



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:** Jhone M. Ebert 

**SUBJECT:** Amendment of §100.5(d)(7) of the Commissioner's Regulations to Expand the Eligible Score Band for the Appeal Process on Regents Examinations Passing Scores

**DATE:** June 6, 2016

**AUTHORIZATION(S):**  

## SUMMARY

### Issue for Decision (Consent Agenda)

Should the Board of Regents adopt as a permanent rule the amendment of §100.5(d)(7) of the Commissioner's Regulations to expand by two additional points the existing eligible score band for an appeal of Regents examinations passing scores, and eliminate the student eligibility requirement related to minimum attendance?

### Reason(s) for Consideration

Implementation of policy

### Proposed Handling

The proposed amendment will be presented to the Full Board for action at the June 2016 Regents meeting. In addition, a second emergency adoption is necessary at the June meeting to ensure that the emergency rule adopted at the March 2016 Regents meeting remains continuously in effect until the effect date of the permanent rule. A copy of the statement of the facts and circumstances that necessitate emergency action is attached.

## **Procedural History**

The proposed amendment was adopted as an emergency action at the March 2016 Regents meeting, effective March 22, 2016. A Notice of Emergency Adoption and Proposed Rule Making was published in the State Register on April 6, 2016.

A copy of the proposed amendment is attached. Supporting materials are available upon request from the Secretary to the Board of Regents.

## **Background Information**

Existing diploma requirements allow students to appeal scores of 62-64 on up to two required Regents examinations. The appeal provision calls for a student to meet the following criteria in order to be granted an appeal by their local school district:

Students must:

1. Have taken the Regents examination under appeal at least two times;
2. Present evidence that the student has taken advantage of academic help provided by the school in the subject tested by the Regents Examination under appeal;
3. Have an attendance rate of 95 percent (except for excused absences) for the school year during which the student last took the Regents examination under appeal;
4. Have a course average in the subject under appeal (as evidenced in the official transcript that records grades achieved by the student in each quarter of the school year) that meets or exceeds the required passing grade by the school; and
5. Be recommended for an exemption to the graduation requirement by the student's teacher or Department chairperson in the subject of the Regents examination under appeal.

In January 2015, the Board of Regents extended the appeal process to include a provision to allow eligible English language learners to appeal scores of 55-61 on the English Language Arts Regents Examination and in December 2015 the Board approved regulations to extend the appeal provision to students with disabilities who were seeking the local diploma through the existing safety net options. These students are able to appeal scores of between 52 and 54 on up to two Regents examinations and earn the local diploma.

## **Summary of Proposed Amendment**

Under this proposal, students could appeal scores of 60-64 (expanded from 62-64) on up to two Regents examinations. Students who are granted one appeal by their local superintendent would then earn a Regents diploma. Students who are granted two appeals would earn a local diploma.

In addition, the attached proposed revision would eliminate the requirement that students meet a minimum attendance requirement of 95%, exclusive of excused absences, in the year they last took the examination under appeal. The attendance requirement should be revised for a number of reasons. The rate required exceeds the statewide average attendance rate. In addition, a student's ability to provide documentation for an excused absence may be dependent upon circumstances that are not within the student's control. Finally, a student's attendance in the year they last took the test may not be appropriate or applicable. At times, a student may be returning to school for the sole purpose of attempting to pass the examination, so class attendance cannot be calculated in the year they last took the exam. No student may submit an appeal unless they have passed the course for which the appeal is being sought. If the student's attendance is adequate to meet course expectations and ultimately pass the course, the appeal should be considered.

### **Recommendation**

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

VOTED: That paragraph (7) of subdivision (d) of section 100.5 of the Regulations of the Commissioner of Education be amended as submitted, effective June 29, 2016; and it is further

VOTED: That paragraph (7) of subdivision (d) of section 100.5 of the Regulations of the Commissioner of Education be amended as submitted, effective June 20, 2016, 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 March 2016 Regents meeting remains continuously in effect until the effective date of the permanent rule.

### **Timetable for Implementation**

The proposed amendment was adopted as an emergency action at the March 2016 Regents meeting, effective March 22, 2016. The March emergency rule will expire on June 19, 2016. If adopted at the June 2016 Regents meeting, the second emergency action will take effect on June 20, 2016 and the permanent rule will take effect on June 29, 2016.

Attachment

## **8 NYCRR §100.5(d)(7)**

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

The proposed amendment is necessary to implement revisions to policy adopted by the Board of Regents to expand by two additional points the existing eligible score band for an appeal of Regents examinations passing scores. Under the proposed amendment, students could appeal scores of 60-64 (expanded from 62-64) on up to two Regents examinations. Students who are granted one appeal by their local superintendent would then earn a Regents diploma. Students who are granted two appeals would earn a local diploma. In addition, the proposed amendment would eliminate the requirement that in order to be eligible to appeal students must meet a minimum attendance requirement of 95%, exclusive of excused absences, in the year they last took the examination under appeal.

At the March 2016 Regents meeting, the proposed amendment was adopted as an emergency action, effective March 22, 2016. A Notice of Emergency Adoption and Proposed Rule Making was published in the State Register on April 6, 2016.

The proposed amendment has now been adopted as a permanent rule at the June 13-14, 2016 Regents meeting. Pursuant to SAPA §203(1), the earliest effective date of the proposed amendment, if adopted at the February meeting, would be June 29, 2016, the date a Notice of Adoption will be published in the State Register. However, the March emergency rule will expire on June 19, 2016, ninety days after filing the Notice of Emergency Adoption and Proposed Rule Making with the Department of State on March 22, 2016. A lapse in the rule could disrupt administration

of the process for certain eligible students to appeal Regents examinations passing scores pursuant to the rule's provisions.

Emergency action is therefore necessary for the preservation of the general welfare in order to ensure that the emergency rule adopted at the March 2016 Regents meeting remains continuously in effect until the effective date of the rule's permanent adoption.

## AMENDMENT OF THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

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

Paragraph (7) of subdivision (d) of section 100.5 of the Regulations of the Commissioner of Education is amended, effective June 20, 2016, as follows:

(7) Appeals process on Regents examinations passing score to meet Regents diploma requirements.

(i) School districts shall provide unlimited opportunities for all students to retake required Regents examinations to improve their scores.

(a) A student who first enters grade nine in September 2005 or thereafter and who fails, after at least two attempts, to attain a score of 65 or above on a required Regents examination for graduation shall be given an opportunity to appeal such score in accordance with the provisions of this paragraph, provided that no student may appeal his or her score on more than two of the five required Regents examinations and provided further that the student:

(1) has scored within [~~three~~] five points of the 65 passing score 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;

(2) provides evidence that he or she has received academic intervention services by the school in the subject area of the Regents examination under appeal;

[(3) has an attendance rate of at least 95 percent for the school year during which the student last took the required Regents examination under appeal;]

[(4)] (3) has attained a course average in the subject area of the Regents examination under appeal that meets or exceeds the required passing grade by the

school and is recorded on the student's official transcript with grades achieved by the student in each quarter of the school year; and

[(5)] (4) is recommended for an exemption to the passing score on the required Regents examination under appeal by his or her teacher or department chairperson in the subject area of such examination.

(b) A student who first enters school in the United States (the 50 States and the District of Columbia) in grade 9, 10, 11 or 12 and is otherwise eligible to graduate in January 2015 or thereafter, is identified as an English Language Learner pursuant to Part 154 of this Title, and fails, after at least two attempts, to attain a score of 65 or above on the required Regents examination in English language arts for graduation, shall be given an opportunity to appeal such score in accordance with the provisions of this paragraph, provided that no such student may appeal his or her score on more than two of the five required Regents examinations and provided further that the student:

(1) . . .

(2) . . .

[(3) has an attendance rate of at least 95 percent for the school year during which the student last took the required Regents examination in English language arts;]

[(4)] (3) . . .

[(5)] (4) . . .

(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) . . . .

(2) has met the criteria specified in subclauses [(2) - (5)] (2) – (4) of clause (a) 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.

(ii) . . . .

(iii) . . . .

(iv) . . . .

(v) . . . .

(vi) . . . .

## ASSESSMENT OF PUBLIC COMMENT

Since publication of a Notice of Proposed Rule Making in the State Register on April 6, 2016, the State Education Department received comments on the proposed amendment. A summary of comments and the Department's responses follows.

### 1. COMMENT:

A commenter supports the proposed regulation expanding the score band on the appeal from 62-64 to 60-64, stating, "...the amendment allows students with test anxiety greater leeway and gives them the ability to succeed." Also states, "...there should be some minimal attendance requirement, i.e. 75%, to require responsibility from the student".

### DEPARTMENT RESPONSE:

To the extent the comments are supportive, no response is necessary. However, to the extent the commenter seeks a minimum attendance requirement to require responsibility from the student, the Department believes that the proposed amendment already provides significant flexibility to the district by allowing the local appeal committee the discretion to recommend approval or denial of an appeal to the district superintendent.

### 2. COMMENT:

The commenter supports expanding the score band for a Regents exam appeal from 62 to 60 and supports the elimination of the minimum attendance requirement. "We support expanding the score band for a Regents exam appeal from 62 to 60. We also support the elimination of the minimum attendance requirement. Multilingual

Learners often struggle to demonstrate what they know and can do on standardized tests due to their developing English language skills. In addition, some older MLLs who have completed all of their coursework and are attempting to pass one or more Regents exams are often unable to meet the minimum attendance requirement. Some Multilingual Learners may also struggle to meet this requirement due to immigration court appearances and other situations beyond their control. ”

The commenter recommends the following modifications to existing rules:

- Reduce the number of times a student must fail a Regents exam in order to be eligible for an appeal. Requiring students to attempt the exam twice causes students and schools to spend time and resources on test prep when they could be engaged in learning and mastering new material. Students who feel discouraged after their first attempt may also become disengaged from school, which contributes to higher dropout rates.
- Allow students to appeal all Regents exams. Providing students with the opportunity to appeal all of the Regents exams will help to ensure that these exams do not pose an obstacle to graduation and postsecondary opportunities for students who have mastered State standards, as demonstrated by their coursework.

The proposed changes to the requirements for a Regents exam appeal will provide increased flexibility within the current assessment system. In order to ensure that all students are given a fair opportunity to demonstrate their mastery of State standards, we encourage the New York State Education Department to continue to

explore options for providing Multilingual Learners access to alternative assessments, including performance-based assessments.”...

**DEPARTMENT RESPONSE:**

To the extent the comments are supportive of the proposed amendment, no response is necessary.

To the extent that the commenter requests that the Department reduce the number of times the test taker must take the examination before eligibility for an appeal and/or allow a student to appeal the score of any Regents examination, the Department believes the proposed amendment strikes the appropriate balance between the need to provide students with the opportunity to graduate and the Board of Regents desire to ensure that students are college and career ready upon graduation.

In the last couple of years, the Department has provided multiple safety net options for the Regents examinations and will continue to pursue other alternatives. Currently, Regents Rule section 8.3(1) and section 100.5 of the Commissioner’s regulations generally set the passing score on the Regents examinations at 65. The appeals process is intended to carve out limited exceptions for students who are unable to pass a subset of Regents examinations at a 65, but have otherwise demonstrated the ability to meet the standards for graduation in those subject areas.

Moreover, the Department believes that making students take the examination twice before being eligible for an appeal provides the student with the opportunity to prepare for the examination again, with the intent for the student to review the material a second time; thereby providing them with a second meaningful opportunity to obtain the content knowledge for that subject area, so they can succeed in college and/or their

career. In any case, the commenter is requesting a change to a requirement of the existing regulation that is beyond the scope of the current rule making.