



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: Kimberly Young Wilkins *Kimberly Young Wilkins*

SUBJECT: Proposed Amendment to Sections 135.1 and 135.4 of the Regulations of the Commissioner of Education Relating to Extended Eligibility for Participation in Inclusive Athletic Activities

DATE: February 24, 2020

AUTHORIZATION(S): *[Signature]* *Sharon L. Tabor*

SUMMARY

Issue for Decision (Consent)

Should the Board of Regents adopt the amendment of Sections 135.1 and 135.4 of the Regulations of the Commissioner of Education relating to extended eligibility for participation in inclusive athletic activities?

Reason(s) for Consideration

Review of State policy.

Proposed Handling

The proposed rule is being presented to the Full Board for permanent adoption at its March 2020 meeting. In addition, a second emergency adoption is necessary to ensure the emergency rule adopted at the December 2019 meeting of the Board of Regents remains continuously in effect until the effective date of its adoption as a permanent rule. A copy of the proposed rule and a statement of facts and circumstances justifying the emergency action are attached.

Procedural History

A Notice of Proposed Rule Making was published in the State Register on September 25, 2019. Following the 60-day public comment period required under the State Administrative Procedure Act, the Department received numerous supportive

comments on the proposed amendment, included as Attachment C. Nevertheless, the proposed amendment was revised for clarification and adopted as an emergency measure at the December 2019 meeting of the Board of Regents, effective December 10, 2019. A Notice of Emergency Adoption and Revised Rulemaking was published in the State Register on December 24, 2019. Following the 45-day public comment period required under the State Administrative Procedure Act for revised rulemakings, the Department received no comments on the proposed rule. A Notice of Emergency Adoption and a Notice of Adoption will be published in the State Register on March 18, 2020.

Supporting materials are available upon request from the Secretary to the Board of Regents.

Background Information

Commissioner's regulation §135.4(c)(7)(ii) establishes the parameters for participation in interscholastic athletic competition for students in grades 7 through 12. The underlying spirit of Commissioner's regulations governing interscholastic athletics is to provide for the safety and equal opportunity for participation of public school students. These principles guide athletic eligibility determinations for all student athletes who wish to participate in interscholastic athletic competition.

Recently, the New York State Public High School Athletic Association (NYSPHSAA) and Special Olympics New York organized a Unified Sports program available to all NYSPHSAA member schools. The Unified Sports Program provides for students with and without disabilities to participate on such teams for the purpose of training and competition. According to NYSPHSAA, "Participation is rooted in the principle of meaningful involvement which ensures that every player is given an opportunity to contribute to the success of his or her team through their unique skills. Inclusive activity is among the most conducive ways to break down stereotypes and foster relationships."

This unique program, which offers opportunities for participation in athletic competition, was not specifically contemplated in the regulations that establish the eligibility rules generally applicable to student athletes. NYSPHSAA has therefore been applying the duration of competition rule contained within Commissioner's regulation §135.4(c)(7)(ii)(b)(1) and applicable to traditional interscholastic athletics to inclusive athletic activities. Generally, the regulation limits eligibility for senior high school athletic competition in a sport during each of four consecutive seasons of such sport, commencing with the pupil's entry into ninth grade and prior to graduation, and until the last day of the school year in which he or she attains the age of 19.

Because the Unified Sports program is designed with participation and inclusivity in mind, applying the existing duration of competition rule curtails a student's participation to four years and before attaining the age of 19. These current eligibility requirements are not aligned with the intent of the inclusive athletics program. There are a number of

students who continue school beyond the age of athletic eligibility, most particularly, students with disabilities, who often remain in school until age 21.

Since this program has increased in popularity, NYSPHSAA and Special Olympics New York, along with numerous other constituents, have approached the Department to allow students an extended time to participate in the Unified Sports program, as long as they continue to be eligible to attend school and such participation would not pose a safety risk.

Proposed Regulatory Change

As the term Unified Sports is a trademarked name, the proposed amendment to the regulation categorizes this program as “inclusive athletic activities.” The proposed amendment establishes a definition for inclusive athletic activities and establishes the eligibility rules applicable to participants in such inclusive athletic activities. It is important to note that nothing in the amendments alters the eligibility limitations contained within Commissioner’s regulation §135.4(c)(7)(ii)(b)(1) for participation in traditional interscholastic athletic competition. The proposed rule is only applicable to students participating in inclusive athletic activities (i.e., the Unified Sports Program).

The proposed amendment establishes an exemption from the age and four-year limitation for students participating in inclusive athletic activities. A student who is enrolled in grades 9 through 12 and has not yet graduated from high school may continue to participate in inclusive athletic activities beyond the age of 19 and beyond four consecutive seasons of an inclusive athletic activity if the superintendent of schools or chief executive officer of the school or school system, as applicable, determines that the student meets the following criteria:

- Such student is a bona fide student of the high school for which the student wishes to participate in inclusive athletic activities and has not graduated from high school; and
- Such student is otherwise qualified to compete in the inclusive athletic activities for which he or she is applying for an exemption; and
- Such student has undergone an adequate health examination by the director of school health services, and the director of school health services has determined that the student's participation in such activities will not present a safety or health concern for such student.

Revision to the Regulation

Following the initial 60-day public comment period required under the State Administrative Procedure Act, the Department revised the proposed amendment to no longer require a student who wishes to participate in inclusive athletic activities to undergo a physical evaluation that includes an assessment of the student’s level of physical development and maturity. The revision instead aligns this requirement with the health exam requirements for interschool athletic competition. Additionally, the Department

made a technical correction to Section 135.1(c)(7)(ii)(c)(4) adding the language “inclusive athletic activities” instead of “interschool athletic activities”.

Related Regents Items

[September 2019: Proposed Amendment of Sections 135.1 and 135.4 of the Commissioner’s Regulations relating to Extended Eligibility for Participation in Inclusive Athletic Activities](http://www.regents.nysed.gov/common/regents/files/919p12d3.pdf) (<http://www.regents.nysed.gov/common/regents/files/919p12d3.pdf>)

Recommendation

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

VOTED: That Sections 135.1 and 135.4 of the Regulations of the Commissioner of Education be amended as submitted, effective March 18, 2020; and it is further

VOTED: That Sections 135.1 and 135.4 of the Regulations of the Commissioner of Education be amended, as submitted, effective March 9, 2020, as an emergency action upon a finding by the Board of Regents that such action is necessary for the preservation of the general welfare so that students who are over the age of 19 but who have not yet graduated high school can immediately participate in inclusive athletic activities.

Timetable for Implementation

If adopted at the March 2020 Regents meeting, the proposed amendment will become effective as an emergency rule effective March 9, 2020 and the permanent rule will become effective on March 18, 2020.

AMENDMENT TO THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to Education Law sections 101, 207, 305, 803 and 3204.

1. Subdivision (h) of section 135.1 of the Regulations of the Commissioner of Education is amended as follows:

(h) Extra class periods in physical education mean those sessions organized for instruction and practice in skills, attitudes and knowledge through participation in individual, group and team activities organized on an intramural, extramural [or], interschool athletic or inclusive athletic basis to supplement regular physical education class instruction.

2. Section 135.1 of the Regulations of the Commissioner of Education is amended by adding a new subdivision (w), to read as follows:

(w) Inclusive athletic activities mean those activities which provide competition between representatives of two or more schools and which combine students with and without disabilities on teams for the purpose of interscholastic play and which ensure proportional representation of students with and without disabilities.

2. Clauses (b) and (c) of subparagraph (ii) of paragraph (7) of subdivision (c) of section 135.4 of the Regulations of the Commissioner of Education shall be amended, to read as follows:

(b) Interschool athletic competition and inclusive athletic activities for pupils in senior high school grades 9, 10, 11 and 12. Inter-high school athletic competition and inclusive athletic activities shall be limited to competition between high school teams, composed of pupils in grades 9 to 12 inclusive, except as otherwise provided in subclause

(a)(4) of this subparagraph for interschool athletic competition. Such activities shall be conducted in accordance with the following:

(1) Duration of competition. A pupil shall be eligible for senior high school athletic competition in a sport during each of four consecutive seasons of such sport commencing with the pupil's entry into the ninth grade and prior to graduation, except as otherwise provided in this subclause, or except as authorized by a waiver granted under clause (d) of this subparagraph to a student with a disability, or as authorized for participation in inclusive athletic activities pursuant to clause (e) of this paragraph. If a board of education has adopted a policy, pursuant to subclause (a)(4) of this subparagraph, to permit pupils in the seventh and eighth grades to compete in senior high school athletic competition, such pupils shall be eligible for competition during five consecutive seasons of a sport commencing with the pupil's entry into the eighth grade, or six consecutive seasons of a sport commencing with the pupil's entry into the seventh grade. A pupil enters competition in a given year when the pupil is a member of the team in the sport involved, and that team has completed at least one contest. A pupil shall be eligible for interschool competition in grades 9, 10, 11 and 12 until the last day of the school year in which he or she attains the age of 19, except as otherwise provided in subclause (a)(4) or clause (d) of this subparagraph, or in this subclause. The eligibility for competition of a pupil who has not attained the age of 19 years prior to July 1st may be extended under the following circumstances.

(i) ...

(ii) ...

(iii)...

(iv)...

(2) Registration. A pupil shall be eligible for interschool competition or inclusive athletic activities in a sport during a semester, provided that he is a bona fide student, enrolled during the first 15 school days of such semester, is registered in the equivalent of three regular courses, is meeting the physical education requirement, and has been in regular attendance 80 percent of the school time, bona fide absence caused by personal illness excepted.

(3) Sports standards. Interschool athletic programs shall be planned so as to provide opportunities for pupils to participate in a sufficient variety of types of sports. Inclusive athletic activities shall be planned so as to provide proportional representation of students with and without disabilities and meaningful participation. "Sports standards, such as number of contests, length of seasons, time between contests, required practice days, etc., for all interschool sports shall conform to guidelines established by the Commissioner of Education.

(c) Male and female pupils on interschool athletic teams and inclusive athletic activities.

(1) Equal opportunity to participate in interschool competition and inclusive athletic activities, either on separate teams or in mixed competition on the same team, shall be provided to [make] male and female students, except as hereinafter provided. In schools that do not provide separate competition for male and female students in a specific sport, no student shall be excluded from such competition solely by reason of sex, except in accordance with the provisions of subclauses (2) and (4) of this clause. For the purposes of this clause, baseball and softball shall be considered to constitute a single sport.

(2) In the sports of baseball, basketball, boxing, field hockey, football, ice hockey, lacrosse, rugby, soccer, softball, speedball, team handball, power volleyball where the height of the net is set at less than eight feet, and wrestling, the fitness of a given student to participate in mixed competition shall be determined by a review panel consisting of the school physician, a physical education teacher designated by the principal of the school, and if requested by the parents of the pupil, a physician selected by such parents. Such panel shall make its determination by majority vote of the members, and in accordance with standards and criteria issued by the department.

(3) Where a school provides separate competition for male and female pupils in interschool athletic competition or inclusive athletic activities in a specific sport, the superintendent of schools, or in the case of a nonpublic school or school system which elects to be governed by this clause, the chief executive officer of the school or school system, may permit a female or females to participate on a team organized for males. However, where separate competition is provided, males may not participate on teams organized for females.

(4) Where a school does not provide separate competition for male and female pupils in interschool athletic competition or inclusive athletic activities in a specific sport, the superintendent of schools, or in the case of a nonpublic school or school system which elects to be governed by this clause, the chief executive officer of the school or school system, or the section may decline to permit a male or males to participate on a team organized for females upon a finding that such participation would have a significant adverse effect upon the opportunity of females to participate successfully in interschool competition or inclusive athletic activities in that sport.

3. Subparagraph (ii) of paragraph (7) of subdivision (c) of section 135.4 of the Regulations of the Commissioner of Education shall be amended by adding a new clause (e) to read as follows:

(e) Exemption from the age requirement and four-year limitation for inclusive athletic activities. A student who is enrolled in grades 9 through 12 and has not yet graduated from high school may be eligible to participate in inclusive athletic activities under the following limited conditions:

(1) such student may be granted an exemption to the age requirement and four-year limitation prescribed in subclause (b)(1) of this subparagraph. An exemption shall only be granted upon a determination by the superintendent of schools or chief executive officer of the school or school system, as applicable, that the given student meets the following criteria:

(i) such student is a bona fide student of the high school for which the student wishes to participate in inclusive athletic activities and has not graduated from high school; and

(ii) such student is otherwise qualified to compete in the inclusive athletic activities for which he or she is applying for an exemption; and

(iii) such student has undergone an adequate health examination by the director of school health services, and the director of school health services has determined that the student's participation in such activities will not present a safety or health concern for such student; and

(2) Nothing in this clause shall permit the extension of eligibility for a student to participate in interschool athletic competition as defined in this section.

8 NYCRR §§135.1 and 135.4

STATEMENT OF FACTS AND CIRCUMSTANCES WHICH NECESSITATE
EMERGENCY ACTION

As the term Unified Sports is a trademarked name, the proposed amendment to the regulation categorizes this program as “inclusive athletic activities.” The proposed amendment establishes a definition for inclusive athletic activities and establishes the eligibility rules applicable to participants in such inclusive athletic activities. It is important to note that nothing in the amendments alters the eligibility limitations contained within Commissioner’s regulation §135.4(c)(7)(ii)(b)(1) for participation in traditional interscholastic athletic competition. The proposed rule is only applicable to students participating in inclusive athletic activities (i.e., the Unified Sports Program).

The proposed amendment establishes an exemption from the age and four-year limitation for students participating in inclusive athletic activities. A student who is enrolled in grades 9 through 12 and has not yet graduated from high school may continue to participate in inclusive athletic activities beyond the age of 19 and beyond four consecutive seasons of an inclusive athletic activity if the superintendent of schools or chief executive officer of the school or school system, as applicable, determines that the student meets the following criteria:

- Such student is a bona fide student of the high school for which the student wishes to participate in inclusive athletic activities and has not graduated from high school; and
- Such student is otherwise qualified to compete in the inclusive athletic activities for which he or she is applying for an exemption; and

- Such student has undergone an adequate health examination by the director of school health services, and the director of school health services has determined that the student's participation in such activities will not present a safety or health concern for such student.

The proposed amendment was adopted as an emergency action at the December Regents Meeting, effective December 10, 2019. The proposed amendment is being presented for adoption as a permanent rule at the March 2020 Regents meeting, however, pursuant to SAPA §203(1), the earliest effective date of the permanent rule is March 18, 2020, the date a Notice of Adoption will be published in the State Register. Since the December emergency rule will expire on March 8, 2020, 90 days after its filing with the Department of State on December 10, 2019, emergency action is necessary for the preservation of the general welfare to ensure that the proposed amendment adopted by emergency action at the December 2019 Regents meeting remains continuously in effect until it can be adopted as a permanent rule.

ASSESSMENT OF PUBLIC COMMENT

Following publication of the Notice of Proposed Rule Making in the State Register on September 25, 2019, the Department received the following comments on the proposed regulation:

1. COMMENT: The Department received numerous comments in support of the proposed regulation indicating that the “extended eligibility” for inclusive athletic activities would benefit all students involved. Many commenters wrote to urge the Department to change the rule as soon as possible so more students could continue to participate in inclusive athletic activities.

RESPONSE: The Department agrees with these positive comments. The rule as written to amend Sections 135.1 and 135.4 of the Commissioner’s Regulations relating to extended eligibility for participation in inclusive athletic activities is being presented to the P-12 Education Committee for recommendation to the Full Board for adoption as an emergency rule at the December 2019 meeting of the Board of Regents. The rule will be in place for the 2019- 2020 winter and spring athletic season