



THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK / ALBANY, NY 12234

TO: Higher Education Committee

FROM: John L. D'Agati *John L. D'Agati*

SUBJECT: Proposed Amendment to Section 102.4 of the Regulations of the Commissioner of Education Relating to Mandatory Reporting Requirements and Testing Misconduct

DATE: October 11, 2013

AUTHORIZATION(S):

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SUMMARY

Issue for Discussion

Should the Board of Regents amend Section 102.4 of the Regulations of the Commissioner of Education Relating to Mandatory Reporting Requirements and Testing Misconduct?

Reason(s) for Consideration

Review of Policy.

Proposed Handling

This item will come before the Higher Education Committee for discussion at its October 2013 meeting. A copy of the proposed amendment is submitted as Attachment A.

Procedural History

A Notice of Proposed Rule Making concerning the proposed amendment will be published in the State Register on November 6, 2013. Supporting materials are available upon request to the Secretary to the Board of Regents.

## Background Information

In November 2011, pursuant to Education Law §104 and section 3.9 of the Rules of the Board of Regents, the Commissioner appointed Henry “Hank” Greenberg as a Special Investigator, and tasked him with performing a review of the Department’s processes and procedures for handling and responding to reports of allegations of misconduct related to the administration and scoring of New York State assessments. In this capacity, Special Investigator Greenberg performed an exhaustive review of the Department’s processes and procedures for the intake, review, referral, investigation, findings, response, follow-up, and records retention policy regarding allegations of educator misconduct during the administration and scoring of State assessments. The review included interviews of Department personnel and others involved in testing investigations, and the review of pending and closed investigative case files, guidance materials, manuals, statutes, and regulations, among other relevant items.

On March 19, 2012, Special Investigator Greenberg reported his findings and recommendations to the Board. See Greenberg, H., Review of the New York State Education Department’s (‘NYSED’) Processes and Procedures for Handling and Responding to Reports of Alleged Irregularities in the Administration and Scoring of State Assessments. The Board accepted all of the Special Investigator’s recommendations, which included the creation of a new Test Security Unit (“TSU”) that would focus on the detection and deterrence of security breaches and other testing irregularities.

Another significant recommendation from Special Investigator Greenberg that the Board adopted was that the Department establish a mandatory reporting requirement for school personnel, who learn of any security breach or other testing misconduct, define specific context based examples of prohibited testing misconduct, and sanction those who fail to comply. (Greenberg Report, pgs. 10 and 14, emphasis in original). Pursuant to this recommendation, the TSU incorporated a mandatory reporting requirement in the Department’s testing manuals for Regents and Grades 3 through 8 examinations. The TSU recommends that the Board formalize Special Investigator Greenberg’s recommendations by amending Section 102.4 of the Commissioner’s Regulations to prohibit certain testing misconduct and that the regulation be amended to include specific concrete examples of what constitutes “testing misconduct.”

Additionally, Special Investigator Greenberg recommended that NYSED “[p]rotect from retribution persons who report security breaches and other testing irregularities.” (Greenberg Report, p. 11). Therefore, the TSU recommends that the Board formalize this recommendation for protecting persons who report test security violations to the TSU by amending Section 102.4 of the Commissioner’s Regulations to include such protection. Under Civil Service Law § 75-b, protections exist for public employees who report violations of “a law, rule, or regulation” that the reporting person

reasonably believes has occurred.<sup>1</sup> The proposed amendment clarifies that certified individuals who take retaliatory action against a person who makes a test fraud report in compliance with the proposed amendment may be subject to Part 83 sanctions.<sup>2</sup>

The proposed amendments enhance the security of the State Assessment program in several ways. First, the regulation defines specific types of testing misconduct, prohibits such misconduct and requires that incidents of suspected testing misconduct be reported to the Department so that they can be investigated and addressed. Second, the proposed amendment serves to protect district personnel, educators and others who file reports of suspected cheating from retaliation by prohibiting them from being disciplined and/or from any other adverse action as the result of the filing of a report while at the same time deterring misconduct and encouraging a culture of ethical testing by serving notice that any ethical testing breaches will be reported to the Department if they become known. The mandatory reporting requirements in the proposed amendment are consistent with the requirements of several other states, including but not limited to, Virginia, Illinois, Texas and Nevada.

#### Recommendation

Not applicable.

#### Timetable for Implementation

It is anticipated that the proposed amendment will come to the Board at is January 2014 meeting. If adopted at the January 2104 meeting, the proposed amendment will become effective on January 29, 2014.

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<sup>1</sup> The primary NYS whistleblower protection law is found in New York Civil Service Law § 75-b.

<sup>2</sup> Civil Service Law § 75-b provides in pertinent part: (a) A public employer shall not dismiss or take other disciplinary or other adverse personnel action against a public employee regarding the employee's employment because the employee discloses to a governmental body information: (i) regarding a violation of a law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety; or (ii) which the employee reasonably believes to be true and reasonably believes constitutes an improper governmental action. "Improper governmental action" shall mean any action by a public employer or employee, or an agent of such employer or employee, which is undertaken in the performance of such agent's official duties, whether or not such action is within the scope of his employment, and which is in violation of any federal, state or local law, rule or regulation.

AMENDMENT TO THE REGULATIONS OF THE COMMISSIONER OF  
EDUCATION

Pursuant to sections 207, 225 and 305 of the Education Law and section 75-b of the Civil Service Law.

1. Section 102.4 of the Regulations of the Commissioner of Education is amended, effective January 29, 2014, to read as follows:

Section 102.4. Fraud in examinations.

(a) Prohibited Student Fraud. If, in the judgment of the principal responsible for administration of an examination under the authority of the Regents, upon the basis of evidence deemed by him to be sufficient, a student has been found guilty of having committed or attempted to commit fraud in the examination, the principal shall be authorized to cancel the examination and to exclude this student from any subsequent Regents examination until such time as the student has demonstrated by exemplary conduct and citizenship, to the satisfaction of the principal, that the student is entitled to restoration of this privilege. As used in this [section] subdivision, fraud shall include the use of unfair means to pass an examination, giving aid to, or obtaining aid from, another person in any examination, alteration of any Regents passcard or other credential, and intentional misrepresentation in connection with examinations or credentials. Before such penalty shall be applied, the student accused of fraud shall be given an opportunity to make satisfactory explanations, including the right to appear before the board of education or a person or persons designated by such board, together with his parent or parents and, if so desired by the parent or parents, an attorney, all of whom shall be given the opportunity to ask questions of the examiner or examiners and any

other person having direct personal knowledge of the facts. The board of education or the person or persons designated by the board for the purpose of such inquiry may affirm, modify or reverse the findings or penalty, if any, imposed by the principal. The principal shall report promptly to the commissioner the name of each student penalized under this regulation, together with a brief description of circumstances.

(b) Prohibited Testing Misconduct. Testing misconduct, assisting in the engagement of, or soliciting another to engage in testing misconduct, and/or the knowing failure to report testing misconduct in accordance with subdivision (d) of this section when committed by an employee of a school district or board of cooperative educational services in a position for which a teaching or school leader certificate is required, shall be deemed to raise a reasonable question of moral character under Part 83 of this Title and shall be subject to referral to the Office of School Personnel Review and Accountability at the State Education Department to the extent provided in Section 83.1 of this Title. Each school district and board of cooperative educational services employee in a position for which a teaching or school leader certificate is not required who commits an unlawful act in respect to examination and records that is prohibited by Education Law §225 shall be subject to disciplinary action by the board of education or the board of cooperative educational services in accordance with subdivision 11 of Education Law §225.

(c). For purposes of this section, testing misconduct shall include, but need not be limited to, the following acts or omissions:

(1) Accessing secure test booklets and/or answer sheets prior to the time allowed by New York State testing rules;

(2) Duplicating, reproducing, or keeping any part of any secure examination materials;

(3) Reviewing test booklets prior to test administration in order to:

(i) determine and record correct responses for use during testing;

(ii) create pre-test lessons or discussions with students about concepts being tested; and/or

(iii) create a “cheat sheet” for students to use during any State assessment, including but not limited to, sharing formulas, concepts, or definitions, necessary for the test;

(4) Providing students clues or answers during test administration, including, but not limited to, one or more of the following actions:

(i) coaching students about correct answers;

(ii) defining terms and concepts contained in the test;

(iii) pointing out wrong answers to a student and suggesting that the student reconsider or change the recorded response;

(iv) reminding students during testing of concepts they learned in class; and/or

(v) making facial or other non-verbal suggestions regarding answers.

(5) Allowing any student more time to take an examination than is allowed for that student;

(6) Leaving any materials displayed in the room containing topics being tested;

(7) Writing test specific formulas, concepts, or definitions on the board prior to and while a State assessment is administered.;

(8) Reviewing a student answer sheet for wrong answers and returning it to a student with instructions to change or reconsider wrong responses;

(9) Altering, erasing, or in any other way changing a student's recorded responses after the student has handed in his/her test materials; or

(10) Rescoring portions of the test in order to add or find points so a student will pass; and/or

(11) Encouraging or assisting an individual to engage in the conduct described in paragraphs (1) through (10) of this subdivision.

(e) Mandatory Reporting of Testing Misconduct. Each school district employee shall be required to report to the Department any known incident of testing misconduct by a certified educator or any known conduct by a non-certified individual involved in the handling, administration or scoring of State assessments that may reasonably be considered to be in violation of section 225 of the Education Law, in accordance with directions and procedures established by the Commissioner for the purpose of maintaining the security and confidential integrity of State assessments.

(f) Prohibition Against Taking Adverse Action Against Certain Employees for Filing a Report. In accordance with section 75-b of the Civil Service Law, a school district or board of cooperative educational services shall not dismiss or take other disciplinary or adverse action against an employee because he/she submitted a report pursuant to subdivision (e) of this section. Any such adverse action by an individual holding a teaching or school leader certificate shall be deemed to raise a reasonable question of moral character under Part 83 of this Title and may be referred to the Office of School Personnel Review and Accountability at the State Education Department.