

## SPECIAL EDUCATION MANDATE RELIEF PROPOSALS

**PUBLIC COMMENT SUBMISSION COVER SHEET – MUST BE RECEIVED NO LATER THAN JULY 25, 2011**

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| <b>MAIL TO:</b>   | New York State Education Department<br>Office of Special Education<br>89 Washington Avenue, Room 309EB<br>Albany, New York 12234<br>Attention: Public Comment – Special Education Mandate Relief Proposals |   |
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## SPECIAL EDUCATION MANDATE RELIEF PROPOSALS

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| <b>FROM</b><br><b>NAME_CARMEN ALVAREZ, VICE PRESIDENT</b><br><b>UNITED FEDERATION OF TEACHERS</b><br>( Please match with submission cover sheet)<br><br><b>PAGE # 2 OF 13</b>  | <b>COMMENT SHEET<br/>FOR SPECIAL<br/>EDUCATION<br/>MANDATE RELIEF<br/>OPTIONS</b><br><br><b>Submission:<br/>Must be <u>received</u> no<br/>later than<br/>July 25, 2011</b> | <b>Mail to:</b> New York State Education Department<br>Office of Special Education<br>89 Washington Avenue, Room 309EB<br>Albany, New York 12234<br>Attention: Public Comment – Special Education<br>Mandate Relief Proposals<br><br><b>Fax:</b> 518-473-5387<br><br><b>Email:</b> <a href="mailto:SPEDPUBLICCOMMENT@MAIL.NYSED.GOV">SPEDPUBLICCOMMENT@MAIL.NYSED.GOV</a> |
| <b>COMMITTEE ON SPECIAL EDUCATION (CSE) MEMBERSHIP</b>   |   |   |
| <b>Appendix B: Proposal #1</b>   | <b>Sections of Law and/or Regulations</b>   |   |
| <b>Conform the membership of CSE to the federal individualized education program (IEP) team membership by repealing the requirement that CSE membership must include a:</b> <ul style="list-style-type: none"> <li>• school psychologist;</li> <li>• parent of a student with disability; and</li> <li>• physician if requested by the school or parent 72 hours before the meeting.</li> </ul>  | <b>Education Law<br/>§4402(1)(b)(1)(a) and (b)<br/><br/>8 NYCRR<br/>§200.3(a)(1)</b>  |   |
| <input type="checkbox"/> Support <input checked="" type="checkbox"/> Oppose <input type="checkbox"/> No Position   |   |   |
| <b>Reasons/Recommendations</b><br><b>School Psychologist:</b><br><br>Federal law and regulations require school districts to assess children suspected of having disabilities in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status and motor abilities. In conducting such assessments school districts must use a variety of assessment tools and strategies to gather relevant functional, developmental and academic information. Such assessments must be technically sound and may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. And they must be administered by trained and knowledgeable personnel in accordance with the instructions provided by the producer of the assessment. School districts are prohibited from using any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child. |   |   |

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By requiring school psychologists to be members of Committees on Special Education, New York State ensures that children suspected of having disabilities receive the full, comprehensive and individual evaluation they are entitled to under federal law. Among school personnel, school psychologists are uniquely qualified to choose and administer the assessments needed to determine whether a child has a disability and identify a child's special education and related service needs. School psychologists often serve as case managers in the evaluation process. In this role, they make recommendations for assessments by other disciplines ensuring that students are evaluated in all areas of suspected disability. School psychologists have the training and expertise to administer and interpret assessments which determine whether a student has a severe cognitive disability and thus play a key role in determining whether a child is eligible for the New York State Alternate Assessment. School psychologists also understand the limitations of tests administered under non-standard conditions and ensure that information from such assessments is used appropriately.

School districts throughout New York State are in the process of rolling out Response to Intervention. Effective July 1, 2012, school districts must have an RtI process in place to assist in determining if a student in kindergarten through grade four has a learning disability in the area of reading. Federal and state laws and regulations clearly specify that information gathered through an RtI process may not be the sole source of information to make the eligibility determination. Rather, students suspected of having a learning disability must receive a comprehensive multidisciplinary evaluation. The continued presence of school psychologists on CSEs will ensure that this requirement is not honored in the breach.

In many schools, particularly in New York City where special education supervisors and education evaluators were eliminated, school psychologists are the only personnel in school buildings with a deep understanding of special education law and policy. Removing the requirement for a school psychologist to be a member of the Committee on Special Education as a mandate relief measure would send an unmistakable message to school districts that lower evaluation standards will be tolerated to provide fiscal relief. In New York City, it would also irreparably damage the already tenuous fabric for special education in our schools.

In justification for the change, the SED argues that parents and school districts could still invite school psychologists to be members of the CSE; that requiring additional individuals with specific knowledge or expertise to attend IEP team meetings is inconsistent with United States Department of Education (USDOE) policy; and that even if this measure is adopted, school psychologists will continue to serve as regular members of the CSE. All of these purported justifications lack merit.

Neither federal nor state regulations address the school district's responsibility to make a school district employee or agent available for IEP team meetings. Accordingly, while a parent can request that school personnel attend their child's IEP team meeting, the district does not have to agree to produce the staff member for the meeting. The ability of parents to invite the school psychologist to the IEP team meeting will be of little use if the school district is not required to make arrangements for the school psychologist to attend. *See, Letter to Byrd, OSEP, 2003.*

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SED's reliance on federal and state regulations permitting school districts and parents to bring other individuals with knowledge or expertise regarding their child to IEP team meetings is further undercut by the strong probability that school districts will severely limit the use of school psychologists in the evaluation process if this mandate relief package (which would also eliminate the requirement for an individual psychological evaluation) is adopted. Simply stated, if school psychologists are not involved in the evaluation because the requirement for a psychological evaluation is eliminated, it is much less likely that either the parent or the school district would invite them to the meeting.

The SED's assertion that inclusion of individuals with specific expertise on IEP teams is contrary to USDOE policy is not consistent with current federal guidance. The following information is taken directly from the USDOE's Office of Special Education Programs' IDEA website:

Question C-6: May State law or regulations regarding IEP Team membership and IEP Team meeting attendance requirements exceed those of the IDEA?

Answer: Yes, but with certain caveats. A State may establish laws or regulations for IEP Team membership and IEP Team meeting attendance, but must ensure that in doing so it does not establish provisions that reduce parent rights or are otherwise in conflict with the requirements of Part B of the IDEA and the Federal regulations. Examples of State regulations that could exceed Federal requirements regarding IEP Team membership but would not conflict with the IDEA in this regard would be for a State to require that a regular education teacher attend an IEP Team meeting regardless of whether the child is or may be participating in the regular education environment, that the IEP Team include additional members beyond those required by 34 CFR §300.321(a), or that a parent has the right to bring their child to any or all IEP Team meetings at any age.

Questions and Answers on Individualized Education Programs (IEPs), Evaluations and Reevaluations,  
<http://idea.ed.gov/explore/view/p/%2Croot%2Cdynamic%2CTopicalArea%2C4%2C>

Lastly, the SED argues that even if school psychologists are eliminated as mandated members of the CSE, parent and/or school districts could continue to include them. The SED further asserts that school psychologists will continue to be regular members of the CSE, serving as one of the federal mandated participants including the representative of the school district and/or the individual who can interpret the instructional implications of evaluations. These contentions are speculative and irrational. The current fiscal climate is extremely challenging. Indeed, that is the very reason these proposals are under consideration. NYSED has presented no evidence that most school districts would choose to have school psychologists participate in IEP team meetings if they are offered the opportunity to contain costs by eliminating the requirement for their attendance. Affluent districts may be less likely to take advantage of this opportunity because they will see increases in impartial hearing requests by parents who understand the role that school psychologists play in the assessment process. But the same is not true in districts where parents are less likely to be familiar with evaluation standards and practices.

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### **Parent of a Student with a Disability:**

In school districts like New York City that make extensive use of subcommittees, parent members are only required for full committee meetings. These are meetings where decisions are made regarding initial placement in a special class, initial placement in a special class outside of the student’s school of attendance and initial placement in a school primarily serving students with disabilities or a school outside of the student’s district. Full committee meetings also review any subcommittee recommendations that are not acceptable to the parent or person in parental relationship to the student. These are without question the most important decisions for students with disabilities and their families. Parent representatives are an invaluable source of information and support for parents at these meetings. Parents who do not need or wish to avail themselves of this support can easily opt not to have the parent representative present.

Parent members are not compensated for their services. Additionally, IDEA regulations were changed in 2006 to clarify that decisions in impartial hearings must be based on substantive grounds. This means that a school district’s failure to arrange for the participation of a parent representative, without more, will not support a decision in the parent’s favor at an impartial hearing. In short, NYSED has not presented any evidence that this is a fiscal burden on school districts.

### **Physician if requested by school district or parents 72 hours before the meeting:**

No information is provided about the circumstances in which school physicians are invited to participate, how often this provision is used, or what kind of fiscal relief would be achieved if this requirement is eliminated. The Regents should request this information before taking action on this proposal.

| Appendix B: Requirements Relating to Proposal #1   | Sections of Law and/or Regulations   |
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| <b>Repeal requirements no longer necessary if Proposal #1 is adopted:</b> <ul style="list-style-type: none"> <li>• <b>Subcommittees on Special Education</b></li> <li>• <b>Meeting notice content information relating to Subcommittees</b></li> </ul> | <b>Education Law</b><br><b>§4402(1)(b)(1)(d)</b><br><br><b>8 NYCRR</b><br><b>§200.3(c)</b> |
| <input type="checkbox"/> Support <input checked="" type="checkbox"/> Oppose <input type="checkbox"/> No Position   |  |

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| <p><b>Reasons/Recommendations</b></p> <p>The current structure, which includes Committees on Special Education (called “full committees” in New York City) and Subcommittees on Special Education (called “IEP Teams” in New York City), ensures that the school psychologist and a parent member are involved when consideration is being given to initially placing or moving a student with a disability to a special class, a specialized school, an out of district placement or home instruction. Decisions made at these meetings have important consequences for students, families and school districts. Full committees are also convened when the parent and the other members of the IEP team cannot reach consensus at an IEP Team (subcommittee) meeting. At these meetings, the school psychologist and the parent member bring additional perspectives to the table which helps to resolve disputes that may otherwise lead to impartial hearings. Eliminating the two-tier structure may lead to an increase in the number of impartial hearings.</p> |   |
| <p><b>COMMITTEE ON PRESCHOOL SPECIAL EDUCATION (CPSE)</b></p>  |   |
| <p><b>Appendix B: Proposal #2</b></p>  | <p><b>Sections of Law and/or Regulations</b></p>            |
| <p><b>Align CPSE membership with the federal IEP team, by repealing the requirement that the CPSE membership must include an additional parent member, but continue the municipality representative until such time that the county no longer has a role in the provision or payment of special education to preschool students.</b></p>   | <p>Education Law §4410(3)(a)(1)<br/>8NYCRR §200.3(a)(2)</p> |
| <p><input type="checkbox"/> Support    <input checked="" type="checkbox"/> Oppose    <input type="checkbox"/> No Position</p>  |   |
| <p><b>Reasons/Recommendations</b></p> <p>The justifications for this proposal are essentially the same as the proposal to eliminate members from the CSE. Our response is the same and we incorporate it by reference.</p>   |   |
| <p><b>INDIVIDUAL EVALUATIONS</b></p>   |   |
| <p><b>Appendix B: Proposal #3</b></p>  | <p><b>Sections of Law and/or Regulations</b></p>            |
| <p><b>Repeal the requirement that the parent selects the preschool evaluator and replace it with the requirement that the school district, after providing the parent with a list of approved evaluators, must consult with the parent</b></p>   | <p>Education Law §4410(4)(b)</p>                            |

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| <p>regarding the selection of an evaluator that can provide a timely evaluation of the preschool child. All school districts would be approved preschool evaluators.</p>  | <p>8 NYCRR §200.16 (c)(1)</p>   |
| <p><input type="checkbox"/> Support    <input checked="" type="checkbox"/> Oppose    <input type="checkbox"/> No Position</p>   |   |
| <p><b>Reasons/Recommendations</b></p> <p>We concur with the position of New York State United Teachers, our state affiliate, on this issue. We would add that transferring this responsibility to school districts would be a significant new burden and, at least in New York City, there is no evidence that it would lead to improved compliance with evaluation timelines.</p>  |   |
| <p><b>Appendix B: Proposal #4</b></p>   | <p><b>Sections of Law and/or Regulations</b></p>  |
| <p>Align the preschool initial evaluation timeline to be the same as the evaluation timeline for school-age students, which is 60 calendar days.</p>  | <p>8 NYCRR §200.16(c)(2)</p>  |
| <p><input type="checkbox"/> Support    <input type="checkbox"/> Oppose    <input checked="" type="checkbox"/> No Position</p>   |   |
| <p><b>Reasons/Recommendations</b></p>   |   |
| <p><b>Appendix B: Proposal #5a</b></p>  | <p><b>Sections of Law and/or Regulations</b></p>  |
| <p>Adopt the federal standard for initial evaluations by repealing the requirement that each initial individual evaluation of a student suspected of having a disability must include a physical examination, individual psychological evaluation, social history, observation, other appropriate evaluations and functional behavioral assessment (FBA) when behavior impedes learning.</p> <p>Replace it with the federal requirement that the initial evaluation include an assessment of the student in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional</p> | <p>Education Law §4402(1)(b)(3)(a)</p> <p>8 NYCRR §§200.1(aa), 200.4(b)(1)(i) – (v)</p> |

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| <b>status, general intelligence, academic performance, communicative status and motor abilities.</b>   |  |
| <input type="checkbox"/> Support <input checked="" type="checkbox"/> Oppose <input type="checkbox"/> No Position   |  |
| <b>Reasons/Recommendations</b>   |  |
| <b>Physical Examination</b>  |  |
| <p>The physical examination which is required as part of an initial individual evaluation is the same physical examination which is required by Sections 903, 904 and 905 of the Education Law. Removing the requirement for a physical examination as part of an individual evaluation will not yield any cost savings to school districts but it could lead teams to give less consideration to health issues which may impact the student’s learning and/or behavior.</p>   |  |
| <b>Individual Psychological Evaluation</b>   |  |
| <p>The term “individual psychological evaluation” is defined in Section 200.1(bb) of the Commissioner’s Regulations as “a process by which a New York State certified school psychologist or licensed psychologist uses, to the extent deemed necessary for purposes of educational planning, a variety of psychological and educational techniques and examinations in the student’s native language to study and describe a student’s developmental, learning, behavioral and other personality characteristics.” Individual psychological evaluations assist in determining whether a student has a disability, the nature of the disability and the impact of the disability on the student’s learning and behavior. Individual psychological assessments have long been part of the evaluation process in New York State and will continue to be an important component of the comprehensive multidisciplinary evaluation as New York school district move to implement Response to Intervention.</p> |  |
| <p>Eliminating the requirement for an individual psychological evaluation would present many risks. School districts that take advantage of the opportunity to eliminate the individual psychological evaluation would face challenges to the adequacy of evaluations by parents. These would come in the form of additional requests for independent educational evaluations and impartial hearings, with attendant costs. The elimination of the requirement for individual psychological evaluations could also lead to the establishment of different standards for evaluations in districts where parents are more affluent and knowledgeable about assessment practices in the private sector and districts where parents are less knowledgeable and have fewer resources.</p>   |  |
| <b>Social History</b>  |  |
| <p>The term “social history” is defined in Section 200.1(tt) of state regulations as “a report of information gathered and prepared by qualified school district personnel pertaining to the interpersonal, familial, and environmental variables which influence a student’s general adaptation to school, including but not limited to data on family composition, family history, developmental history of the student, health of the student, family interaction and school adjustment of the student.”</p>  |  |

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This is a unique requirement in New York State regulations which we believe adds an important and even essential dimension to the evaluation process.

As explained in the New York City Department of Education's Standard Operating Procedures Manual, conditions in the student's home environment or community often have a significant impact on school performance. The social history provides an important opportunity detect family stress as well as existing or possible sources of support, both of which are helpful in determining whether and which types of service will be most effective. Students often perform and behave differently in their home and community than they do in school. This is important information for the IEP team as it may help identify student strengths as well as possible sources of stress for the student in the school environment. For culturally and linguistically diverse students, the social history provides information regarding the family's contact with the native country or home community, the student and the family's adjustment and assimilation to American culture and the school environment, and patterns of language usage in the home and community. This information helps to ensure that students are not inappropriately identified as students with disabilities because of language and/or cultural differences.

In New York City, school social workers are responsible for conducting the social history part of the evaluation. Social workers play a key role in encouraging parents to participate in the educational planning process. In addition to gathering information for the team, school social workers are responsible for informing parents of their rights under special education laws and regulations and obtaining informed parental consent where required. The social worker is also knowledgeable about community resources and may refer families for community based services, when appropriate.

For all of these reasons, we believe that eliminating the requirement for the social history would remove something very valuable from the evaluation process.

### **Observation**

One of the most persistent historical criticisms of the evaluation process is that it does not produce enough instructionally relevant information. The observation is the one component that really looks at how the suspected disability impacts the student's participation, performance and behavior in the classroom and in other school related activities. The observation is also key to moving from a medical model of service delivery to an educational model. As school districts resume Medicaid billing, it is extremely important not for educators and service providers not to lose sight of where they are and why they are doing what they do.

### **Functional Behavioral Assessment**

When a child's behavior impedes the child's learning or that of others, the IEP Team must consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.

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Because similar behaviors may have different causes or serve different functions in individual students, IEP teams must look beyond the outward manifestations of the behavior, i.e., what the behavior looks like or sounds like, to develop effective strategies interventions. Functional behavioral assessment is the tool which provides this information.

The functional behavioral assessment (FBA) is a problem-solving process for addressing problem behaviors. In conducting an FBA, a member or members of the IEP team use a variety of strategies and techniques to help determine the purpose of the behavior. This information, in turn, guides the team in developing interventions to address the behavior.

According to the Center for Effective Collaboration and Practice, an organization funded by the USDOE and the Office of Special Education Programs to develop and disseminate effective practices, “by incorporating functional behavioral assessment into the IEP process, the IEP team can gain the information needed to develop a plan or include strategies in the IEP, and IEP team members can develop a plan that teaches and supports *replacement behaviors*, which serve the same function as the problem behavior, itself.” The Center recommends that IEP teams integrate functional behavioral assessments throughout the process of developing, reviewing, and, if necessary, revising a student’s IEP.

School districts will be less likely to use functional behavioral assessments in developing IEPs for students with behaviors that impede learning if this requirement is eliminated. More importantly, if this proposal is adopted, students with disabilities are less likely to have the benefit of effective interventions and strategies targeted to their individual needs and teachers are more likely to be impeded in the important work of improving student achievement as they struggle to deal with problem behaviors.

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| <b>Appendix B: Proposal #5b</b>   | <b>Sections of Law and/or Regulations</b>                       |
| <b>Repeal the requirement that establishes a process for a school psychologist to determine the need to administer an individual psychological evaluation and provide a written report when such evaluation is determined not to be necessary. (Contingent upon Proposal #5a to adopt the federal standard for individual evaluations.)</b> | <b>Education Law §4402(1)(b)(3)(a)<br/>8 NYCRR §200.4(b)(2)</b> |
| <input type="checkbox"/> Support <input checked="" type="checkbox"/> Oppose <input type="checkbox"/> No Position  |   |
| <b>Reasons/Recommendations</b><br>This requirement provides flexibility. As noted by New York State United Teachers, our state affiliate, this provision was originally established to provide fiscal relief to school districts during an earlier fiscal crisis.   |   |

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| <b>PLANNING AND REPORTING REQUIREMENTS</b>  |   |
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| <b>Appendix B: Proposal #6</b>  | <b>Sections of Law and/or Regulations</b>                         |
| <p>Repeal the outdated requirement that the school district must provide a form to parents of certain children with disabilities who are veterans of the Vietnam War for a report to the Division of Veterans' Affairs for research purposes.</p>   | <p>Education Law §4402(1)(b)(3)(h)<br/>Executive Law §353(15)</p> |
| <p><input type="checkbox"/> Support    <input type="checkbox"/> Oppose    <input checked="" type="checkbox"/> No Position</p>   |   |
| <b>Reasons/Recommendations</b>  |   |
| <b>POLICIES AND PROCEDURES</b>  |   |
| <b>Appendix B: Proposal #7</b>  | <b>Sections of Law and/or Regulations</b>                         |
| <p>Repeal the requirement for boards of education to have plans and policies for appropriate declassification of students with disabilities, while retaining the federal requirement that each student with a disability receive a reevaluation prior to a declassification recommendation.</p>   | <p>Education Law §4402(1)(b)(3)(d-2)<br/>8 NYCRR §200.2(b)(8)</p> |
| <p><input type="checkbox"/> Support    <input checked="" type="checkbox"/> Oppose    <input type="checkbox"/> No Position</p>   |   |
| <b>Reasons/Recommendations</b>  |   |
| <p>The regulation pertaining to declassification has three parts: it requires requires 1) regular consideration for declassifying students when appropriate; 2) a reevaluation of the student prior to declassification; and 3) the provision of educational and support services to the student upon declassification. Curiously, NYSED neglects to mention the third requirement in its supporting materials. It is unlikely that school districts will stop thinking about declassification if this regulation and the law upon which it is based is repealed. School districts may, however, quickly move to eliminate decertification plans and services. In our view, this would be a serious mistake.</p> <p>Among other things, the availability of declassification support services ensures that students receive support as they generalize the strategies and skills they have learned to address their learning and behavior issues into the general education setting. Under New York City's current policy, for example, students may receive instructional support, remediation, instructional modifications and individual and/or group counseling or speech for up to one year. Declassification support also ensures that students who need test accommodations to demonstrate what they know and can do on state and local assessments continue to receive that service after they leave special education.</p> |   |

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The “declassification IEP” also documents eligibility for the “safety net” for students declassified in grades 8 – 12.

While NYSED argues that these requirements have not been effective, no evidence is provided. Anecdotal reports from our members and parents indicates that declassification support promotes appropriate and timely declassification of students with disabilities. We believe that declassification decisions will be delayed and that already low declassification rates will decline if this measure is adopted.

### APPROVAL OF CERTAIN EARLY INTERVENTION PROGRAMS

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| <b>Appendix B: Proposal #8</b>   | <b>Sections of Law and/or Regulations</b> |
| Repeal the requirement that the Commissioner of Education must approve the provision of early intervention services by approved preschool providers. Transfer this responsibility to the Department of Health, which is the lead State agency for Early Intervention Services. | Education Law §4403(18)                   |

Support     Oppose     No Position

Reasons/Recommendations

### COMMISSIONER'S APPOINTMENT TO STATE SUPPORTED SCHOOLS

|   |   |
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| <b>Appendix B: Proposal #9</b>  | <b>Sections of Law and/or Regulations</b>                 |
| Repeal the Commissioner of Education’s role in appointments to State-supported schools and the requirement that the State-supported school evaluate the student in addition to the evaluation conducted by the school district. | Education Law §4201<br>8 NYCRR §200.7(d)(1)(ii) and (iii) |

Support     Oppose     No Position

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### **Reasons/Recommendations**

We concur with the position of New York State United Teachers, our state affiliate, on this issue.