nondisabled preschool children," and "locating classes for preschool children with disabilities in regular elementary schools."

#### Recommendations:

- Expand prekindergarten programs: The State should continue to expand universal prekindergarten programs to 4-year-olds and then to 3-year-olds starting with high-needs districts.
- Expand subsidized child care: The State should invest in subsidized child care so that more young children from low-income backgrounds have access to early childhood education programs.
- Provide information about early childhood programs upon receipt of referral: NYSED should amend the regulations to require the district to provide families with information about universal prekindergarten and other publicly funded early childhood programs along with the list of evaluation agencies after receiving a preschool special education referral.
- Provide information about early childhood programs at IEP meetings: NYSED should amend the regulations to require the district representative at IEP meetings to discuss and provide written and oral information about the availability of universal prekindergarten and other publicly funded early childhood programs available in the district if the child is not attending or registered at an early childhood program. Regulations should require the district representative at the preschool IEP meeting to be knowledgeable about the publicly funded early childhood education programs in the district, including, but not limited to, universal prekindergarten, Head Start, and subsidized child care.



- Assist families in enrolling children in early childhood programs: NYSED should amend the regulations to require the district to assist families in identifying and enrolling their preschooler with a disability in an early childhood program when the child is recommended for Special Education Itinerant Teacher (SEIT) services or related services, the child is not attending or registered at an early childhood program, and the family would like this assistance.
- Provide funding to facilitate addition of preschool students with disabilities in universal prekindergarten class: Most universal prekindergarten classes are capped at 18 students. NYSED regulations allow universal prekindergarten classes to have 19 or 20 students if there is an additional staff member (usually a paraprofessional). In addition, prekindergarten programs may request a variance from NYSED to include a 21<sup>st</sup> child in the class in order to accommodate a student with a disability. However, NYSED does not assist districts in funding the staff member needed to exceed 18 students. The State should reimburse districts for the cost of the extra staff member needed to include additional students with disabilities in a prekindergarten class.

***Challenge:*** Lack of Preschool Integrated Classes

AFC has worked with families of preschoolers who would benefit from a preschool special class in an integrated setting, but for whom the district has recommended a preschool special class with the explanation that there are no seats available in a preschool special class in an integrated setting. These children need the support of a special education teacher, but do not need to be segregated for the full day.

**Recommendations:**

- Increase the number of preschool special classes in integrated settings: With the expansion of full-day universal prekindergarten in New York State, the State has the opportunity to build a preschool system that is designed purposefully to include more preschool special classes in integrated settings. NYSED should incentivize and open additional preschool special classes in integrated settings in districts where there is a shortage. Prekindergarten regulations and RFPs should require districts receiving universal prekindergarten funding to have a certain percentage of full-day special classes in integrated settings available.
- Develop a new integrated model: Special classes in integrated settings arose as a preschool special education model at a time when there were far fewer public early childhood programs than there are today. The expansion of full-day universal prekindergarten provides an opportunity for NYSED to develop a new model of integrated classes within the prekindergarten system as an expansion of the continuum of services for preschoolers with disabilities.



- Provide adequate funding: The State must ensure that preschool special classes in integrated settings are funded adequately. Without an adequate reimbursement rate that provides sufficient funding for teacher salaries among other costs, we will continue to see a shortage of preschool special classes in integrated settings.

**Challenge:** Lack of Access to Regular Early Childhood Programs for Preschoolers Whose IEPs Recommend Half-Day Special Classes

Preschoolers with IEPs that recommend half-day (2.5 hour) preschool special classes or half-day preschool special classes in integrated settings could benefit from participating in a prekindergarten class with supports for the remainder of the day.<sup>2</sup> However, frequently, when children’s IEPs recommend a half-day preschool special class or half-day preschool special class in an integrated setting, the CPSE does not discuss where the child will attend school for the rest of the day or what services would be necessary for the child to participate in an early childhood education program alongside typically developing peers for the remainder of the day. In fact, we have worked with families whose children were asked to leave their full-day universal prekindergarten programs entirely when the CPSE recommended a half-day preschool special class or half-day preschool special class in an integrated setting. As such, these children missed out on instructional time, exposure to the general education curriculum, and opportunities to learn alongside typically developing peers.

Recommendations:

- Make prekindergarten seats available to children whose IEPs recommend half-day special classes: Universal prekindergarten regulations and RFPs should make clear that districts and other entities administering prekindergarten programs must allow children whose IEPs recommend a half-day special class or half-day special class in an integrated setting to participate in prekindergarten for the rest of the day. NYSED must also provide adequate funding to make this arrangement financially viable.
- Provide full-day support: Preschool students who receive half-day special classes have significant needs and may need services, supports, and accommodations to participate in a universal prekindergarten or other early childhood program for the rest of the day. For such children, regulations should require the CPSE at the IEP meeting to discuss the early childhood

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<sup>2</sup> While we focus this section on preschoolers whose IEPs recommend half-day special classes, we note that these recommendations can also apply to preschoolers whose IEPs recommend full-day special classes as full-day special classes operate for a shorter day than full-day prekindergarten classes in New York City.



setting of the parent's choice, including a universal prekindergarten program, where the child will spend the rest of the day, and any supports or services necessary for the child to get an appropriate education for the rest of the day.

- Coordinate location of special classes and prekindergarten programs: Universal prekindergarten regulations and RFPs should require districts to prioritize opening prekindergarten classes at community-based organizations that operate preschool special classes and preschool special classes in integrated settings so that preschoolers can attend half-day special classes and universal prekindergarten classes at the same site. Requiring a preschool student to ride a bus from a half-day special class to a universal prekindergarten class in the middle of the school day takes time away from learning alongside typically developing peers.

**Challenge:** Lack of Supports in Prekindergarten and Other Early Childhood Programs Unlike school-aged programs located in public schools where there are often full-time special education teachers, school psychologists, and other staff with knowledge about students with disabilities in the school building, many prekindergarten programs are in community-based organizations where there may be nobody on staff with education, experience, or training regarding special education. While a Special Education Itinerant Teacher (SEIT) may help to include some preschoolers with disabilities in early childhood programs for an hour or two per day, early childhood teachers often struggle with how to work with children with disabilities for the remainder of the day. We have seen this challenge with preschool students who have a variety of disabilities, but especially for children with autism and children with delays in social-emotional development and behavioral challenges. When staff in a universal prekindergarten program or other regular early childhood program does not feel it can manage a child's needs, the solution is often to ask the CPSE to recommend a preschool special class, moving the child to a segregated setting that may not have been necessary had the child and prekindergarten program received needed support at the prekindergarten program.

Recommendations:

- Include sufficient funding to serve students with disabilities: Prekindergarten per pupil funding must account for the fact that a percentage of children will be students with disabilities who may need additional supports beyond what is provided on the child's IEP.
- Hire inclusion specialists: Prekindergarten regulations and RFPs should require districts or other entities administering universal prekindergarten programs to hire inclusion specialists who can assist prekindergarten programs to serve children



who are suspected of having disabilities or who have IEPs, and the State should provide funding to cover this cost. Districts should hire inclusion specialists with expertise in best practices for serving preschoolers with disabilities. These specialists could consult with prekindergarten programs, help programs identify which children to refer for special education evaluations, and help programs serve children who are in the process of being evaluated for special education services, children who are awaiting services, or children who have IEPs.

- Increase support for school personnel: While federal law requires IEP teams to consider the support needed for school personnel to serve a student with an IEP and the state IEP form includes a box for this information, there are no New York IDEA regulations regarding this requirement, and, in New York City, the box is uniformly left blank. NYSED should draft regulations regarding the requirement to consider support needed for school personnel and should issue guidance about best practices for support for school personnel in universal prekindergarten and other early childhood programs.
- Increase indirect SEIT services: Indirect Special Education Itinerant Teacher (SEIT) services allow a special education teacher to assist the child's preschool teacher in adjusting the learning environment or modifying instructional methods to meet the individual needs of a preschool student with a disability who attends an early childhood program. However, in New York City, this service is rarely recommended. We have never seen a CPSE district representative initiate a discussion about or recommendation for indirect SEIT services. Yet, this service can be extremely helpful in building the capacity of a prekindergarten teacher to serve a student with a disability so that the student does not need to move to a more restrictive setting. NYSED should issue guidance regarding indirect SEIT services and should encourage districts that rarely recommend this service to train CPSE administrators and prekindergarten program staff about the availability of this service.
- Develop a protocol and adequate funding mechanism for FBAs/BIPs: High-quality Functional Behavioral Assessments (FBAs) and Behavior Intervention Plans (BIPs) can help to address the behaviors of young children, making it possible for them to stay in regular early childhood settings instead of transferring to preschool special classes. Although FBAs are required for children whose behavior interferes with their learning, we rarely see FBAs performed for preschoolers in New York City, even for children referred to the CPSE because of challenging behaviors who have been suspended or expelled from their regular early childhood settings. In our experience, there is a lot of confusion about who is responsible for conducting an FBA and how the payment works. NYSED must





develop procedures for conducting preschool FBAs and a sufficient rate for evaluators conducting FBAs.

- Develop additional behavioral supports: Programs such as the Early Childhood Consultation Partnership that provide behavioral consultation to prekindergarten teachers have been proven to reduce the number of preschoolers requiring placement in preschool special classes. The State should invest in such programs that provide early childhood teachers the support they need to address children's behavior so that children can remain in their prekindergarten or other early childhood programs.
- Ensure adequate numbers of SEITs and related service providers: School districts, including New York City, have shortages of related service providers, especially related service providers willing to travel to prekindergarten or other early childhood programs. We have seen many cases in which parents were asked to leave their jobs in the middle of the day, pull their children out of their prekindergarten classes, transport their children long distances to related services offices located far away from their prekindergarten programs, sit while their children received a half-hour occupational therapy session, transport their children back to their prekindergarten programs, and then return to work. In addition to being burdensome, and in many cases impossible, for families and children, such arrangements take children away from high-quality inclusive settings where students with disabilities are learning alongside typically developing peers. Furthermore, when a child does not receive mandated services, such as counseling, at their prekindergarten or early childhood program, the child's needs go unaddressed in their school environment, increasing the likelihood that the child will be recommended for a special class. NYSED must work with districts to ensure that there are adequate numbers of related service providers who travel to children's early childhood programs. NYSED should examine practices around recruiting, retaining, and compensating these providers. Furthermore, with the growth of universal prekindergarten and the need for prekindergarten teachers, New York City experienced a shortage of SEITs last year. When children needed the support of a special education teacher and SEITs were not available, the only option was a special class (to the extent a seat was available).
- Require prekindergarten programs to train staff on inclusion: NYSED should require school districts and other entities receiving universal prekindergarten funding to provide ongoing professional development to prekindergarten teachers, administrators, and other staff members regarding preschool special education services, IEPs, and the inclusion of preschoolers with disabilities in prekindergarten programs.



- Provide training to IEP team members: NYSED should ensure that CPSE administrators, evaluation agencies, preschool special education providers, and early childhood program teachers receive training regarding inclusion and ways to develop effective IEP programs in inclusive settings.
- Develop pre-referral and pre-IEP implementation support system: The preschool special education evaluation process is lengthy and, for a variety of reasons, often takes much longer than the school-aged evaluation process. During this time, while the child's needs go unaddressed, a preschooler's need for support often increases. We have seen cases where initially, it appeared that a child could be served appropriately with supports in a prekindergarten or other regular early childhood program but by the time the IEP meeting occurred months later, the child's needs, including behavioral challenges, had increased to the point that the early childhood program staff believed that the child needed a preschool special class. NYSED must develop a mechanism for children in prekindergarten programs to receive support while waiting for evaluations, IEP meetings, and IEP implementation. Earlier supports may help a student to be included in a regular early childhood program in the long run.
- Streamline referral, evaluation, and IEP meeting process: Similarly, NYSED should work to ensure that there are sufficient numbers of preschool special education evaluators, that evaluations move forward immediately following referral, and that IEP meetings are held in a timely manner. Currently, in New York City, a child may wait weeks or even longer between referral and the start of evaluation. During this time, the child's delays often go unaddressed, increasing the likelihood in certain cases that the child will need a special class by the time evaluations are completed and the IEP meeting is held.

***Challenge:*** Lack of Coordination between Preschool Special Education System and Prekindergarten/Early Childhood Programs

There are a number of ways in which the lack of coordination between the preschool special education system and universal prekindergarten poses barriers to high-quality inclusive education for preschoolers.

**Recommendations:**

- Align program hours and other requirements: Currently, preschool special classes, including special classes in integrated settings, operate for only 5 hours and 30 minutes per day. However, in New York City, full-day universal prekindergarten classes operate for 6 hours and 20 minutes. Requiring students with disabilities to leave class an hour before their non-disabled classmates stigmatizes students with disabilities and denies them access to the full-day program that their non-disabled



peers have available. NYSED should align program hours, fund the full-day, and review regulations and guidance to ensure that other requirements (e.g., naptime, lunchtime) are aligned.

- Require CPSEs to record the child’s early childhood program: If the school district does not know where the child is attending preschool, the district cannot arrange for special education services to take place at the early childhood program. Regulations should require that the IEP team discuss and record the name and address of the regular early childhood setting that the child is attending to ensure that the district has this information. Regulations should require the district to provide information to parents about how to update this information if the child’s setting changes.
- Clarify the process for sharing IEPs: NYSED should amend the regulations or issue guidance to clarify the process for sharing IEPs with early childhood programs, including those that are not run by the district, inviting early childhood teachers to IEP meetings, and communicating with early childhood programs. This work may also involve the development of MOUs and release forms.

Thank you for the opportunity to submit comments. We look forward to working with NYSED to promote access to high-quality inclusive settings for students with disabilities. If you have any questions or would like to discuss any of our recommendations, please do not hesitate to contact us.

Respectfully,

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