

Special Education Variances



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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. In addition, recently enacted amendments to regulation now allow variances to the size of integrated co-teaching classes serving 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.

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- Attachment A includes the State Education Department's procedure for requesting a variance as referenced in Sections I and II. School districts must submit a worksheet and narrative which provides supporting information for the variance request.
 - Attachment B includes the special class size variance by notification procedure referenced in Section IV of this Fact Sheet.
 - Attachment C includes the procedures to exceed the class size limit in an integrated co-teaching services class as referenced in Section V.

I. Variances that Must be Approved by SED

The following are 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 caseloads 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(h)(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; and
 - 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(h)(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.

Integrated Co-Teaching Services:

- Variances for the fourteenth student with a disability in the class (CR 200.6(g)(1)(ii)). See Section V of this Fact Sheet, Variances for Integrated Co-Teaching Services, for more information.

Preschool Special Classes:

- Variances are available to exceed the chronological age range of 36 months within preschool special classes (CR 200.16 (i)(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(w)(3)(ii) 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, a teacher may refer a student to the Committee on Special Education or Committee on Preschool Special Education, if the teacher believes the program or placement recommended in the IEP is no longer appropriate.

Variations vs. Innovative Program Waivers

Variations 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(1) and 200.16(i)(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 Variance is Not Required (“Variance by Notification”)

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 (“Variance by 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, 2013**. This change is reflected in the following chart. Further information on this topic is available in the NYSUT Fact Sheet #16 titled *Special Education Class Size Limits in Middle and Secondary Schools*.

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

A thirteenth student with a disability can be added to an Integrated Co-Teaching setting through a “Variance by Notification” process (CR 200.6(g)(1)(i)). See Section V of this Fact Sheet, Variances for Integrated Co-Teaching Services, for more information.

V. Variances for Integrated Co-Teaching Services

"Integrated co-teaching services" as used in the Regulations of the Commissioner of Education means a general education teacher and a special education teacher jointly providing instruction to a class that includes both students with and students without disabilities to meet the diverse learning needs of all students in a class. The regulatory maximum number of students with disabilities receiving integrated co-teaching services in a class is 12 students. The total of 12 students includes any student with a disability in that class, regardless of whether all of the students are recommended for integrated co-teaching services. For example, if two students with disabilities in a class are recommended for resource room and related services and ten are recommended for integrated co-teaching services, there are 12 students with disabilities in that classroom.

Effective December 8, 2010, section 200.6(g)(1) of the Regulations of the Commissioner of Education was amended to provide for variance procedures that would authorize a school district to increase the maximum number of students with disabilities in such classes by not more than two additional students. Two variance processes were established in regulation to authorize the temporary increase in the maximum number of students with disabilities in an integrated co-teaching services class:

1. A variance by notification to increase the maximum number of students with disabilities to 13; and
2. A variance request for Commissioner’s prior approval to increase the number of students with disabilities to not more than a total of 14.

More information on the variance procedures for integrated co-teaching services can be found in Attachment C.

VI. 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.”*

VII. 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.vesid.nysed.gov/specialed/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.

NYSED SPECIAL EDUCATION PROGRAM REVIEW **SPECIAL CLASS**

District/Agency: _____ Building: _____

Class Designation: _____ Name of Teacher: _____

Class Size/Staffing Ratio: _____ Name(s) of paraprofessional(s): _____

FOR DEPARTMENTALIZED SPECIAL EDUCATION PROGRAMS AND/OR FOR PERIOD-BY-PERIOD SPECIAL CLASS PROGRAMS, A SEPARATE FORM MUST BE COMPLETED FOR EACH INSTRUCTIONAL PERIOD.

Name	DOB	CSE Classification	IEP Class Size/ Staffing Ratio	IQ Score or Range	Reading/ Math Achievement Levels	<p><i>Rational for Grouping</i> <i>(Please address the similarity of needs of this class/instructional group in the areas of academic achievement, social skills and development, physical development, and management and behavioral needs)</i></p>

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.

Description of the Class:

- Learning rate and educational performance – two students are functioning on grade level; six students are reading between 3rd and 6th grade level and retain concepts more readily when subject matter is presented verbally; one student is reading on a 2nd grade level and has difficulty with all new concepts, needing extra aide or teacher reinforcement.
- Social Development – All students have difficulty developing appropriate peer relationships, lack self-confidence and have difficulty understanding cause and effect.
- Physical development – within normal range for junior HS students.
- 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.

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.

ATTACHMENT B

NEW YORK STATE EDUCATION DEPARTMENT SPECIAL EDUCATION CLASS SIZE VARIANCE NOTIFICATION FORM (MIDDLE AND SECONDARY CLASSES ONLY)

INSTRUCTIONS

This Class Size Variance Notification Form applies to all special education programs serving public school students whether operated by the local district, BOCES, State-supported or State-operated school, an approved private school, or State department or agency. This variance procedure does not apply to the City School District of the City of New York.

1) Name of School

Provide name of the public school district, BOCES, Special Act School District, Private Approved School, State-supported/State-operated School, or State department or agency.

2) Number of Classes

Indicate the number of classes for which a variance will be implemented. This information should be provided for each regulatory class size which will have a variance.

3) Class Size with Variance

Indicate the maximum anticipated class size(s) resulting from the variance for the current school year.

4) Number of Middle School (or Age Equivalent) Classes

Indicate the number of middle school classes affected by the variance for each class size for which a variance is implemented. This pertains to classes for grades 7 and 8 or classes serving students age equivalent to these grades.

5) Number of Secondary School (or Age Equivalent) Classes

Indicate the number of secondary school classes affected by the variance for each class size for which a variance is implemented. This pertains to classes for grades 9 through 12 or classes serving students age equivalent to these grades.

6) Educational Justification

Provide the educational reasons for the implementation of the variance.

7) Signature

Provide the name and original signature of the Chief Executive Officer.

SUBMIT TWO COPIES OF THIS FORM TO:

Eileen Borden, Associate

VESID Special Education Quality Assurance • One Commerce Plaza • Room 1623 • Albany, New York 12234

NEW YORK STATE EDUCATION DEPARTMENT

**SPECIAL EDUCATION CLASS SIZE VARIANCE NOTIFICATION
FORM (MIDDLE AND SECONDARY CLASSES ONLY)**

'Name of School _____

Regulatory Class Size	²Total Number of Classes in Variance	³Class Size with Variance	⁴Number of Middle School Classes	⁶Number of Secondary School Classes
15:1				
12:1+1				
8:1+1				
6:1+1				
12:1+(3:1)				

Please provide a statement regarding the educational justification for the variance(s)

The undersigned certifies that:

The special classes for which the class size variance has been implemented will be in compliance with special class size requirements pursuant to 8NYCRR 200.6(g) and 200.13(a)(3) at the start of the school year (for the purposes of this variance, the start of the school year is September 1).

All students affected by the implementation of the class size variance will continue to receive appropriate special education programs and services to meet their individual needs.

The parents of all students who are enrolled in classes affected by the class size variance have been notified of the variance.

Name of Chief Executive Officer

Signature

Date

Variance Procedures to Temporarily Exceed the Maximum Number of Students with Disabilities in an Integrated Co-teaching Services Class

A school district may implement a temporary increase beyond the maximum number of students with disabilities in an integrated co-teaching services class under one of the following two procedures:

Child-Specific Variance by Notification:

After the start of the school year in September, a school district may temporarily, for the remainder of the school year, enroll **one** additional student with a disability beyond the maximum of 12 students with disabilities in a class where integrated co-teaching services are provided through a **notification process** without prior approval by the New York State Education Department (NYSED).

The temporary increase should only be implemented in those extenuating circumstances when it is necessary for the student to be enrolled in a particular integrated co-teaching services class in order to participate and progress in the general education curriculum in accordance with his/her individualized education program (IEP).

To implement this notification process, **within ten (10) business days of the student's placement in the integrated co-teaching services class**, the school district must submit written notification to NYSED using the attached form. One form per student, identifying the student by his/her full name, must be submitted for each integrated co-teaching services class for which a variance is needed.

Upon receipt of a variance by notification, NYSED will send a letter of acknowledgement to the school district. A copy of the variance by notification will be forwarded for review by the Special Education Quality Assurance (SEQA) Regional Office. The Commissioner or his designee may revoke or preempt any increase in the number of students with disabilities in an integrated co-teaching services class beyond the regulatory maximum upon a finding that such increase would fail to be consistent with appropriate special education.

Child-Specific Variance with Commissioner Approval:

In the event that a school district has already increased the maximum number of students with disabilities in an integrated co-teaching services class to 13 using the "Child-Specific Variance by Notification" process (see above) and now requests approval to temporarily, for the remainder of the school year, enroll a second student with a disability in that same integrated co-teaching

services class, the school district must submit a request for prior **child-specific approval** to NYSED using the attached form.

The temporary increase should only be implemented in those extenuating circumstances when it is necessary for the student to be enrolled in the particular integrated co-teaching class in order to participate and progress in the general education curriculum in accordance with his/her IEP.

A variance request must be submitted **and approval received from NYSED** prior to the placement of the student in the integrated co-teaching services class. One form per student, identifying the student by his/her full name, must be submitted for each integrated co-teaching class for which a variance is needed.

The NYSED SEQA office, on behalf of the Commissioner, will review the child-specific approval request and respond to the school district indicating approval or disapproval of the request.

NYSED may deny a program approval to temporarily increase the number of students with disabilities in an integrated co-teaching services class to 14 upon a finding that the school district did not provide the required information, if the reason for the temporary increase is determined to be unjustified, and/or if the school district cannot meet the assurances provided. If the request is not approved, the school district must inform the student's Committee on Special Education (CSE).

The attached form is used for either:

1. Submission of a variance by notification, or
2. Submission of a request for a variance with Commissioner approval.

The form includes information on the specific integrated co-teaching class affected, the student to be enrolled, the educational justification for the placement and assurances that the:

- CSE has determined that, for a "Child-Specific Variance by Notification," no other appropriate placement is available in an integrated co-teaching services class that has less than 12 students with disabilities; or, for a "Child-Specific Variance with Commissioner Approval," no other appropriate placement is available in an integrated co-teaching services class that has not increased the number of students with disabilities to 13 through the notification process;
- request to enroll the additional student with a disability in the integrated co-teaching services class has been made in accordance with the procedures herein; and
- maximum number of students with disabilities enrolled in the integrated co-teaching services class shall not exceed 12 students with disabilities at the start of classes the following September.

Procedures to Temporarily Exceed the Maximum of 12 Students with Disabilities in an Integrated Co-teaching Services Class

- Use this form for either:
 - (1) Submission of a variance by notification, **or**
 - (2) Submission of request for a variance with Commissioner approval.
- **Submit one form per student for each integrated co-teaching services class** for which a variance is needed.
- **All sections of the form must be completed or it will be returned unprocessed.** Any returned forms must be revised and resubmitted within five days.
- A “Child-Specific Variance by Notification” must be submitted **within 10 business days of the student’s placement** in an integrated co-teaching class with a copy kept for your files.
- A request for a “Child-Specific Variance with Commissioner Approval” must be submitted to the New York State Education Department (NYSED) and NYSED approval must be received **before** the student with a disability is placed in the integrated co-teaching services class for which the variance is being requested.

Submit the form:

- By mail to NYSED, Office of Special Education, 89 Washington Avenue, Room 309 EB, Albany, NY 12234, Attention: Integrated Co-teaching Variance;
- By facsimile to the attention of “Integrated Co-Teaching Variance” at 518-402-3583; or
- By e-mail to NYSED_SEQA@mail.nysed.gov.

Name of School District: _____

Address: _____

Contact Person for this Notification: _____

Phone: _____ Fax: _____ Email: _____

Date submitted: _____

Complete one box below to indicate the type of request:

Child-Specific Variance by Notification (enrolling one additional student with a disability in an integrated co-teaching services class beyond the 12-student regulatory maximum).

OR

Child-Specific Variance with Commissioner Approval (seeking approval to add a second student with a disability to an integrated co-teaching services class beyond the 12-student regulatory maximum). The school district must have already submitted notification to NYSED of enrollment of one additional student with a disability to the same class.

<p align="center">Integrated Co-Teaching Services Class Information</p>	<p align="center">Student Information</p>	
<p>Building: _____</p> <p>Grade: _____</p> <p>Subject: _____</p> <p>Teacher: _____</p>	<p align="center"><u>For Notification</u></p> <p>Name of the <u>one</u> additional student with a disability enrolled: _____</p> <p align="center"><i>Last name, first name</i></p> <p>Student's DOB: __/ __/ __</p> <p>Date the <u>one</u> additional student entered the integrated co-teaching services class: __/ __/ __</p>	<p align="center"><u>For Commissioner Approval</u></p> <p>Name of the <u>second</u> student with a disability requested to be enrolled: _____</p> <p align="center"><i>Last name, first name</i></p> <p>Student's DOB: __/ __/ __</p> <p>Date the <u>second</u> student is proposed to enroll in the integrated co-teaching services class: __/ __/ __</p>

Provide the educational justification for the placement of the additional student with a disability in the integrated co-teaching services class.

Describe the age range and functional levels of the students with disabilities in the current integrated co-teaching services class and how the additional student with a disability would affect the grouping of students with disabilities according to similarity of individual needs in the areas of academic achievement, functional performance and learning characteristics, social development, physical development and management needs for the purpose of special education.

The undersigned assures that the:

- Committee on Special Education (CSE) has determined that for a “Child-Specific Variance by Notification,” no other appropriate placement is available in an integrated co-teaching class that has less than 12 students with disabilities; or, for a “Child-Specific Variance with Commissioner Approval,” no other appropriate placement is available in an integrated co-teaching class that has not increased the number of students with disabilities to 13 through the notification process;
- request to enroll the additional student with a disability in the integrated co-teaching services class has been made in accordance with the procedures herein; and
- maximum number of students with disabilities enrolled in the integrated co-teaching services class shall not exceed 12 students with disabilities at the start of classes the following September.

Name of School Superintendent
Or Designee

Signature

Date