



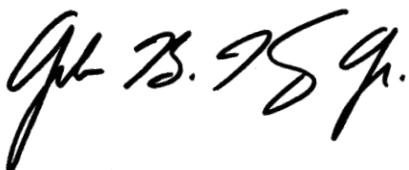


TO: The Honorable the Members of the Board of Regents

FROM: Ken Slentz 

SUBJECT: Emergency Adoption of Proposed Amendment to Sections 200.16(c) and 200.20(b) of the Regulations of the Commissioner of Education Relating to Special Education Services and Programs for Preschool Children with Disabilities

DATE: June 16, 2014

AUTHORIZATION(S):  

SUMMARY

Issue for Decision (Consent Agenda)

Should the Board of Regents adopt as an emergency action the revised proposed amendment of sections 200.16 and 200.20 of the Regulations of the Commissioner of Education to conform State regulations to Chapter 545 of the Laws of 2013?

Reason(s) for Consideration

Required by Statute (L. 2013, Ch. 545, sections 1 and 2).

Proposed Handling

The proposed amendment will be submitted to the Full Board for adoption as an emergency rule at the June 2014 Regents meeting. A statement of the facts and circumstances which necessitate emergency action is attached.

Procedural History

The proposed amendment was adopted as an emergency action at the March 2014 Regents meeting, effective April 17, 2014. A Notice of Emergency Adoption and Proposed Rule Making was published in the State Register on March 26, 2014. A

second emergency action was adopted at the May 2014 Regents meeting in order to ensure that the emergency rule remains continuously in effect until the effective date of its adoption as a permanent rule. The proposed amendment has now been revised as a result of public comment. It is anticipated that a Notice of Emergency Adoption and Revised Rule Making will be published in the State Register on July 9, 2014. A copy of the revised proposed amendment and an Assessment of Public Comment are attached. Supporting materials are available upon request from the Secretary to the Board of Regents.

Background Information

Chapter 545 of the Laws of 2013 amended Education Law section 4410 to add a requirement that if a Committee on Preschool Special Education (CPSE) recommends that a child be placed in a program that also conducted the child's evaluation, then it must indicate in writing that the placement is appropriate for the child and provide notice to the Commissioner of the recommendation. In addition, a requirement was added stating that a provider of special services must certify in its application for approval that it will take measures to ensure that its executive director/chief executive officer, or person performing the duties of this position, meets the criteria established by the commissioner for this role. If the executive director/chief executive officer is employed and paid as a full-time, full-year employee, then he or she is not permitted to engage in any activity that would interfere with the ability to perform the duties, responsibilities and obligations of this position.

The purpose of the proposed amendment is to conform the Commissioner's Regulations to Education Law section 4410, as amended by Chapter 545 of the Laws of 2013, which was enacted to address certain findings in relation to audits of preschool providers conducted by the Office of the State Comptroller.

The proposed amendment to section 200.16(c) would require the CPSE to submit a written notice to the Commissioner when it places a preschool student with a disability in a program operated by the same provider who evaluated the student. The Department has added such written notice to the "Preschool STAC-1: Request for Commissioner's Approval of Reimbursement for Services for Students with Disabilities." A STAC-1 form currently must be submitted for each preschool student with a disability. Including this notice on the STAC-1 will minimize the administrative burden of school districts for additional reporting, as well as provide the Department with the ability to verify and run reports on such data using existing technology. No revisions were made to this section in response to public comment.

The proposed amendment to section 200.20(b) was revised in response to public comment to expand the qualifications of individuals who could be hired as an executive director of approved preschool special education programs or assigned executive director responsibilities. The proposed amendment would require that individuals hired or assigned with executive director responsibilities, on or after April 17, 2014, the effective date of Chapter 545, have an education background in a field related to

business, administration and/or education and/or hold a New York State certification or license to provide an evaluation of and/or a related service to a student with a disability. The proposed amendment further requires that the each approved program ensure that the executive director has: (a) knowledge of the program and supervisory requirements for providing appropriate evaluations and/or special education services to preschool students with disabilities; (b) knowledge of and the ability to comply with applicable laws and regulations; (c) the ability to maintain or supervise the maintenance of financial and other records;(d) the ability to establish the approved program's policy, program and budget; and (e) the ability to recruit, employ, train, direct and evaluate qualified staff.

The proposed amendment also requires that all executive directors or individuals who are assigned executive director duties and responsibilities of preschool programs ensure that the executive director resides within a reasonable geographic distance from the program to ensure appropriate oversight of the day to day activities of the program; and that individuals who are assigned in a full-time role as the executive director are not engaging in activities that would interfere with or impair the executive director's ability to carry out and perform his or her duties, responsibilities and obligations.

Recommendation

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

VOTED: That the emergency rule amending paragraph (3) of subdivision (c) of section 200.16 and adding a new paragraph (3) of subdivision (b) of section 200.20 of the Regulations of the Commissioner, which was adopted at the May 19, 2014 meeting of the Board of Regents, is repealed, effective June 24, 2014, and it is further

VOTED: That paragraph (3) of subdivision (c) of section 200.16 of the Regulations of the Commissioner of Education be amended, and that a new paragraph (3) of subdivision (b) of section 200.20 be added, as submitted, effective June 24, 2014, 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 immediately adopt revisions to the proposed amendment to ensure that qualified individuals are appointed as executive directors of approved preschool special education programs or assigned to perform the duties of chief executive officers of such programs, and to otherwise ensure that the emergency rule implementing Chapter 545 of the Laws of 2013, which was adopted at the March 2014 Regents meeting and readopted at the May 2014 Regents meeting, remains continuously in effect until the effective date of its adoption as a permanent rule.

Timetable for Implementation

The proposed amendment was adopted as an emergency rule at the March 10-11, 2014 Regents meeting, effective April 17, 2014, and readopted as an emergency rule at the May 19, 2014 Regents meeting to ensure that the emergency rule remains continuously in effect until the effective date of its adoption as a permanent rule.

If adopted at the June Regents meeting, the May emergency rule will be repealed, and the revised proposed rule will take effect, on June 24, 2014. It is anticipated that the proposed amendment will be presented for permanent adoption at the September 15-16, 2014 Regents meeting, after publication of the revised proposed rule in the State Register on July 9, 2014 and expiration of the 30-day public comment period. In addition, since the June emergency rule will expire on August 22, 2014, another emergency adoption will be necessary at the July 2014 Regents meeting in order to keep the emergency rule continuously in effect until the effective date of its adoption as a permanent rule at the September meeting.

AMENDMENT OF THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to Education Law sections 101, 207, 305, 308, 4401, 4402, 4403, 4410 and Chapter 545 of the Laws of 2013.

1. The emergency rule amending paragraph (3) of subdivision (c) of section 200.16 and adding a new paragraph (3) of subdivision (b) of section 200.20 of the Regulations of the Commissioner, which was adopted at the May 19, 2014 meeting of the Board of Regents, is repealed effective June 24, 2014.

2.. Paragraph (3) of subdivision (c) of section 200.16 of the Regulations of the Commissioner of Education is amended, effective June 24, 2014, as follows:

(3) Prior to making any recommendation that would place a child in an approved program owned or operated by the same agency which conducted the [initial] evaluation of the child, the committee may exercise its discretion to obtain an evaluation of the child from another approved evaluator. If the committee recommends placing a child in an approved program that also conducted an evaluation of the child, it shall indicate in writing that the placement is appropriate for the child and shall provide written notice to the commissioner of such recommendation on a form prescribed by the commissioner.

3. A new paragraph (3) of subdivision (b) of section 200.20 of the Regulations of the Commissioner of Education is added, effective June 24, 2014, as follows:

(3) Each approved preschool program shall ensure that:
(i) the executive director or person assigned to perform the duties of a chief executive officer hired or assigned on or after April 17, 2014, shall have earned a bachelor's degree or higher from an accredited or approved college or university in a field related to business, administration and/or education and/or shall hold a New York

State certification or license to provide an evaluation of and/or a related service to a student with a disability as such term is defined in section 200.1(qq) of this Part. In addition, the executive director, or person assigned to perform the duties of a chief executive officer, shall, at a minimum, have the following qualifications:

(a) knowledge of the program and supervisory requirements for providing appropriate evaluations and/or special education services to preschool students with disabilities;

(b) knowledge of and ability to comply with applicable laws and regulations;

(c) ability to maintain or supervise the maintenance of financial and other records;

(d) ability to establish the approved program's policy, program and budget; and

(e) ability to recruit, employ, train, direct and evaluate qualified staff.

(ii) the executive director or person assigned to perform the duties of a chief executive officer shall reside within a reasonable geographic distance from the program's administrative, instructional and/or evaluation sites to ensure appropriate oversight of the program; and

(iii) if paid as a full time executive director, the executive director shall be employed in a full-time, full-year position and shall not engage in activity that would interfere with or impair the executive director's ability to carry out and perform his or her duties, responsibilities and obligations.

8 NYCRR §§200.16 and 200.20

ASSESSMENT OF PUBLIC COMMENT

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the State Register on March 26, 2014, the State Education Department (SED) received the following comments.

Section 200.16(c)(3) – Placement of Preschool Students With The Same Provider That Evaluated The Student

COMMENT:

The proposed rule reduces potential for conflict of interest in placement decisions; will result in a decreased risk of over-identification of preschool children with disabilities; and encourages Committees on Preschool Special Education (CPSE) to consider alternate placements.

DEPARTMENT RESPONSE:

Comments are supportive in nature; no response necessary.

COMMENT:

Proposal adds more paperwork to an already paper-laden process; places undue burden on committees in the form of additional paperwork and procedural delays; further complicates CPSE process. Clarify what documentation districts would be required to submit to Commissioner; provide guidance to CPSE chairpersons.

DEPARTMENT RESPONSE:

The proposed rule does not add a reporting requirement beyond that which is required by State law. To address the paperwork reporting burden, the Department has incorporated this report into the “Preschool STAC-1: Request for Commissioner’s

Approval of Reimbursement for Services for Students with Disabilities” form, which districts are currently required to submit for each preschool student with a disability.

COMMENT:

Since evaluations are conducted by skilled professionals and eligibility is based on standardized assessments, the need for these additional procedures is questioned.

DEPARTMENT RESPONSE:

Amendment conforms to legislation requiring districts to submit a written notice to the Commissioner when it places a preschool student with a disability in a program operated by same provider who evaluated the student, and does not address special education eligibility or professional skills of evaluators.

COMMENT:

Parent decides which specific program his/her child will attend. School districts do not recommend specific programs.

DEPARTMENT RESPONSE:

The parent(s) of a child suspected of having a disability are responsible for selecting an approved evaluator to conduct their child’s individual evaluation. The CPSE is responsible to review the evaluation report, determine eligibility, develop the Individualized Education Program (IEP) and then select a provider to implement the child’s IEP. The CPSE must consider the concerns of the parent and the parent, as a member of the CPSE, participates in the placement recommendation. However, the parent does not select the provider.

COMMENT:

In some rural areas, there are a limited number of evaluation sites and special education programs. It may be necessary for a child to attend the same program that provided the evaluation. It is common practice for evaluating agencies to also provide service(s).

DEPARTMENT RESPONSE:

While the regulation requires reporting to the Commissioner whenever CPSE recommends placement in a program operated by same agency that evaluated the student, there is no requirement that such recommendation be a last resort consideration for the student; nor does it require that the parent select an evaluator in consideration of whether the evaluator may potentially be appropriate as provider of preschool services to the child. Nothing precludes the CPSE from placing the student in the same program that evaluated the student, if appropriate.

COMMENT:

Recommendations are made for a service, not a location.

DEPARTMENT RESPONSE:

Section 200.16 of the Regulations of the Commissioner of Education requires the CPSE to recommend appropriate services and/or special programs and the frequency, duration, location and intensity of such services. The school district must select the provider to implement the recommended program.

COMMENT:

Regulation presumes that all evaluation sites are self-promoting, unethical and unprofessional; only districts suspected of inappropriately directing referrals to a certain

provider(s), should be asked to justify their actions. The sole act of reporting CPSE decisions in writing to the Commissioner may not resolve placement concerns.

DEPARTMENT RESPONSE:

The change to State law and conforming regulations provide further assurance to the Department that the CPSE has found the recommended placement to be appropriate for the individual child and provides a reporting process by which the Department can review data to determine patterns or trends that may require further review. The statutory provision requires reporting by all districts.

COMMENT:

Recommend that all approved programs that conduct evaluations disclose name of their owner/director to the CPSE in the event that there are separate agencies with same owner/director; full disclosure or an arms-length policy should be implemented for programs providing evaluations.

DEPARTMENT RESPONSE:

While individual CPSEs may request this information, which is a matter of public record, disclosure of preschool program owner/director names was not addressed in the amendment of Education Law section 4410 by Chapter 545 of the Laws of 2013 and, therefore, is not included in the amendment to section 200.16 of the Commissioner's Regulations.

COMMENT:

Recommend distinguishing between initial and subsequent evaluations to avoid including the initial evaluation within the subsequent placement disclosure.

DEPARTMENT RESPONSE:

The reporting form seeks information as to whether the placement recommendation is with the same provider that conducted the most recent evaluation for this student.

COMMENT:

Recommend including special education itinerant services (SEIS) as part of the definition of “program”.

DEPARTMENT RESPONSE:

SEIS is included as a type of program. The reporting form asks for the name of the service provider for special class, special class in an integrated setting or SEIS.

Section 200.20(b)(3) – Qualifications of Executive Directors of Approved 4410

Programs

COMMENT:

The proposed rule raises standards for future directors and ensures quality leadership. Amendment is long overdue. Program directors should minimally have a bachelor’s degree.

DEPARTMENT RESPONSE:

Comments are supportive in nature; no response necessary.

COMMENT:

Network of 4410 providers also consists of multi-service, multi-state, agency funded not-for-profit entities that offer services for individuals ranging from birth through adulthood, and are licensed and funded by several different State agencies. The proposed rule was crafted for single purpose 4410 entities. Revise the proposed rule to include broader educational background and experience as necessary to accommodate

these entities. Expand qualifications to include certified or licensed professionals (e.g., school psychologists, social workers, speech language pathologists, occupational and physical therapists).

DEPARTMENT RESPONSE:

The proposed rule has been revised to expand executive director qualifications to also include individuals who hold New York State certification or license to provide evaluation and/or special education related services and to clarify that the executive director must have knowledge of the “program and supervisory” requirements for providing appropriate evaluations and/or special education services to preschool students with disabilities.

COMMENT:

Provision for executive director to have “appropriate qualifications to oversee a special education program...” is not necessary because 4410 providers are already required to have access to staff with an SED granted School Administrator Supervisor (SAS) certificate. In multi-funded, multi-licensed entities, education department directors would be expected to have those qualifications, rather than executive directors. Question if these are the only qualifications required of an executive director or are they in addition to School Administrator and Supervisory certification. Must the executive director hold an administrative certification if held by another supervisory staff person?

DEPARTMENT RESPONSE:

While all executive directors of preschool programs must have the qualifications identified in section 200.20(b)(3), every executive director is not required to hold

certification as a School Building Leader (formerly "School Administrator/Supervisor") - or School District Leader (formerly "School District Administrator"). Because of the broad nature of agencies that may also be operating a preschool special education program, only those individuals who provide supervision to special education teachers and related service providers are required to have administrative certification as required pursuant to Part 80 of the Regulations.

COMMENT:

If each supervisor performs less than 25 percent of their time supervising, is it possible for the program to not have anyone on site with SAS certification? If a supervisor performs more than 25 percent of time supervising and meets all other requirements, but does not have SAS certification, is this adequate?

DEPARTMENT RESPONSE:

These questions are beyond the scope of this amendment.

COMMENT:

Executive directors often hire individuals to perform duties in areas that they themselves have limited knowledge or experience. Requiring executive directors to be responsible for so many diverse areas could put them in positions that they are incapable of handling. The rule will limit new programs because the pool of individuals with all of these qualifications may not exist.

DEPARTMENT RESPONSE:

Agencies must ensure that individuals appointed or assigned executive director responsibilities must be able to oversee a program that provides preschool evaluations and/or services. The regulations are written broadly enough to ensure that executive

directors have an education and experience background to properly oversee such a program, while not placing unduly restrictive constraints on the hiring/assignment process. While others may be hired with more expertise in each area, the executive director must have sufficient knowledge in the statutory and regulatory requirements for the operation of the program to ensure oversight of the efficient and effective operation of the programs for preschool students.

COMMENT:

Develop guidance documents clarifying credentials and experience required of executive directors.

DEPARTMENT RESPONSE:

A special education field advisory addressing amendment to section 200.20 of the regulations was released in April 2014. Additional guidance will be issued with the adoption of revised rules.

COMMENT:

Concerned about residency requirement for executive director, which was rejected in initial legislative bill.

DEPARTMENT RESPONSE:

The expressed intent of the legislative amendment was to ensure that executive directors have the qualifications to properly oversee such programs and specifically to address findings that some executive directors resided in other states or long distances from the program they are charged to oversee.

COMMENT:

Clarify whether current executive directors are exempt from this amendment.

Revise the proposed rule to require current executive directors be given a period of time to complete qualification requirements.

DEPARTMENT RESPONSE:

The amendment only pertains to executive directors hired or assigned after April 17, 2014. To ensure job and program oversight stability, the Department does not support a provision to phase in the requirement for individuals currently appointed as executive directors or assigned executive director functions.

COMMENT:

Revise by adding, “or the equivalent” to educational requirements and “demonstrated experience” as an alternative to educational requirement. Seasoned executive directors would not be eligible under current language.

DEPARTMENT RESPONSE:

Amendment does not pertain to executive directors that are hired or assigned prior to April 18, 2014. However, experienced executive directors that change their employment on or after this date would have to meet the new qualifications in section 200.20.

COMMENT:

Recommend that preschool program administrators be held to the same standards as school-age administrators.

DEPARTMENT RESPONSE:

The amendment is proposed to comply with the statutory changes, which specifically require the Commissioner to develop regulations to address special education services and programs for preschool children with disabilities.

COMMENT:

Many agencies do not supervise their contracted staff in the field.

DEPARTMENT RESPONSE:

An approved preschool program must have direct control of the work and provide direct and appropriate supervision of all of the special education and related services provided to students. Programs should not be relying on “contracted staff in the field.” Staff must have an employer-employee relationship with the approved preschool program and all programs must include a plan for staff supervision, identifying the name and title of the individual who will have direct supervisory responsibilities for the staff and providing the supervisor’s resume to document an appropriate level of experience.

8 NYCRR §§200.16 and 200.20

STATEMENT OF FACTS AND CIRCUMSTANCES WHICH NECESSITATE EMERGENCY ACTION

The purpose of the proposed amendment is to implement Education Law section 4410, as amended by Chapter 545 of the Laws of 2013. Chapter 545 became effective on April 17, 2014 and was enacted to address certain findings in relation to audits of preschool providers conducted by the Office of the State Comptroller.

The proposed amendment to section 200.16(c) would require the Committee on Preschool Special Education to submit a written notice to the Commissioner when it places a preschool student with a disability in a program operated by the same provider who evaluated the student.

The proposed amendment to section 200.20(b) would add a requirement that providers ensure that executive directors or individuals assigned with executive director responsibilities, who are hired or assigned on or after the effective date of the regulations, have an education background in a field related to business, administration and/or education and/or hold a New York State certification or license to provide an evaluation of and/or related service to a student with a disability; and that such individuals have the knowledge and ability to oversee a preschool special education program. The proposed amendment also requires that all executive directors of approved preschool programs reside within a reasonable geographic distance from the program to ensure appropriate oversight of the day to day activities of the program; and that individuals who are assigned in a full-time role as the executive director are not

engaging in activities that would interfere with or impair the executive director's ability to carry out and perform his or her duties, responsibilities and obligations.

The proposed amendment was adopted as an emergency action at the March 10-11, 2014 Regents meeting, effective April 17, 2014. A Notice of Emergency Adoption and Proposed Rule Making was published in the State Register on March 26, 2014, and a 45-day public commenting period commenced, expiring on May 12, 2014. The proposed amendment was subsequently re-adopted by emergency action at the May 19, 2014 Regents meeting to keep the rule continuously in effect until it can be adopted as a permanent rule.

As a result of public comment received, the proposed amendment to section 200.20(b) has been revised to expand the qualifications of executive directors to also allow individuals who hold New York State certification or license to provide an evaluation of or related service to a student with a disability and who meet the other qualifications to be hired or assigned as executive directors. The proposed rule was also revised to add that individuals must be knowledgeable about the "program and supervisory" requirements for providing appropriate evaluations and/or special education services to preschool students with disabilities.

Because the Board of Regents meets at monthly intervals, and there is no Regents meeting scheduled for August 2014, the earliest the revised proposed amendment could be adopted by regular action after publication of a Notice of Emergency Adoption and Revised Rule Making in the State Register on July 9, 2014 and expiration of the 30-day public comment period prescribed in State Administrative Procedure Act (SAPA) section 202 would be the September 15-16, 2014 Regents meeting. Furthermore,

pursuant to SAPA section 203(1), the earliest effective date of the revised proposed amendment, if adopted at the September meeting, would be October 1, 2014, the date a Notice of Adoption would be published in the State Register. However, emergency action to adopt the proposed rule is necessary for the preservation of the general welfare to immediately adopt revisions to the proposed amendment to ensure that qualified individuals are appointed as executive directors of approved preschool special education programs or assigned to perform the duties of a chief executive officer for such programs, and to otherwise ensure that the emergency rule implementing Chapter 545 of the Laws of 2013, which was adopted by emergency action at the March 2014 Regents meeting and readopted at the May 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 September 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 30-day public comment period prescribed in the State Administrative Procedure Act for State agency rule makings.