



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

**FROM:** Kimberly Young Wilkins *Kimberly Young Wilkins*

**SUBJECT:** Proposed Amendment of Section 135.4 of the Regulations of the Commissioner of Education Relating to Eligibility for Participation of Students Who Have Section 504 or ADA plans in Interschool Competition and Inclusive Athletic Activities

**DATE:** July 2, 2020

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

#### SUMMARY

##### **Issue for Decision (Consent)**

Should the Board of Regents amend Section 135.4 of the Regulations of the Commissioner of Education relating to eligibility for participation of students who have Section 504 or ADA plans in interschool competition and inclusive athletic activities?

##### **Reason(s) for Consideration**

Review of Policy.

##### **Proposed Handling**

The proposed amendment will be presented to the Full Board for adoption as an emergency rule at its July 2020 meeting. A copy of the proposed rule is attached (Attachment A), as well as a statement of facts and circumstances justifying emergency action (Attachment B).

##### **Procedural History**

The proposed amendment was presented to the Full Board for adoption as an emergency action at the June 2020 meeting of the Board of Regents, effective June 9, 2020. A Notice of the Emergency Adoption and Proposed Rule Making was published in the State Register on June 24, 2020. Supporting materials are available upon request from the Secretary to the Board of Regents. To date, the Department has not received public comment on the proposed amendment. Because the emergency action will expire on September 6, 2020, a second emergency action is necessary to ensure that the emergency

rule remains continuously in effect until it can be permanently adopted at the September 14-15, 2020 Regents meeting and take effect as a permanent rule. Supporting materials are available upon request from the Secretary to the Board of Regents.

### **Background Information**

The current Commissioner's Regulation §135.4(b)(2) provides that a pupil shall be eligible for interschool competition or inclusive athletic activities in a sport during a semester, provided that he or she:

- 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.

The current regulation, as written, has been interpreted by schools and athletic associations, etc., as precluding consideration of a request for an accommodation on behalf of an otherwise qualified student with a disability who is not registered in the equivalent of three regular courses as a result of his or her education plan approved under section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act (ADA). The amendment makes it clear that the regulation should not be interpreted as barring consideration of such accommodation requests in accordance with federal law.

### **Proposed Regulatory Change**

The proposed amendment clarifies that the rule shall not be construed to preclude schools and associations, etc., from considering accommodation requests from otherwise qualified students with disabilities for participation in interschool competition or inclusive athletic activities who, pursuant to an approved section 504 or ADA plan, are not registered in the equivalent of three regular courses.

### **Related Regents Items**

June 2020: [Proposed Amendment of Section 135.4 of the Regulations of the Commissioner of Education Relating to Eligibility for Participation of Students Who Have Section 504 or ADA plans in Interschool Competition and Inclusive Athletic Activities](https://www.regents.nysed.gov/common/regents/files/620bra4.pdf)  
(<https://www.regents.nysed.gov/common/regents/files/620bra4.pdf>)

### **Recommendation**

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

VOTED: That Section 135.4 is amended, as submitted, effective September 7, 2020, as an emergency action upon a finding by the Board of Regents that such action is necessary for the preservation of the public health and general welfare to immediately clarify that schools and associations, etc., are not precluded from considering accommodation

requests from otherwise qualified students with disabilities for participation in interschool competition or inclusive athletic activities who, pursuant to an approved 504 or ADA plan, are not registered in the equivalent of three regular courses and to ensure that the emergency action taken at the June meeting remains in effect until the proposed rule can be permanently adopted.

### **Timetable for Implementation**

If adopted at the July 2020 Regents meeting, the emergency rule will become effective September 7, 2020. It is anticipated that the proposed rule will be presented to the Board of Regents for permanent adoption at the September Regents meeting, after publication of the proposed amendment in the State Register and expiration of the 60-day public comment period required under the State Administrative Procedure Act.

**Attachment A**

AMENDMENT OF THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

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

1. Subclause (2) of clause (b) of subparagraph (ii) of paragraph (7) of subdivision (c) of section 135.4 of the Regulations of the Commissioner of Education is amended to read as follows:

(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. Nothing in this clause shall be construed to preclude a chief school officer, athletic association, league or section from duly considering a request for an accommodation on behalf of an otherwise qualified student with a disability who is not registered in the equivalent of three regular courses as a result of his or her education plan approved under section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act.

**8 NYCRR §135.4**

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

The proposed amendment to section 135.4 of the Regulations of the Commissioner of Education is necessary to immediately clarify that schools and associations, etc., are not precluded from considering accommodation requests from otherwise qualified students with disabilities for participation in interschool competition or inclusive athletic activities who, pursuant to an approved 504 or ADA plan, are not registered in the equivalent of three regular courses.

The proposed amendment was presented to the Full Board for adoption as an emergency action at the June 2020 meeting of the Board of Regents, effective June 9, 2020. Since the Board of Regents meets at fixed intervals, the earliest the proposed rule can be presented for permanent adoption, after expiration of the required 60-day comment period provided for in the State Administrative Procedure Act (SAPA) sections 201(1) and (5), would be the September 2020 Regents meeting. Furthermore, pursuant to SAPA 203(1), the earliest effective date of the proposed rule, if adopted at the September meeting would be September 30, 2020, the date the Notice of Adoption would be published in the State Register. However, the June emergency rule will expire on September 6, 2020.

Therefore, emergency action is necessary at the July 2020 meeting for the preservation of the public health and general welfare in order to immediately clarify that schools and associations, etc., are not precluded from considering accommodation requests from otherwise qualified students with disabilities for participation in interschool competition

or inclusive athletic activities who, pursuant to an approved 504 or ADA plan, are not registered in the equivalent of three regular courses and to ensure that the emergency action taken at the June meeting remains in effect until the rule can be permanently adopted.

It is anticipated that the proposed rule will be presented for adoption as a permanent rule at the September 2020 Regents meeting, which is the first scheduled meeting after the 60-day public comment period prescribed in SAPA for State agency rule makings.