



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: John B. King, Jr. *John B. King, Jr.*

SUBJECT: Proposed addition of §§100.2(II) and 104.3 and amendment of §§ 100.3(b)(2), 100.4(b)(2), and 100.4(e) of the Regulations of the Commissioner relating to Promotion Determinations

DATE: July 2, 2014

AUTHORIZATION(S):

Richard A. Santora

SUMMARY

Issue for Decision (Consent Agenda)

Should the Regents approve as a permanent rule the proposed additions of sections 100.2(II) and 104.3 and amendment of sections 100.3(b)(2), 100.4(b)(2), and 100.4(e) of the Regulations of the Commissioner of Education, to implement Chapter 56 of the Laws of 2014, relating to grades 3-8 English Language Arts (ELA) and mathematics assessments and promotion and placement determinations, and student official transcripts and permanent records?

Reason(s) for Consideration

Required by Statute (L. 2014, Ch. 56).

Proposed Handling

The proposed amendment will be presented to the Full Board at the July Regents meeting for adoption as a permanent rule. In addition, a second emergency adoption is necessary to ensure the emergency rule adopted at the April Regents meeting remains continuously in effect until the effective date of its adoption as a permanent rule. A

statement of the facts and circumstances which necessitate emergency action is attached.

Procedural History

The proposed amendment was adopted as an emergency rule at the April 2014 Regents meeting, effective April 29, 2014. A Notice of Emergency Adoption and Proposed Rule Making was published in the State Register on May 14, 2014. A copy of the 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

On March 31, 2014, Governor Cuomo signed Chapter 56 of the Laws of 2014. Chapter 56 enacts into law major components of legislation necessary to implement the education, labor, housing, and family assistance budget for the 2014-2015 state fiscal year.

Part AA, Subpart B of Chapter 56 of the Laws of 2014 adds new subdivisions (45) and (46) to Education Law section 305, which direct the Commissioner to provide that no school district or board of cooperative educational services (BOCES) may place or include on a student's official transcript or maintain in a student's permanent record any individual student score on a State administered standardized English language arts or mathematics assessment for grades three through eight, and that any test results on such assessments sent to parents/persons in parental relation include a clear and conspicuous notice that such results will not be included on the student's official transcript or in the student's permanent record and are being provided for diagnostic purposes. The statute provides that these provisions shall expire and be deemed repealed on December 31, 2018.

Part AA, Subpart C of Chapter 56 of the Laws of 2014 added a new subdivision (47) to Education Law section 305, which directs the Commissioner to provide that no school district shall make any student promotion or placement decisions based solely or primarily on student performance on the State administered standardized English language arts and mathematics assessments for grades three through eight. However, a school district may consider student performance on such State assessments provided that the school district uses multiple measures in addition to such assessments and that such assessments do not constitute the major factor in such determinations. In addition, the Commissioner shall require every school district to annually notify the parents and persons in parental relation to the students attending such district of the district's grade promotion and placement policy along with an explanation of how such policy was developed. Such notification may be provided on the school district's website, if one exists, or as part of an existing informational document that is provided to parents and persons in parental relation.

The proposed amendment of sections 100.3(b)(2), 100.4(b)(2), and 100.4(e) provides that no school district shall make promotion or placement decisions based solely or primarily on student performance on the Grades 3-8 ELA and math assessments, but that a school district may consider student performance on the assessments provided it uses multiple measures in addition to the assessments. The proposed addition of section 100.2(II) requires each school district to adopt a grade promotion and placement policy that is consistent with the above amendments, and annually notify parents of policy along with an explanation of how the policy was developed. Such notification may be provided on the school district's website, if one exists, or as part of an existing informational document that is provided to parents and persons in parental relation.

This is consistent with the Department's February 2014 discussion item, which stated that if districts elect to make promotion decisions based on student performances on the Grades 3-8 ELA and math assessments, that the Department strongly encourages that the results be used in combination with other measures of student performance, including writing samples, class work, homework, teacher observations, and other relevant information.

Additionally, the proposed addition of section 104.3 provides, for the period commencing on April 1, 2014 and expiring on December 31, 2018, that no school district or BOCES may place or include on a student's official transcript or maintain in a student's permanent record any individual student score on a State administered standardized ELA or mathematics assessment for grades 3-8, and that any test results on assessments sent to parents include a clear and conspicuous notice that the results will not be included on the student's official transcript or in the student's permanent record and are being provided to the student and parents for diagnostic purposes.

Recommendation

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

VOTED: That subdivision (II) of section 100.2 and section 104.3 of the Regulations of the Commissioner be added and that paragraphs 100.3(b)(2) and 100.4(b)(2), and subdivision 100.4(e) be amended, as submitted, effective July 30, 2014; and it is further

VOTED: That subdivision (II) of section 100.2 and section 104.3 of the Regulations of the Commissioner be added and that paragraphs 100.3(b)(2) and 100.4(b)(2), and subdivision 100.4(e) be amended, as submitted, effective July 28, 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 ensure that the emergency rule adopted at the April 2014 Regents meeting remains continuously in effect until the effective date of the rule's permanent adoption.

Timetable for Implementation

The proposed amendment was adopted as an emergency rule at the April 28-29, 2014 Regents meeting, effective April 29, 2014 and will expire on July 27, 2014. If adopted at the July Regents meeting, the permanent rule will take effect on July 30, 2014 and the emergency rule will take effect on July 28, 2014.

AMENDMENT OF THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to Education Law sections 101, 207, 208, 209, 210, 215, 305, 308, 309 and 3204

1. Subdivision (II) of section 100.2 of the Regulations of the Commissioner is added, effective July 30, 2014, as follows:

(II) Grade promotion and placement policy. Each school district shall adopt a grade promotion and placement policy that is consistent with sections 100.3(b)(2)(iv), 100.4(b)(2)(v) and 100.4(e)(6) of this Part, and annually notify the parents and persons in parental relation to the students attending such district of such policy along with an explanation of how the policy was developed. Such notification may be provided on the school district's website, if one exists, or as part of an existing informational document that is provided to parents and persons in parental relation.

2. Paragraph (2) of subdivision (b) of section 100.3 of the Regulations of the Commissioner is amended, effective July 30, 2014, as follows:

(2) Required assessments.

(i) Except as otherwise provided in subparagraphs (ii) and (iii) of this paragraph, at the specified grade level, all students shall take the following tests, provided that testing accommodations may be used as provided for in section 100.2(g) of this Part in accordance with department policy:

(a) beginning in January 1999, the English language arts elementary assessment and the mathematics elementary assessment shall be administered in

grade four and, beginning in the 2005-2006 school year, the English language arts elementary assessments and the mathematics elementary assessment shall be administered in grades three and four; and

(b) beginning in January 2000, the elementary science assessment shall be administered in grade four.

(ii) Students receiving home instruction pursuant to section 100.10 of this Part may take, but shall not be required to take, the State assessments required of public school students.

(iii) In accordance with their individualized education programs, students with disabilities instructed in the alternate academic achievement standards defined in section 100.1(t)(2)(iv) of this Part shall be administered a State alternate assessment to measure their achievement.

(iv) Notwithstanding the provisions of this section, no school district shall make any student promotion or placement decisions based solely or primarily on student performance on the English language arts elementary assessments and the mathematics elementary assessments administered in grades three and four. However, a school district may consider student performance on such assessments provided the school district uses multiple measures in addition to such assessments and that such assessments do not constitute the major factor in such determinations.

3. Paragraph (2) of subdivision (b) of section 100.4 of the Regulations of the Commissioner is amended, effective July 30, 2014, as follows:

(2) Required assessments.

(i) Except as otherwise provided in subparagraphs (iv) and (v) of this paragraph, all students shall take the following assessments, provided that testing accommodations may be used as provided for in section 100.2(g) of this Part in accordance with department policy:

(ii) beginning with the 2005-06 school year, English language arts and mathematics assessments shall be administered in grades five and six;

(iii) for school years prior to July 1st of the 2010-2011 school year, all students in grade five shall take the social studies elementary assessment;

(iv) students receiving a program of home instruction pursuant to section 100.10 of this Part may take, but shall not be required to take, the State assessments required of public school students;

(v) in accordance with their individualized education programs, students with disabilities instructed in the alternate academic achievement standards defined in section 100.1(t)(2)(iv) of this Part shall be administered a State alternate assessment to measure their achievement;

(vi) beginning September 1, 2000 and continuing up to and including the 2004-2005 school year, fifth grade students who scored at Level 1 of the State designated performance levels on the English language arts elementary assessment and/or the mathematics elementary assessment administered in grade four shall receive at least one semester of academic intervention services and be retested no later than the

completion of grade five. Multiple sources of evaluation, including, but not limited to, a commercial test or other external test of demonstrated technical quality determined by the school district to be a valid and reliable means of evaluating a student's progress in achieving the elementary level State learning standards in English language arts and mathematics, shall be used to retest students in accordance with the district-adopted or district-approved procedure established pursuant to section 100.2(ee) of this Part;

(v) Notwithstanding the provisions of this section, no school district shall make any student promotion or placement decisions based solely or primarily on student performance on the English language arts assessments and the mathematics assessments administered in grades five and six. However, a school district may consider student performance on such assessments provided the school district uses multiple measures in addition to such assessments and that such assessments do not constitute the major factor in such determinations.

4. Subdivision (e) of section 100.4 of the Regulations of the Commissioner of Education is amended, effective July 30, 2014, as follows:

(e) Required assessments in grades seven and eight. Except as otherwise provided in subdivisions (f) and (g) of this section, and except for students who have been admitted to a higher grade without completing the grade at which the assessment is administered, all students shall take the following assessments, provided that testing accommodations may be used as provided for in section 100.2(g) of this Part in accordance with department policy.

(1) Beginning with school year 1998-99, the English language arts intermediate assessment shall be administered in grade eight. Beginning with the 2005-2006 school year, English language arts assessments shall be administered in grades seven and eight.

(2) Beginning with the 1998-99 school year, the mathematics intermediate assessment shall be administered in grade eight. Beginning with the 2005-2006 school year, mathematics assessments shall be administered in grades seven and eight, provided that, for the 2013-2014 school year, students who attend grade seven or eight may take a Regents examination in mathematics in lieu of or in addition to the grade seven or eight mathematics assessment, in accordance with section 100.18(b)(14) of this Part.

(3) The program evaluation test in social studies in grade eight, beginning in May 1989. Beginning with the school year 2000-2001 through the 2009-2010 school year, the social studies intermediate assessment shall replace the program evaluation test and shall be administered in grade eight.

(4) Beginning with the school year 2000-2001, the science intermediate assessment shall be administered in grade eight; provided that students who attend grade eight may take a Regents examination in science in lieu of or in addition to the grade eight science intermediate assessment, in accordance with this section and section 100.18(b)(14) of this Part, and provided further that the science intermediate assessment shall not be administered in grade eight to students who take such assessment in grade seven and are being considered for placement in an accelerated

high school-level science course when they are in grade eight pursuant to subdivision (d) of this section.

(5) Such other assessments as the commissioner determines appropriate.

(6) Notwithstanding the provisions of this section, no school district shall make any student promotion or placement decisions based solely or primarily on student performance on the English language arts assessments and the mathematics assessments administered in grades seven and eight. However, a school district may consider student performance on such assessments provided the school district uses multiple measures in addition to such assessments and that such assessments do not constitute the major factor in such determinations.

5. Section 104.3 of the Regulations of the Commissioner of Education is added, effective July 30, 2014, as follows:

§ 104.3 Prohibition on inclusion of individual student scores on State administered standardized English language arts or mathematics assessments for grades three through eight. During the period commencing on April 1, 2014 and expiring on December 31, 2018:

(a) no school district or board of cooperative educational services may place or include on a student's official transcript or maintain in a student's permanent record any individual student score on a State administered standardized English language arts or mathematics assessment for grades three through eight, provided that nothing herein shall be construed to interfere with required State or federal reporting or to excuse a school district from maintaining or transferring records of such test scores separately

from a student's permanent record, including for purposes of required State or federal reporting; and

(b) any test results on a State administered standardized English language arts or mathematics assessment for grades three through eight sent to parents or persons in parental relation to a student shall include a clear and conspicuous notice that such results will not be included on the student's official transcript or in the student's permanent record and are being provided to the student and parents for diagnostic purposes.

_8 NYCRR §§100.2, 100.3, 100.4 & 104.3

ASSESSMENT OF PUBLIC COMMENT

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the State Register on May 14, 2014, the State Education Department received the following comment.

COMMENT:

The application of the rule's requirements to charter schools unlawfully conflicts with the New York State Education Law, and further undermines charter schools' longstanding autonomy regarding their educational programming.

DEPARTMENT RESPONSE:

The proposed rule is necessary to conform the Commissioner's Regulations to Subparts B and C of Part AA of Chapter 56 of the Laws of 2014, which became effective April 1, 2014. Consistent with the statute, the proposed rule by its terms applies to school districts and boards of cooperative educational services (BOCES). However, it appears that the previously published Regulatory Flexibility Analysis and the Rural Area Flexibility Analysis inadvertently included references to charter schools in their respective analyses. The Department has therefore prepared a Revised Regulatory Flexibility Analysis and Revised Rural Area Flexibility Analysis to delete such references and has submitted them for publication herein with the Notice of Adoption.

8 NYCRR §§100.2, 100.3, 100.4 and 104.3

STATEMENT OF FACTS AND CIRCUMSTANCES WHICH NECESSITATE
EMERGENCY ACTION

The proposed rule is necessary to conform the Commissioner's Regulations to Subparts B and C of Part AA of Chapter 56 of the Laws of 2014, which became effective April 1, 2014.

Part AA, Subpart B of Chapter 56 of the Laws of 2014 adds new subdivisions (45) and (46) to Education Law section 305, which direct the Commissioner to provide that no school district or board of cooperative educational services may place or include on a student's official transcript or maintain in a student's permanent record any individual student score on a State administered standardized English language arts or mathematics assessment for grades three through eight, and that any test results on such assessments sent to parents/persons in parental relation include a clear and conspicuous notice that such results will not be included on the student's official transcript or in the student's permanent record and are being provided for diagnostic purposes. The statute provides that these provisions shall expire and be deemed repealed on December 31, 2018.

Part AA, Subpart C of Chapter 56 of the Laws of 2014 adds a new subdivision (47) to Education Law section 305, which directs the Commissioner to provide that no school district shall make any student promotion or placement decisions based solely or primarily on student performance on the state administered standardized English language arts and mathematics assessments for grades three through eight. However,

a school district may consider student performance on such state assessments provided that the school district uses multiple measures in addition to such assessments and that such assessments do not constitute the major factor in such determinations. In addition, the Commissioner shall require every school district to annually notify the parents and persons in parental relation to the students attending such district of the district's grade promotion and placement policy along with an explanation of how such policy was developed. Such notification may be provided on the school district's website, if one exists, or as part of an existing informational document that is provided to parents and persons in parental relation.

The proposed amendment was adopted as an emergency action at the April 28-29, 2014 Regents meeting, effective April 29, 2014, and has now been adopted as a permanent rule at the July 8-9, 2014 Regents meeting. Pursuant to SAPA §203(1), the earliest effective date of the permanent rule is July 30, 2014, the date a Notice of Adoption will be published in the State Register. However, the April emergency rule will expire on July 27, 2014, 90 days after its filing with the Department of State on April 29, 2014. A lapse in the rule's effective date could disrupt Emergency action is therefore necessary for the preservation of the general welfare to ensure that the proposed rule adopted by emergency action at the April 2013 Regents meeting, and adopted as a permanent rule at the July 2014 Regents meeting, remains continuously in effect until the effective date of its permanent adoption.

AMENDMENT OF THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to Education Law sections 101, 207, 208, 209, 210, 215, 305, 308, 309 and 3204

1. Subdivision (II) of section 100.2 of the Regulations of the Commissioner is added, effective July 28, 2014, as follows:

(II) Grade promotion and placement policy. Each school district shall adopt a grade promotion and placement policy that is consistent with sections 100.3(b)(2)(iv), 100.4(b)(2)(v) and 100.4(e)(6) of this Part, and annually notify the parents and persons in parental relation to the students attending such district of such policy along with an explanation of how the policy was developed. Such notification may be provided on the school district's website, if one exists, or as part of an existing informational document that is provided to parents and persons in parental relation.

2. Paragraph (2) of subdivision (b) of section 100.3 of the Regulations of the Commissioner is amended, effective July 28, 2014, as follows:

(2) Required assessments.

(i) Except as otherwise provided in subparagraphs (ii) and (iii) of this paragraph, at the specified grade level, all students shall take the following tests, provided that testing accommodations may be used as provided for in section 100.2(g) of this Part in accordance with department policy:

(a) beginning in January 1999, the English language arts elementary assessment and the mathematics elementary assessment shall be administered in

grade four and, beginning in the 2005-2006 school year, the English language arts elementary assessments and the mathematics elementary assessment shall be administered in grades three and four; and

(b) beginning in January 2000, the elementary science assessment shall be administered in grade four.

(ii) Students receiving home instruction pursuant to section 100.10 of this Part may take, but shall not be required to take, the State assessments required of public school students.

(iii) In accordance with their individualized education programs, students with disabilities instructed in the alternate academic achievement standards defined in section 100.1(t)(2)(iv) of this Part shall be administered a State alternate assessment to measure their achievement.

(iv) Notwithstanding the provisions of this section, no school district shall make any student promotion or placement decisions based solely or primarily on student performance on the English language arts elementary assessments and the mathematics elementary assessments administered in grades three and four. However, a school district may consider student performance on such assessments provided the school district uses multiple measures in addition to such assessments and that such assessments do not constitute the major factor in such determinations.

3. Paragraph (2) of subdivision (b) of section 100.4 of the Regulations of the Commissioner is amended, effective July 28, 2014, as follows:

(2) Required assessments.

(i) Except as otherwise provided in subparagraphs (iv) and (v) of this paragraph, all students shall take the following assessments, provided that testing accommodations may be used as provided for in section 100.2(g) of this Part in accordance with department policy:

(ii) beginning with the 2005-06 school year, English language arts and mathematics assessments shall be administered in grades five and six;

(iii) for school years prior to July 1st of the 2010-2011 school year, all students in grade five shall take the social studies elementary assessment;

(iv) students receiving a program of home instruction pursuant to section 100.10 of this Part may take, but shall not be required to take, the State assessments required of public school students;

(v) in accordance with their individualized education programs, students with disabilities instructed in the alternate academic achievement standards defined in section 100.1(t)(2)(iv) of this Part shall be administered a State alternate assessment to measure their achievement;

(vi) beginning September 1, 2000 and continuing up to and including the 2004-2005 school year, fifth grade students who scored at Level 1 of the State designated performance levels on the English language arts elementary assessment and/or the mathematics elementary assessment administered in grade four shall receive at least one semester of academic intervention services and be retested no later than the

completion of grade five. Multiple sources of evaluation, including, but not limited to, a commercial test or other external test of demonstrated technical quality determined by the school district to be a valid and reliable means of evaluating a student's progress in achieving the elementary level State learning standards in English language arts and mathematics, shall be used to retest students in accordance with the district-adopted or district-approved procedure established pursuant to section 100.2(ee) of this Part;

(v) Notwithstanding the provisions of this section, no school district shall make any student promotion or placement decisions based solely or primarily on student performance on the English language arts assessments and the mathematics assessments administered in grades five and six. However, a school district may consider student performance on such assessments provided the school district uses multiple measures in addition to such assessments and that such assessments do not constitute the major factor in such determinations.

4. Subdivision (e) of section 100.4 of the Regulations of the Commissioner of Education is amended, effective July 28, 2014, as follows:

(e) Required assessments in grades seven and eight. Except as otherwise provided in subdivisions (f) and (g) of this section, and except for students who have been admitted to a higher grade without completing the grade at which the assessment is administered, all students shall take the following assessments, provided that testing accommodations may be used as provided for in section 100.2(g) of this Part in accordance with department policy.

(1) Beginning with school year 1998-99, the English language arts intermediate assessment shall be administered in grade eight. Beginning with the 2005-2006 school year, English language arts assessments shall be administered in grades seven and eight.

(2) Beginning with the 1998-99 school year, the mathematics intermediate assessment shall be administered in grade eight. Beginning with the 2005-2006 school year, mathematics assessments shall be administered in grades seven and eight, provided that, for the 2013-2014 school year, students who attend grade seven or eight may take a Regents examination in mathematics in lieu of or in addition to the grade seven or eight mathematics assessment, in accordance with section 100.18(b)(14) of this Part.

(3) The program evaluation test in social studies in grade eight, beginning in May 1989. Beginning with the school year 2000-2001 through the 2009-2010 school year, the social studies intermediate assessment shall replace the program evaluation test and shall be administered in grade eight.

(4) Beginning with the school year 2000-2001, the science intermediate assessment shall be administered in grade eight; provided that students who attend grade eight may take a Regents examination in science in lieu of or in addition to the grade eight science intermediate assessment, in accordance with this section and section 100.18(b)(14) of this Part, and provided further that the science intermediate assessment shall not be administered in grade eight to students who take such assessment in grade seven and are being considered for placement in an accelerated

high school-level science course when they are in grade eight pursuant to subdivision (d) of this section.

(5) Such other assessments as the commissioner determines appropriate.

(6) Notwithstanding the provisions of this section, no school district shall make any student promotion or placement decisions based solely or primarily on student performance on the English language arts assessments and the mathematics assessments administered in grades seven and eight. However, a school district may consider student performance on such assessments provided the school district uses multiple measures in addition to such assessments and that such assessments do not constitute the major factor in such determinations.

5. Section 104.3 of the Regulations of the Commissioner of Education is added, effective July 28, 2014, as follows:

§ 104.3 Prohibition on inclusion of individual student scores on State administered standardized English language arts or mathematics assessments for grades three through eight. During the period commencing on April 1, 2014 and expiring on December 31, 2018:

(a) no school district or board of cooperative educational services may place or include on a student's official transcript or maintain in a student's permanent record any individual student score on a State administered standardized English language arts or mathematics assessment for grades three through eight, provided that nothing herein shall be construed to interfere with required State or federal reporting or to excuse a school district from maintaining or transferring records of such test scores separately

from a student's permanent record, including for purposes of required State or federal reporting; and

(b) any test results on a State administered standardized English language arts or mathematics assessment for grades three through eight sent to parents or persons in parental relation to a student shall include a clear and conspicuous notice that such results will not be included on the student's official transcript or in the student's permanent record and are being provided to the student and parents for diagnostic purposes.