



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

**TO:** The Honorable the Members of the Board of Regents

**FROM:** Cosimo Tangorra, Jr. *Cosimo Tangorra Jr.*

**SUBJECT:** Proposed Amendment of Section 100.2(ee) of the Commissioner's Regulations, relating to Academic Intervention Services (AIS)

**DATE:** November 10, 2014

**AUTHORIZATION(S):**

*Richard A. Santorum* *John B. P. Jr.*

## SUMMARY

### Issue for Decision (Consent Agenda)

Should the Regents approve, as an emergency action, the proposed amendment of Commissioner's Regulations section 100.2(ee) to extend certain of the rule's provisions through the 2014-15 school year, to provide continued flexibility to school districts in the provision of Academic Intervention Services (AIS) for those students who performed below Level 3 on the grade 3-8 ELA and math assessments but at or above cut scores established by the Regents?

### Reason(s) for Consideration

Review of Policy.

### Proposed Handling

This item will come before the Full Board for adoption as an emergency rule at the November 2014 Regents meeting. A copy of the proposed amendment and a statement of the facts and circumstances which necessitate emergency action is attached. Supporting materials are available upon request from the Secretary to the Board of Regents.

## **Procedural History**

The proposed amendment was adopted as an emergency rule at the September 15-16, 2014 Regents meeting. A Notice of Emergency Adoption and Proposed Rule Making was published in the State Register on October 1, 2014. The September emergency rule will expire on December 14, 2014. A second emergency action is necessary at the November 2014 Regents meeting in order to ensure that the emergency rule remains in effect until it can be adopted at the December 15-16, 2014 Regents meeting and take effect as a permanent rule.

## **Background Information**

At the Board of Regents July 2013 meeting, Department staff discussed with the Board the implications for the provision by school districts of AIS as a result of the substantial decrease in the percentage of students who demonstrated the knowledge and skills necessary to meet grade level Common Core Learning Standards (CCLS) relative to the percentage of students demonstrating this against the 2005 standards.

To ensure that existing support services, including Academic Intervention Services (AIS), remain relevant and appropriate as New York implements the CCLS, the Regents directed the Department to develop proposed amendments to Commissioner's Regulations to provide flexibility in the provision of Academic Intervention Services.

Historically, students who have scored below proficient (Level 3) on State assessments in English language arts or mathematics have been required to receive AIS. However, proficiency standards on the 2012 and the 2013 state assessments could not be directly compared because the 2012 tests were designed to measure different learning standards than the 2013 Common Core tests. Therefore, the Department determined the scale scores for each respective year that was associated with students who scored at the same percentile rank on the two assessments. The Department used these percentile ranks as the basis for determining which students must be provided AIS during the 2013-14 transition year to ensure that the change in proficiency rates would not result in a significant increase in the percentage of students who must receive these services. The cut scores that the Department used resulted in districts being required to provide AIS to approximately the same percentages of students Statewide in the 2013-14 school year as received AIS in the 2012-13 school year. This was analogous to the action taken by the Regents in July 2010 to address the raising of the cut scores on the 2010 Grade 3-8 English language arts and mathematics assessments.

Under the approved regulation, districts were required to establish a policy to determine what services, if any, to provide in the 2013-14 school year to students who scored above the transitional cut scores established by the Department but below proficiency on the 2013 assessments.

Specifically, the amendment provided that for the 2013-14 school year only:

- Students who scored at or below the specified cut points for Grades 3-8 English Language Arts and mathematics must receive academic intervention instructional services.
- Students who scored at or above the specified cut points but below the 2013 level 3/proficient cut points would not be required to receive academic intervention instructional and/or student support services unless the school district deemed it necessary.
- Each school district developed and maintained on file a uniform process by which the district determined whether to offer AIS during the 2013-14 school year to students who scored at or above the specified cut points but below the level 3/proficient on grade 3-8 English Language Arts or mathematics State assessments in 2013-14.
- Each school by November 1, 2013 either posted a description of this process to its Website or distributed to parents in writing a description of such process.

The proposed amendment would extend the 2013-14 amendment to the Commissioner's Regulations through the 2014-15 school year to continue flexibility in the provision of Academic Intervention Services.

### **Recommendation**

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

VOTED: That paragraph (2) of subdivision (ee) of section 100.2 of the Regulations of the Commissioner of Education be amended, as submitted, effective December 15, 2014, as an emergency action upon a finding of the Board of Regents that such action is necessary for the preservation of the general welfare to ensure that the emergency rule adopted at the September 15-16, 2014 Regents meeting remains continuously in effect until it can be presented for adoption and take effect as a permanent rule.

### **Timetable for Implementation**

The proposed rule was adopted by emergency action at the September Regents meeting, effective September 16, 2014, and will expire on December 14, 2014. If adopted at the November Regents meeting, the second emergency action will take effect on December 15, 2014. It is anticipated that the proposed amendment will be presented for permanent adoption at the December 15-16, 2014 Regents meeting and take effect as a permanent rule on December 31, 2014.

## **8 NYCRR §100.2(ee)**

### STATEMENT OF FACTS AND CIRCUMSTANCES WHICH NECESSITATE EMERGENCY ACTION

The proposed rule would extend certain of the provisions in section 100.2(ee) of the Commissioner's Regulations through the 2014-2015 school year, in order to provide continued flexibility to school districts in the provision of Academic Intervention Services (AIS) for those students who performed below Level 3 on the grade 3-8 ELA and math assessments but at or above cut scores established by the Regents.

The proposed amendment was adopted as an emergency action at the September 15-16, 2014 Regents meeting, effective September 16, 2014. A Notice of Emergency Adoption and Proposed Rule Making was published in the State Register on October 1, 2014. Since the Board of Regents meets at monthly intervals, the earliest the proposed amendment could be adopted by regular action after publication of the Notice of Proposed Rule Making and expiration of the 45-day public comment period prescribed in State Administrative Procedure Act (SAPA) section 202 would be the December 15-16, 2014 Regents meeting. Because SAPA section 203(1) provides that an adopted rule may not become effective until a Notice of Adoption is published in the State Register, the earliest the proposed amendment could become effective if adopted at the December Regents meeting, is December 31, 2014. However, the September emergency rule will expire on December 14, 2014, 90 days from its filing with the Department of State on September 16, 2014. A lapse in the rule's effective date could disrupt the provision of modified AIS services during the 2014-2015 school year.

Emergency action is therefore necessary for the preservation of the general welfare to ensure that the proposed rule adopted by emergency action at the September 2014 Regents meeting remains continuously in effect until the effective date of its permanent adoption.

It is anticipated that the proposed amendment will be presented for adoption as a permanent rule at the December 15-16, 2014 Regents meeting, which is the first scheduled Regents meeting after publication of the proposed rule in the State Register and expiration of the 45-day public comment period prescribed in the State Administrative Procedure Act for State agency rule makings.

## AMENDMENT OF THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

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

Paragraph (2) of subdivision (ee) of section 100.2 of the Regulations of the Commissioner of Education is amended, effective December 15, 2014, as follows:

(2) Requirements for providing academic intervention services in grade three to grade eight. Schools shall provide academic intervention services when students:

(i) score below:

(a) the State designated performance level on one or more of the State elementary assessments in English language arts, mathematics or science, provided that for the [2013-2014] 2014-2015 school year only, the following shall apply:

(1) those students scoring below a scale score specified in subclause (3) of this clause shall receive academic intervention instructional services; and

(2) those students scoring at or above a scale score specified in subclause (3) of this clause but below level 3/proficient shall not be required to receive academic intervention instructional and/or student support services unless the school district, in its discretion, deems it necessary. Each school district shall develop and maintain on file a uniform process by which the district determines whether to offer AIS during the [2013-2014] 2014-2015 school year to students who scored above a scale score specified in subclause (3) of this clause but below level 3/proficient on a

grade 3-8 English language arts or mathematics State assessment in [2012-2013] 2013-2014, and shall no later than [November 1, 2013] November 1, 2014 either post to its website or distribute to parents in writing a description of such process;

(3) . . .

(b) . . .

(ii) . . .

(iii) . . .