



TO: P-12 Education Committee

FROM: Angelica Infante-Green *A. Infante - Green*

SUBJECT: Proposed Amendments to Section 100.5 and 200.4 of the Commissioner's Regulations to Require Superintendents to Make a Local Determination as to Academic Proficiency for Certain Students with Disabilities to Graduate with a Local Diploma

DATE: October 6, 2016

AUTHORIZATION(S):  

SUMMARY

Issue for Decision

Should the Board of Regents adopt the proposed amendment to sections 100.5 and 200.4 of the Commissioner's regulations to require superintendents to make a local determination as to academic proficiency for certain students with disabilities to graduate with a local diploma?

Reason(s) for Consideration

Implementation of policy.

Proposed Handling

The proposed amendment is submitted to the P-12 Education Committee for recommendation to the Full Board for adoption as an emergency rule at its October 2016 meeting. A Notice of Emergency Adoption and Revised Rule Making will be published in the State Register on November 2, 2016. A statement of facts and circumstances justifying the emergency is included as Attachment A.

Procedural History

At its June 2016 Regents meeting, the Board of Regents adopted the proposed amendment. A Notice of Emergency Adoption and Proposed Rule Making was published in the State Register on July 6, 2016. Following the 45-day public comment period required under the State Administrative Procedure Act, the Department received several comments on the proposed amendment. A second emergency adoption was taken at the September 2016 meeting, effective September 18, 2016, to ensure that the proposed amendment adopted at the June 2016 Regents meeting remained continuously in effect until it could be revised and adopted as a permanent rule. The proposed amendment has been revised in response to public comment. A third emergency adoption is therefore necessary to ensure that the amendment adopted at the September meeting, with the revisions made as a result of public comment, remains continuously in effect until it can be permanently adopted.¹ A copy of the revised proposed amendment and an Assessment of Public Comment are attached (see Attachments B and C). Supporting materials for the proposed amendment are available upon request from the Secretary to the Board of Regents.

Background Information

It is essential that we have high expectations for what students with disabilities can learn and to provide reasonable accommodations for them to demonstrate that they have reached the standards. With these high expectations for students, we must also have high expectations for teaching with appropriate opportunities, supports, services and instruction provided to students with disabilities.

Safety Net Options for Students with Disabilities

Over the past several years, the Board of Regents has reviewed and revised the safety net options available to students with disabilities. Currently, there are three safety net options available to students with disabilities to graduate with a local diploma:

1. **Low Pass Rate Safety Net Option:** 5 required Regents exams with a score of 55 – 64.
2. **Low Pass Rate Safety Net Option with Appeal:** Students who score up to three points below a score of 55 on a Regents exam would be eligible to receive the local diploma via appeal if all of the conditions of appeal are met.

¹ Furthermore, because the third emergency adoption revises the amendments adopted by emergency action at the September Regents meeting, which does not expire until November 15, 2016, it is also necessary to repeal the September emergency adoption.

- 3. Compensatory Safety Net Option:** A student with a disability may receive a local diploma if he/she scores between 45-54 on one or more of the Regents exams required for graduation, other than English language arts (ELA) or mathematics, but achieves a score of 65 or higher on another required Regents exam which can compensate for the lower score. A score of 65 or higher on a single examination may not be used to compensate for more than one examination for which a score of 45-54 is earned.

Summary of Amendments Adopted in June and September 2016

Superintendent's Review

All students with disabilities must be held to high expectations and be provided meaningful opportunities to participate and progress in the general education curriculum to prepare them to graduate with a regular high school diploma. The majority of students with disabilities can meet the State's learning standards for graduation. However, there are some students who, because of their disabilities, are unable to demonstrate their proficiency on standard State assessments, even with testing accommodations. For these students, at its June 2016 Regents meeting, the Board of Regents adopted an amendment to the Commissioner's regulations to ensure that students with disabilities have demonstrated that they have met the State's learning standards. The amendment required superintendents (or the principal/head of school of a registered nonpublic school or charter school, as applicable) to review, document and provide a written certification/assurance that there is evidence that the student has otherwise met the standards for graduation with a local high school diploma. Because ELA and math are foundation skills for which there must be a standardized measure of achievement, this option does require a minimum score on the ELA and math Regents exams. However, for the other three exams required for graduation, this option allows review of other documentation of proficiency when the student cannot pass one or more of these exams.

The conditions of the review are detailed below:

Applicability

This option is open to students with disabilities with a current Individualized Education Program (IEP) only. It does not apply to students with section 504 accommodation plans or students who have been declassified from special education.

Superintendent Review

At its June meeting, the Board of Regents adopted regulations to require a superintendent to conduct an automatic review of an eligible student with a disability for a local diploma if the student otherwise met the standards for graduation with a local diploma, but he/she was not successful, because of his/her disability, at demonstrating his/her proficiency on the Regents exams required for graduation. However, in

response to public comment, the proposed amendment was revised to require that for reviews conducted on or after October 18, 2016, the superintendent may only consider an eligible student for a local diploma through the superintendent determination pathway *upon receipt of a written request from the student's parent or guardian*. Such request must be submitted in writing to the student's school principal or chairperson of the district's Committee on Special Education (CSE). A written request received by the school principal, chairperson of the district's CSE, or any other employee of the school, must be forwarded to the school superintendent immediately upon its receipt.

Process

Under this pathway, a school superintendent has the responsibility to determine if a student with a disability has otherwise met the standards for graduation with a local diploma when such student has not been successful, because of his/her disability, at demonstrating his/her proficiency on the Regents exams required for graduation.

Conditions

1. The student has a current IEP and is receiving special education programs and/or related services.
2. The student did not meet the graduation requirements through the low pass (55-64) safety net option² or the compensatory option³ [section 100.5(b)(7)(vi)(c) and (d)(7)].
3. The student must have earned the required course credits and have passed, in accordance with district policy, all courses required for graduation, including the Regents courses to prepare for the corresponding required Regents exam areas (ELA, math, social studies, and science).
4. The student must have received a minimum score of 55 on both the Regents ELA and math exams or a successful appeal of a score between 52 and 54.
5. There must be evidence that the student participated in the other exams required for graduation pursuant to section 100.5(a)(5), but has not passed one or more of these as required for graduation.
6. In a subject area where the student was not able to demonstrate his/her proficiency of the State's learning standards through the corresponding Regents assessment required for graduation, there must be evidence that the

² A student also has the option to appeal a score of 52-54 on up to two Regents exams pursuant to section 100.5(b)(7)(vi)(c). While the appeal option exists, it is not required in order for a student to be considered for the superintendent's determination option.

³ A student also has the option to appeal the ELA and/or math scores pursuant to section 100.5(d)(7). While the appeal option exists, it is not required in order for a student to be considered for the superintendent's determination option.

student has otherwise demonstrated graduation level proficiency in the subject area.

Review and Documentation

In conducting a review to ensure the student has met the academic standards, the superintendent must consider evidence that demonstrates that the student:

1. Passed courses culminating in the exam required for graduation, in accordance with the grading policies of the district. In making this determination, the superintendent may consider the student's final course grade as well as student work completed throughout the school year and/or interim grades on homework, projects, class work, quizzes, tests, etc., that demonstrate that the student has met the learning standards for the course; and
2. Actively participated in the exam required for graduation.

The superintendent must sign an assurance on the form that certifies that the information is accurate and the superintendent attests that the student has met graduation requirements. A copy of the form must be placed in the student's record and a copy must be submitted to the Department no later than by August 31st following the student's graduation.

Decision

A determination by the superintendent is final.

Audit

The Commissioner shall periodically audit the determinations granted by superintendents to ensure that conditions described above are being met.

Allowance of Low Pass Appeal in Addition to Compensatory Option

Prior to the adoption of the emergency rule at the June Regents meeting, students with disabilities who made use of the compensatory option described above were not eligible to also make use of the low pass appeal wherein they are able to appeal scores of 52-54. The amendment adopted in June removes this prohibition and allows these students to make use of both options in meeting graduation requirements.

Revisions to proposed amendment as a result of public comment

In response to public comment and questions raised by the field, the following major revisions were made to the proposed amendment:

- Section 100.5(d)(12) of the proposed amendment was revised to require that on or after October 18, 2016 (the effective date of the revised rule), a superintendent may only make a determination whether an eligible student has met the requirements for graduation through the superintendent determination pathway option upon receipt of a written request from an eligible student's parent or guardian.
- The proposed amendment has been further revised to do the following:
 - Require that the student and the parent of the student receive written notice of the superintendent's determination with the copy of the completed superintendent's determination form and, where the superintendent determines that the student has met the requirements for graduation, the district must provide prior written notice that the student is not eligible to receive a free appropriate public education after graduation with a local diploma. Where the superintendent determines that the student has not met the requirements for graduation, the written notice shall inform the student and his/her parent that the student has the right to attend school until receipt of a local or Regents diploma or until the end of the school year in which the student turns age 21, whichever shall occur first;
 - Clarify that the definition of superintendent for purposes for this regulation only shall include the principal or head of school of charter schools and non-public schools, as applicable.
- In addition, in order to ensure appropriate transition planning, amendments to section 200.4(d)(2)(ix) are proposed to require that, for students of transition age, the development of transition goals and services at a CSE meeting must include a discussion with the student's parents of the student's progress toward receiving a diploma and that parents be provided with information explaining graduation requirements, including eligibility criteria and process for requesting the superintendent determination.

Related Regents Item(s)

<http://www.regents.nysed.gov/meetings/2016/2016-06/p-12-education>

<http://www.regents.nysed.gov/meetings/2016/2016-09/meeting-board-regents-0>

Recommendation

It is recommended that the Board of Regents take the following action:

VOTED: That the emergency action taken at the September 2016 Regents meeting to add a new paragraph (12) to subdivision (d) of section 100.5 of the Regulations of the Commissioner of Education, is rescinded, effective October 17, 2016 and that a new paragraph (12) be added to subdivision (d) of section 100.5 of the

Regulations of the Commissioner and clause (c) of subparagraph (i) of paragraph (7) of subdivision (d) of section 100.5, and subparagraph (ix) of paragraph (2) of subdivision (d) of section 200.4 of the Regulations of the Commissioner of Education be amended, as submitted, effective October 18, 2016; as an emergency action upon a finding by the Board of Regents that such action is necessary for the preservation of the general welfare in order to ensure that certain students with disabilities who are graduating from high school and their parents are aware that if they do not meet the graduation standards through the existing appeal and safety net options, that the parent may request that the superintendent make a determination as to whether the student has met the academic standards and is eligible for a diploma; and to further ensure that superintendents are on notice that they must make a determination as to whether certain students with disabilities are eligible for local diploma if the student meets the requirements of the proposed amendment upon receipt of a written request from an eligible student's parent; and to further ensure that the emergency rule adopted at the June and September Regents meetings and as further revised, as submitted, remain in effect until it can be adopted as a permanent rule.

Timetable for Implementation

If adopted at the October meeting, the revised emergency rule will become effective on October 18, 2016. It is anticipated that the proposed amendment will be presented for permanent adoption at the December Regents meeting after publication of a Notice of Emergency Adoption and Revised Rule Making in the State Register on November 2, 2016 and expiration of the 30-day public comment period for revised rule makings. If adopted at the December 2016 Regents meeting, the proposed amendment will be effective as a permanent rule on December 28, 2016.

Attachments

8 NYCRR §100.5

STATEMENT OF FACTS AND CIRCUMSTANCES WHICH NECESSITATE
EMERGENCY ACTION

All students with disabilities must be held to high expectations and be provided meaningful opportunities to participate and progress in the general education curriculum to prepare them to graduate with a regular high school diploma. The majority of students with disabilities can meet the State's learning standards for graduation. However, there are some students who, because of their disabilities, are unable to demonstrate their proficiency on standard State assessments, even with testing accommodations. For these students, the proposed amendment, which was adopted by the Board of Regents at its June 2016 meeting, provides a superintendent review option in order for certain students with disabilities to graduate with a local diploma, beginning with students graduating in June 2016.

The proposed amendment was readopted as a second emergency measure, effective September 18, 2016, to ensure that the emergency rule adopted at the June Regents meeting remained continuously in effect until it could be adopted as a permanent rule.

The proposed amendment has now been substantially revised in response to public comment. For instance, section 100.5(d)(12)(iii) of the proposed amendment has been added to provide that on or after October 18, 2016 a superintendent may only make a determination whether a student has met the requirements for graduation through the superintendent determination pathway option upon receipt of a written

request from an eligible student's parent or guardian. In order to ensure appropriate transition planning, section 200.4 has also been amended to require that the development of transition goals and services must include a discussion with the student's parents of the student's progress toward receiving a diploma and that parents be provided with information explaining graduation requirements, including eligibility criteria and process for requesting the superintendent determination.

It is anticipated that the revised rule will be presented for adoption as a permanent rule at the December 2016 Regents meeting, which is the first scheduled meeting after expiration of the 30 day public comment period prescribed in the State Administrative Procedure Act for State agency rule makings. A third emergency adoption is necessary to immediately adopt the revisions made in response to public comment and to otherwise ensure that the rule remains continuously in effect until the effective date of its adoption as a permanent rule, and thereby ensure that certain students with disabilities who are graduating from high school and their parents are aware that if they do not meet the graduation standards through the existing appeal and safety net options, that the student's parent may request that the superintendent make a determination as to whether the student has met the academic standards and is eligible for a diploma if the student meets the requirements of the proposed amendment. It is also necessary to ensure that superintendents are on notice that upon receipt of a written request from an eligible student's parent, they must make a determination as to whether certain students with disabilities are eligible for local diploma if the student meets the requirements of the proposed amendment.

Attachment B

AMENDMENT OF THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to Education Law sections 101, 207, 208, 209, 305, 308, 309 and 3204

1. The emergency action taken at the September 2016 Regents meeting to add a new paragraph (12) to subdivision (d) of section 100.5 of the Regulations of the Commissioner of Education, is rescinded, effective October 17, 2016.

2. A new paragraph (12) shall be added to subdivision (d) of section 100.5 of the Regulations of the Commissioner of Education, effective October 18, 2016, to read as follows:

(12) Superintendent determination pathway for certain students with disabilities for eligibility for a local diploma.

(i) For purposes of this paragraph only, superintendent shall mean the superintendent of a school district or the principal, head of school, or their equivalent, of a charter school or nonpublic school, as applicable.

(ii) School districts, registered nonpublic high schools and charter schools shall ensure that every student who is identified as a student with a disability as defined in Education Law section 4401(1) and section 200.1(zz) of this Title and who does not meet the assessment requirements for graduation through the existing appeal options, including the compensatory score option or the 55-64 low pass safety net option available under this section but who is otherwise eligible to graduate in June 2016 and thereafter shall be considered for a local diploma through the superintendent determination pathway in accordance with the requirements of this paragraph, provided that the student:

(a) has a current individualized education program and is receiving special education programs and/or related services pursuant to Education Law section 4402 and section 200.4 of this Title; and

(b) took the English Regents examination required for graduation pursuant to this section and achieved a minimum score of 55 or successfully appealed a score of between 52 and 54 on such examination pursuant to paragraph (7) of this subdivision; and

(c) took a mathematics Regents examination required for graduation pursuant to this section and achieved a minimum score of 55 or successfully appealed a score of between 52 and 54 on such examination pursuant to paragraph (7) of this subdivision; and

(d) participated in the remaining Regents examinations required for graduation pursuant to clauses (c), (d), (e) and (f) of subparagraph (a)(5)(i) of this section, but was unable to achieve a minimum score of 55 on one or more of the remaining assessments required for graduation or did not initiate an appeal of a score of between 52 and 54 on one or more such examinations pursuant to paragraph (7) of this subdivision, or was unable to use the compensatory score option for one or more such examinations pursuant to clause (b)(7)(vi)(c) of this section, and

(e) has earned the required course credits pursuant to this section and passed, in accordance with district policy, all courses required for graduation.

(iii) For each eligible student under this paragraph, the superintendent shall conduct a review to determine whether the student has otherwise demonstrated proficiency in the knowledge, skills and abilities in the subject area(s) where the student

was not able to demonstrate his/her proficiency of the State's learning standards as measured by the corresponding Regents examination(s) and document such determination in accordance with the following procedures:

(a) the superintendent shall consider evidence that the student attained a grade for the course that meets or exceeds the required passing grade by the school for the subject area(s) under review and such grade is recorded on the student's official transcript with grades achieved by the student in each quarter of the school year. Such evidence may include, but need not be limited to, the student's final course grade, student work completed throughout the school year and/or any interim grades on homework, class work, quizzes and tests; and

(b) the superintendent shall consider the evidence that demonstrates that the student actively participated in the Regents examination(s) for the subject area(s) under review; and

(c) the superintendent shall, as soon as practicable, in a form and manner prescribed by the commissioner, document the evidence reviewed for an eligible student with disability under this paragraph and make a determination as to whether the student met the requirements for issuance of a local diploma pursuant to this paragraph and certify that the information provided is accurate; and

(d) the superintendent shall, as soon as practicable, provide each student and parent or person in parental relation to the student with a copy of the completed form and written notification of the superintendent's determination, and place a copy of the completed form in the student's record.

(1) Where the superintendent determines that the student has not met the requirements for graduation pursuant to this paragraph, the written notice shall inform the student and parent or person in parental relation to the student that the student has the right to attend school until receipt of a local or Regents diploma or until the end of the school year in which the student turns age 21, whichever shall occur first.

(2) Where the superintendent determines that the student has met the requirements for graduation pursuant to this paragraph, the parent shall receive prior written notice pursuant to the requirements of section 200.5(a)(5)(ii) of this Title indicating that the student is not eligible to receive a free appropriate public education after graduation with the receipt of the local diploma pursuant to this paragraph; and

(e) the superintendent shall, no later than August 31 of each year, provide the commissioner with a copy of the completed form for each student; and

(f) the commissioner may conduct audits of compliance with the requirements of this paragraph.

(iv) On or after October 18, 2016, a superintendent shall only make a determination under this paragraph upon receipt of a written request from an eligible student's parent or guardian. Such request shall be submitted in writing to the student's school principal or chairperson of the district's committee on special education. A written request received by the school principal, chairperson of the district's committee on special education, or any other employee of the school as applicable, shall be forwarded to school superintendent immediately upon its receipt.

2. Clause (c) of subparagraph (i) of paragraph (7) of subdivision (d) of section 100.5 of the Regulations of the Commissioner is amended, effective October 18, 2016, 2016, as follows:

(c) A student who is otherwise eligible to graduate in January 2016 or thereafter, is identified as a student with a disability as defined in section 200.1(zz) of this Title, and fails, after at least two attempts, to attain a score of 55 or above on up to two of the required Regents examinations for graduation shall be given an opportunity to appeal such score in accordance with the provisions of this paragraph for purposes of graduation with a local diploma, provided that the student:

(1) has scored within three points of a score of 55 on the required Regents examination under appeal and has attained at least a 65 course average in the subject area of the Regents examination under appeal; and

(2) has met the criteria specified in subclauses (a)(2)-(4) of this subparagraph. [Notwithstanding the provisions of this clause, a student with a disability who makes use of the compensatory option in clause (b)(7)(vi)(c) of this section to obtain a local diploma may not also appeal a score below 55 on the English language arts or mathematics Regents examinations pursuant to this clause.]

3. Subparagraph (ix) of paragraph (2) of subdivision (d) of section 200.4 of the Regulations of the Commissioner is amended, effective October 18, 2016, as follows:

(ix) Transition services. (a) For those students beginning not later than the first IEP to be in effect when the student is age 15 (and at a younger age, if determined appropriate), and updated annually, the IEP shall, under the applicable components of the student's IEP, include:

[(a)] (1) ...

[(b)] (2) ...

[(c)] (3) ...

[(d)] (4) ...

[(e)] (5) ...

(b) To ensure appropriate transition planning for the student, the development of transition goals and services pursuant to subclause (a) of this clause, shall include a discussion with the student's parents of:

(1) the graduation requirements that apply to the student depending upon the year in which he or she first enters grade nine;

(2) how the student is progressing toward receipt of a diploma including:

(i) the courses the student has passed and the number of credits the student has earned as required for graduation;

(ii) the assessments required for graduation that the student has taken and passed; and

(3) the appeal, safety net and superintendent determination pathway options that may be available to the student through section 100.5 of this Title to allow the student to meet the graduation assessment requirements.

(c) At the CSE meeting in which transition services will be discussed, the student's parents shall be provided with written information explaining the graduation requirements. Such information must include the eligibility criteria and processes for seeking an appeal to graduate with a lower score on a Regents examination and for requesting that a student be considered for a local diploma through the superintendent

determination pathway pursuant to section 100.5 of this Title. Parents shall also be informed that graduation from high school with a local diploma or Regents diploma shall terminate their child's entitlement to a free public education pursuant to Education Law section 3202(1) and their eligibility for special education services pursuant to this Part.

8 NYCRR §§100.5(d)(12)

ASSESSMENT OF PUBLIC COMMENT

Since publication of a Notice of Proposed Rule Making in the State Register on July 6, 2016, the State Education Department (SED) received the following comments on the proposed amendment.

1. COMMENT:

Additional graduation pathway for students with disabilities is welcome policy change. Pleased SED and Board of Regents (BOR) continue discussing graduation pathways providing students with disabilities flexibility to satisfy graduation requirements. Appreciate district responsibility for eligibility determinations; families are not aware of different/confusing exam appeal options. Number of commenters supported proposal and multiple pathways, which recognizes some students' inability to demonstrate proficiency on high-stakes tests, but recommended modifications. Creates opportunity for students with individualized education programs (IEPs) to earn local diploma.

DEPARTMENT RESPONSE:

Comments generally supportive; no response necessary.

2. COMMENT:

Power rests with uninformed superintendent and allows superintendent to make subjective determination. Forcing early graduation does not allow students to become independent members of society. May inadvertently open door to prematurely push students with disabilities out of system as cost savings or remove challenging students; limits student's work toward IEP goals by denying entitlement to free appropriate public

education(FAPE); may impact classification rate and increase due process regarding eligibility or declassification if parents view special education as increasing likelihood of graduation.

DEPARTMENT RESPONSE:

Rule has been revised to require that the superintendent only consider whether a student is eligible for a local diploma through the superintendent pathway option upon written request of the parent. A student may only be awarded a local diploma using this option if there is evidence that he/she has otherwise met the standards for graduation.

3. COMMENT:

Proposal endorses lower standards, undermines objectives for students to leave school prepared for independence, post-secondary education and employment and ignores district's policies for college-readiness. BOR documented lack of college/career readiness of students awarded local diplomas based on higher standards than superintendent determination. Students face remedial courses, tuition debt, reduced chances of completing degree; and minimal employment opportunities. State University of New York predicts college readiness by scores of 75 on English Language Arts (ELA) and 80 on math Regents exams and is proposing to eliminate remedial programs. Reducing passing rate creates situations where students cannot function in college and will not have access to remedial support.

DEPARTMENT RESPONSE:

SED does not agree proposal will lower education standards or result in students not being college/career ready. Rule was developed to ensure students with disabilities meet State's learning standards for graduation, while recognizing the particular

challenges some students face in passing Regents exams. Because ELA and math are foundation skills for which there must be standardized measures of achievement, this option requires 55 minimum score on these Regents exams. For other three required exams, superintendent must review, document and provide written certification/assurance that a student has otherwise met graduation standards for a local diploma.

4. COMMENT:

Proposal removes parents/students/committee on special education (CSE), who know child best, from process and right of individual with disability to choose path. Does not: provide families opportunity to review determination and confirm exiting is in student's best interests; require CSE review student's IEP before receiving diploma [see OSERS Letter to Richards, IDELR 288]; or include consideration of student's IEP goals/transition plan. Require CSE convene to review IEP/pertinent documents related to IEP/transition plan prior to determination. CSE discussion would inform students/parents of implications of graduation with local versus Regents diploma. Replace superintendent with CSE recommendation regarding proposed graduation. Require CSE recommendation and that superintendent review and consider CSE's recommendation and student's IEP and transition needs/goals when making determination. Allow parent and/or staff initiation. Without family's consent, students' rights under Individuals with Disabilities Education Act (IDEA) and to FAPE can be denied. Families should be consulted throughout process and have equal say in child's educational needs; not decided just by superintendent. Require family notification once potential eligibility is identified and student opportunity to accept or forgo/defer pathway

and remain in school until 21; not having this right is unfair and has long-term impact on student's future. Allow parents to accept diploma but decline termination of services. Suggest form contain statement that student accepts determination. Require districts inform parents/students of option and parent and/or student request superintendent's review. Have review initiated by student, parent/guardian, teacher/principal, or CSE, similar to appeals process. Add limited resolution period to dispute determination while meeting August 31 SED submission timeline.

DEPARTMENT RESPONSE:

It is important that parents be engaged as meaningful partners in the special education process and education of their child, including transition planning. Rule has been revised to only allow a superintendent to make a determination as to whether an eligible student with a disability has met the requirements for a local diploma upon written request of the parent. To ensure appropriate transition planning, rule has also been revised to require that for students of transition age, CSE discuss the student's progress toward receiving a diploma and parents be provided with information explaining graduation requirements, including eligibility criteria and process for requesting the superintendent determination. Under federal and State law/regulations, graduation with a regular diploma ends a student's entitlement to a free public education under Education Law section 3202(1) and eligibility for special education services; therefore, once a student is determined eligible for a local or Regents diploma, parents and students do not have the right to decline such diploma.

5. COMMENT:

Procedure to provide parent with prior written notice (PWN) regarding pending change in placement when district intends to graduate student before age 21 [See 34 CFR section 300.102(a)(3)(iii)] not incorporated into regulations. Require parent receive legally sufficient PWN regarding superintendent determination, providing clear explanation for decision. Clarify when parents must receive notice of superintendent's determination. Concerned determination is final and there is no recourse/appeal mechanism. Due process demands student's right to challenge superintendent's unilateral, subjective determination as graduation with local diploma is change in placement. Graduation subject to stay-put provisions; parent can invoke due process and student remains eligible for special education services until proceedings conclude.

DEPARTMENT RESPONSE:

Under Commissioner's Regulations section 200.5(a)(5)(ii), districts are required to provide PWN to parent prior to student's graduation with local or Regents diploma in a reasonable timeframe before it proposes to graduate student. Notice must indicate student is no longer eligible to receive FAPE. Notice of superintendent's determination should be provided at same time district provides parent PWN. As with any district proposal to change educational program/ placement of a student with a disability, parents may seek to resolve disagreement with proposal to graduate student through all appropriate means, including mediation and due process hearing proceedings.

6. COMMENT:

Requiring students to only actively participate in exams may send message students do not have to try to pass exams. Unlikely students can demonstrate graduation level proficiency yet not minimal proficiency on State assessments. Limit

range of failing scores acceptable for superintendent determination. Provide students with extremely low scores (i.e., 0-35) option for continued eligibility for FAPE.

DEPARTMENT RESPONSE:

Proposal recognizes there are some students who, because of their disabilities, are unable to demonstrate their proficiency on examinations required for graduation, even with testing accommodations, but are able to demonstrate graduation level proficiency of State's learning standards and pass courses culminating in the required graduation examinations. We decline to limit scores student would need to graduate through superintendent determination pathway.

7. COMMENT:

Reevaluate students prior to terminating services.

DEPARTMENT RESPONSE:

Under section 200.4(c)(4) of Commissioner's regulations, reevaluation is not required before termination of student's eligibility due to graduation with local or Regents diploma.

8. COMMENT:

Eliminate requirement that students participate in exams other than ELA and math required for graduation; they can be demoralizing, discouraging and result in undue stress.

DEPARTMENT RESPONSE:

Rule was developed to ensure students with disabilities meet State's learning standards for graduation; therefore, for other three required exams, superintendent

must review, document and provide written certification/assurance there is evidence student has otherwise met graduation standards for local diploma.

9. COMMENT:

Charter schools are only required to meet same health/safety, civil rights, and student assessment requirements applicable to public schools; because superintendent determination does not fit these categories, BOR does not have statutory authority to mandate charter schools consider this option. Charter School Act does not provide BOR regulatory power regarding graduation safety nets; charter schools have option to grant diploma created by BOR but are not required to. Only amendment to Charter Schools Act or schools charter could mandate this. Clarify that charter schools can choose to utilize new safety net option procedures but are not required to do mandatory review. Request that "Charter school" be removed from superintendent determination regulations.

DEPARTMENT RESPONSE:

Under Education Law §2854(1)(b) and (d), charter schools shall meet the same student assessment requirements applicable to other public schools and may grant regents and local diplomas to the same extent as other public schools. In a charter school the "superintendent" equivalent in a district school would be the charter school's head of school or other such school leader as designated by charter school's board of trustees.

10. COMMENT:

To be equitable, extend superintendent determination to all students, including students with Section 504 Accommodation Plans, declassified students, multilingual

learners. Students with IEPs are not the only students struggling with Regents exams; no student should be penalized for not demonstrating mastery of NYS standards on high-stakes standardized tests. Pathway operates with one-size-fits-all framework, unfairly penalizing students struggling with high-stakes standardized tests. Create multiple instructional/assessment pathways to diploma (e.g., performance- and project-based assessments) for students unable to demonstrate proficiency on State assessments; hold all students to high expectations. Hold Statewide hearings/listening tour regarding Regents exam requirements and alternative diploma pathways. Diploma path should not be tied to standardized written exams; graduation exit exams not required in over 60% of states. Reevaluate mindset that local diploma is “less than” diploma. Policy should acknowledge students are able to show achievement in ways besides standardized tests. Overemphasis on passing Regents exams detracts from well-rounded education.

DEPARTMENT RESPONSE:

The majority of students, including students with IEPs and 504 plans, declassified students and multilingual learners, can meet State’s learning standards for graduation. Proposal recognizes there are certain students with disabilities with an IEP who, because of their disability, are unable to demonstrate proficiency on standard State assessments.

BOR will continue to discuss multiple diploma pathways for all students and alternative ways to assess proficiency toward State’s learning standards for purposes of graduation.

11.COMMENT:

Having separate local diploma for students with disabilities is discriminatory [See Letter to White, OSEP, 63 IDELR 230 (7/2/14)] and discloses disability to potential colleges/employers. Depriving students opportunity to earn Regents diploma, benefit nondisabled peers enjoy, is discriminatory and violates Section 504 of the Rehabilitation Act and Americans with Disabilities Act. Permit local diploma for all students.

DEPARTMENT RESPONSE:

This is not separate type of diploma. Local diploma is currently available to all students, not just students with disabilities, who satisfactorily appeal two Regents test scores. Nothing in revised rule precludes a student with a disability from working toward a Regents diploma.

12.COMMENT:

Concerned earning CDOS credential is not available with Superintendent Determination.

DEPARTMENT RESPONSE:

Nothing in proposed rule prohibits students from earning the credential as supplement to local diploma through superintendent determination pathway or using credential for 5th assessment for local diploma (see 100.5[d][11]).

13.COMMENT:

Proposal passed without sufficient opportunity for thoughtful review and public comment. SED publicized regulations during summer when stakeholders are less connected to school issues and did not conduct hearings. Public largely unaware of proposal; comment period is very short and should be lengthened.

DEPARTMENT RESPONSE:

In accordance with State Administrative Procedure Act (SAPA) requirements, proposed rule was published in NYS Register and comment was accepted for 45 days. Additional guidance for schools/parents on superintendent determination is posted on SED's website (<http://www.p12.nysed.gov/specialed/publications/superintendent-determination-of-graduation-with-a-local-diploma.htm>).

14. COMMENT:

Reopen consortium school application process to allow all high schools to apply using successful model of authentic project-based assessments.

DEPARTMENT RESPONSE:

Comment beyond scope of proposed rulemaking.