



# INFORMATION BULLETIN

## Special Education Variances

The State Education Department is authorized to approve a variance that enables a school district, BOCES or approved private school to exceed special education class size limits, chronological age range limits, or the number of students to be assigned to a resource room or consultant teacher in programs for students with disabilities. These variances may have implications for local collective bargaining agreements — variances may enable a school to reduce staffing needs, increase staff workload and/or affect the compatibility of student needs in an instructional group.

A school district, BOCES or private school would request a variance through regional special education staff of the State Education Department (SED), called Regional Associates. The request must be supported by a written educational justification. An educational agency is not required to obtain the signature of a representative of the collective bargaining agent as part of the approval process.

This Information Bulletin contains the following information:

- I. Variances that must be approved by the SED;
- II. Requirements for Variance Approval
- III. Teacher Involvement in the Variance Process
  - ◆ Variances vs. Innovative Program Waivers
- IV. When SED's Approval of a Variance is Not Required
- V. NYSUT Policy on Special Education Variances; and
- VI. Advice to Local Leaders.

Attachment A includes the State Education Department's procedure for requesting a variance. School districts must submit a worksheet and narrative which provides supporting information for the variance request.

Local leaders should refer to specific sections of Part 200 of the Regulations of the Commissioner of Education for regulatory language concerning the provision of special education programs and services.

No. 200619

Replaces 200502, 200403, 200204 and 200520

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December 2006

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## **I. Variances that Must be Approved by SED**

There are five instances in which variances from certain regulatory requirements must be approved by the SED. A school district, BOCES or approved private schools (commonly referred to as 853 schools or 4201 schools) requesting such a variance must have approval from SED before the variance can be implemented.

### **Resource Room Programs:**

- ◆ Variances are available for the size of an instructional group and for the total number of students assigned to a resource room teacher (CR 200.6(f)(6)) An instructional group may not exceed 5 students. The composition of instructional groups in a resource room must be based on the similarity of the individual needs of the students according to Section 200.6(f)(4). Resource room teacher case loads may not exceed 20 students at the elementary level or 25 students with disabilities enrolled in grades seven through twelve or a multi-level middle school program operating on a period basis.

### **Special Classes:**

- ◆ Variances are available for special class sizes and for chronological age ranges of students assigned to such classes (CR 200.6(g)(6)), (see Section IV for information on middle and secondary special classes). The chronological age range in a special class for students with disabilities under the age of 16 may not exceed 36 months. The special class size limits are:
  - 15 students: 1 teacher;
  - 12 students: 1 teacher and 1 paraprofessional;
  - 8 students: 1 teacher and 1 paraprofessional;
  - 12 students; 1 teacher and one additional staff person for every three students in the class.

In all cases the size and composition of a special class shall be based on the similarity of the individual needs of the students according to Section 200.6(g)(2) of the Regulations.

- ◆ Variances are available for the size of special classes composed entirely of students with autism (six students; one teacher and one paraprofessional) and the chronological age ranges of students in such classes (CR 200.13 (e));

### **Consultant Teacher Services:**

- ◆ Variances are available for the number of students assigned to a consultant teacher (CR 200.6 (d)(3)) The consultant teacher caseload may not exceed 20 students with disabilities.

### **Preschool Special Classes:**

- ◆ Variances are available to exceed the chronological age range of 36 months within preschool special classes (CR 200.16 (h)(3)(iii)(a)).

## **II. Requirements for Variance Approval**

- ◆ A variance is requested when unique circumstances surrounding an individual student make a variance the most appropriate way to meet a student's educational needs;
- ◆ A variance must be requested **in writing**;

- ◆ Written justification (see attachment A) must document the compatibility of the needs of all students in the instructional group, including the range of academic or educational achievement, social development, physical development and management needs;
- ◆ A variance is in effect only for the school year in which they are approved;
- ◆ A variance is requested on a **student-by-student basis. There is no such thing as a blanket variance.**”;
- ◆ A variance must be **approved** in writing; and
- ◆ A variance may **not** be implemented prior to approval.

### III. Teacher Involvement in the Variance Process

Unlike applications for special education innovative program waivers (see page 4), special education variances do not require the signature of a representative of the collective bargaining organization. Moreover, special education variances do not require prior notification of the teacher involved. NYSUT urges school districts to involve teachers when a variance is being considered.

According to the State Education Department the following procedures are used by SED to evaluate and approve/disapprove variance requests.

- ◆ Prior to submitting a variance request, the appropriate school district administrator should consult with the special education teacher.
- ◆ The SED Regional Associate may visit the district’s program prior to making a final determination. During this visit, the Regional Associate could engage in one or more of the following activities:
  - discuss the nature of the variance with the teacher;
  - observe the class environment; and
  - review the IEPs of other children in the instructional program (students with disabilities who are placed together for purposes of special education must be grouped by similarity of individual needs as defined in Section 200.1(kk) of the Regulations).
- ◆ The State Education Department’s letter of approval includes a statement requesting the district to inform the teacher that a variance for a particular child has been granted.
- ◆ Upon notification that a variance has been approved, the teacher should request a copy of the approval letter.
- ◆ If a teacher believes that a variance is inappropriate, the teacher should discuss it with the Regional Associate. Teachers should involve the local union in this process right from the beginning. The local may wish to involve its NYSUT Labor Relations Specialist at this point.
- ◆ In addition, consistent with Section 200.4(c) of the Regulations, a teacher may refer a student to the Committee on Special Education (e) or Committee on Preschool Special Education, if the teacher believes the program or placement recommended in the IEP is no longer appropriate.

## Variances vs. Innovative Program Waivers

Variances are limited to the above instances. However, **waivers** are also available from Sections 200.1, 200.6 and 200.16 through a separate application and approval process, as specified in Sections 200.6(k) and 200.16(h)(vi) of the Regulations. (Section 200.1 includes definitions used in this part of the regulations; Sections 200.6 and 200.16 describe the continuum of services for school-age students and educational programs for preschool students with disabilities, respectively.) These waivers involve innovative special education **programs** rather than individual students. The purpose of an innovative program waiver is to enable a school district, BOCES, approved private school, state-operated or supported school or state education department or agency to implement a program to enhance student achievement and/or opportunities for placement in general education classes and programs. They **must** be approved in writing prior to being implemented.

The application process for special education innovative program waivers requires consultation and **signature** of the collective bargaining representative; it allows for a statement of opposition to be included, should the local collective bargaining organization be opposed to the waiver. Local leaders experiencing problems regarding special education waivers should immediately contact their NYSUT Labor Relations Specialist.

### IV. When SED Approval of a Certain Variance is Not Required

Section 4402 of the Education Law, allows all school districts, except New York City, to exceed the class size limits by 20 percent, rounded up to the next whole number, in classes for **middle and secondary school students** upon written notice to the Commissioner and parental notification. Districts may implement such a variance without prior approval of SED. School districts wishing to exceed these standards **must begin each school year in September in compliance with the existing special class size regulatory requirements**. This provision has been extended through **July 1, 2007**. This change is reflected in the following chart. Further information on this topic is available in NYSUT Briefing Bulletin titled *Special Education Class Size Limits in Middle and Secondary Schools (Number 06-30.)*

**Class Size Limits**

Present	Now Available
15:1	18:1
12:1:1	15:1:1
6:1:1	8:1:1
8:1:1	10:1:1
12:1:4	15:1:4

## V. NYSUT Policy

The NYSUT policy regarding variances is as follows:

*“The Board of Regents should eliminate the granting of variances in class size, pupil contact hours and chronological age range as contained in the regulations of the Commissioner of Education. When variances in areas other than class size, pupil contact hours, and chronological age range are being considered, the State Education Department should direct the district involved to negotiate these variances with the collective bargaining agent.” “NYSUT should seek legislation that would repeal 4402(6) of Education Law thus extending to all New York State school districts the provision currently affecting New York City.*

## VI. Advice to Local Leaders

- ◆ Request to see the State Education Department’s letter approving the variance request.
- ◆ Do not accept variances that are “in the works.”
- ◆ When appropriate, contact the Regional Associate assigned to your school district regarding all variances. Request that the Regional Associate meet with the teacher to explain the reason for its approval. The locations and telephone numbers of regional offices of the State Education Department are available at [www.nysed.gov/vesid/sped/quality](http://www.nysed.gov/vesid/sped/quality).
- ◆ Recommend that teachers refer any student to the district’s Committee on Special Education whose educational needs cannot be met due to a variance. Some students need a small class size, and their needs must be considered.
- ◆ Contact your NYSUT Labor Relations Specialist with problems and concerns regarding variances.



## Sample Variance Narrative

<u>Student(s) Name(s) – DOB:</u>	Bobby D. (mo/day/yr)
<u>Type of Variance:</u>	Age range- The student is the youngest in the class and three-year age limit is exceeded by three months.
<u>Number of Student:</u>	9
<u>Age Range in Class</u>	3 years, 3 months (youngest DOB mo/yr – oldest DOB mo/yr).
<u>Disability:</u>	All students are emotionally disturbed.
<u>Class Size/Staffing Ratio:</u>	12:1 + 1 In addition, one student is assigned a full-time one-to-one aide.
<u>Related Services:</u>	The psychologist is available to the students in the program two days per week. Eight students received individual counseling (one student is being seen privately and is not seen individually by the school psychologist). Nine students receive small group counseling.
<u>Participation in Regular Education:</u>	Five students are mainstreamed for 2 periods; two students are mainstreamed for 3 periods; two students are mainstreamed for 4 periods. All students also have two PE periods per week. The student for whom the variance is requested is mainstreamed for four periods.
<u>Description of the Class:</u>	<ul style="list-style-type: none"><li>• Learning rate and educational performance – two students are functioning on grade level; six students are reading between 3<sup>rd</sup> and 6<sup>th</sup> grade level and retain concepts more readily when subject matter is presented verbally; one student is reading on a 2<sup>nd</sup> grade level and has difficulty with all new concepts, needing extra aide or teacher reinforcement.</li><li>• Social Development – All students have difficulty developing appropriate peer relationships, lack self-confidence and have difficulty understanding cause and effect.</li><li>• Physical development – within normal range for junior HS students.</li><li>• Management needs – the student require a great deal of adult support and structure in order to maintain appropriate behavior; they still need extra help dealing with social situations. The teacher and psychologist are helping the students learn appropriate behavior.</li></ul>

### Description of the Student:

- The student for whom the variance is being requested is one of the higher functioning students academically. He was in this program last year and made progress in his social/emotional growth. It is felt that he

is still immature socially and emotionally and needs the extra adult support provided in this program for another year.

Other Available Options:

- If the student is denied the variance, he would be placed out of the district in a BOCES program. We feel this would be a less desirable alternative because that would remove this student from his home school and those opportunities to be educated with his non-disabled peers.

Correction of the Problem for the Following School Year:

- The oldest student in the class will be moving to the high school program placing the student within the three-year age range.
- The student will also be considered for placement in a less restrictive environment for the following school year if progress continues at the present rate.

Doc# 54959