



TO: P-12 Education Committee

FROM: Elizabeth R. Berlin *Elizabeth R Berlin*

SUBJECT: Proposed Amendment of Section 200.18 of the Commissioner's Regulations Relating to the Establishment of Tuition Rates Resulting from Fiscal Audits of Approved Programs Educating Students with Disabilities Ages 3 to 21 Who Have Been Enrolled Pursuant to Articles 81 and 89 of the Education Law.

DATE: September 7, 2016 *Mary Ellen Elin*

AUTHORIZATION(S): 

SUMMARY

Issue for Decision

Should the Board of Regents adopt, as an emergency measure, the proposed amendment of section 200.18 of the Commissioner's regulations, relating to the establishment of tuition rates resulting from fiscal audits of approved programs educating students with disabilities ages 3 to 21 who have been enrolled pursuant to articles 81 and 89 of the Education Law?

Reason(s) for Consideration

The New York State Supreme Court, Appellate Division, Third Department held that the existing language of section 200.18(c) of the Regulations of the Commissioner precludes, at least in part, the Department from exercising discretion in establishing tuition rates as "the Commissioner's otherwise broad discretion in setting the reconciliation rate is curtailed where the service provider has been audited by the Comptroller."¹ To the extent the Department is bound solely to the information contained in final audit reports, it would be restricted from taking adjustments in excess

¹ Mid Island Therapy Associates, LLC v. New York State Dep't of Educ., 99 A.D.3d 1082, 1084 (3d Dept. 2012).

of those identified in the audit or deviating from audit findings and recommendations. This would in turn limit the Department's ability to exercise discretion when enforcing its own standards and the Commissioner's general duties with respect to establishing tuition reimbursement rates. Differences of opinion as to the breadth of the Appellate Division's holding and the corresponding degree to which the Department's discretion is curtailed when an approved special education provider has been subject to audit has resulted in litigation. The proposed amendment will resolve this issue and provide clarification to other agencies and providers involved in the rate-setting process following the issuance of an official financial audit.

Proposed Handling

The proposed rule is being presented to the P-12 Education Committee for recommendation and to the Full Board for adoption as an emergency rule at the September 2016 Regents meeting. A statement of facts and circumstances which necessitate emergency action is included as Attachment A.

Procedural History

A Notice of Emergency Adoption and Proposed Rule Making will be published in the State Register on October 19, 2016. A copy of the proposed rule is included as Attachment B. Supporting materials are available upon request from the Secretary to the Board of Regents.

Background Information

Section 200.18(a) of Commissioner's Regulations provides that all approved programs shall be subject to audit by the State.² Audits of approved special education programs may be conducted by the Department, the Office of the State Comptroller, and other State agencies or agencies of other states. Additionally, pursuant to section 4410 of the Education Law and 200.18(b) of Commissioner's Regulations, approved preschool special education providers may be also be audited by each municipality, or in the case of a city having a population of one million or more, the board of education, bearing fiscal responsibility for tuition reimbursement. Additionally, chapter 545 of the Laws of 2013 directed the New York State Comptroller to audit the expenses reported to the Department by every preschool special education provider, to the extent such funds as are made available for such purpose.

In accordance with Education Law sections 4003, 4401, 4403, 4405, 4408 and 4410 and sections 200.9 and 200.19 of the Regulations of the Commissioner, the Commissioner establishes tuition reimbursement rates for approved special education programs. Following an official financial audit, the Department revises a program's

² For purposes of this regulation, approved programs include programs that provide special education to students with disabilities requiring the establishment of a tuition rate, in accordance with sections 4003, 4401, 4403, 4405, 4408 and 4410 of the Education Law. These include preschool and school-age special education private providers, Special Act School Districts, BOCES, and school-districts.

originally established tuition rate to reflect a “rate based on audit” which is defined in section 200.9(a)(19) of Commissioner’s Regulations as “a tuition rate that has been calculated based on a final audit of actual program expenses, revenues, enrollment data and other relevant program information performed by the Commissioner, the State Comptroller, other State agencies or agencies or subdivisions of other states, or a municipality in accordance with section 200.18 of this Part.” The existing language of section 200.18(c)(1) of the Regulations of the Commissioner states that a final audit report shall be issued for each audit and used to establish tuition rates developed by the Commissioner and certified by the Director of the Budget. This tuition rate is used by the appropriate school district, local agency or municipality to recoup any overpayment deemed due.

In October of 2012, the Supreme Court, Appellate Division, Third Department, interpreted the language of section 200.18(c)(1) of the Regulations of the Commissioner and held that “the Commissioner’s otherwise broad discretion in setting the reconciliation rate is curtailed where the service provider has been audited by the Comptroller” and that as a result the Department was “bound to accept the data provided by the [provider] petitioner in establishing its tuition rates.”³ This decision resulted in the Department being prohibited from making an adjustment to a provider’s reimbursement rate, even with documented evidence to support the adjustment, as the adjustment was not specifically mentioned in the final audit report. This decision could also be interpreted to limit the Department’s ability to use its discretion regarding the implementation of audit report findings and recommendations thus requiring the Department to adopt all disallowances regardless of whether it agrees with the audit determination or not. This interpretation would effectively restrict the Department’s ability to exercise discretion in the enforcement of its own reimbursement standards under applicable laws, rules and regulations, and placed constraints on the Commissioner’s general duties with respect to establishing tuition reimbursement rates subject to the approval of the Director of the Budget.

The proposed amendment clarifies that the Department maintains discretion in establishing tuition rates based on a financial audit, specifically in deciding whether or not to adopt all of the recommended audit fiscal disallowances and/or whether to take further disallowances as deemed warranted upon internal review and desk audits. Pursuant to the proposed amendment, the Department would establish tuition rates based on an audit to the extent that the Commissioner determines the audit findings and recommendations are warranted and consistent with the Individuals with Disabilities Education Act (20 U.S.C. sections 1400 *et seq.*), Articles 81 and 89 of the Education Law, Parts 100 and 200 of the Commissioner’s regulations and the Department’s tuition reimbursement guidelines and requirements. Upon a determination that a particular finding or recommendation is not warranted, or is not consistent with the Individuals with Disabilities Education Act (20 U.S.C. sections 1400 *et seq.*), Articles 81 and 89 of the Education Law, Parts 100 and 200 of the Commissioner’s regulations and/or the Department’s tuition reimbursement guidelines and requirements, discretion will be

³ 99 A.D.3d at 1084-85.

exercised in establishing a rate based on audit, subject to the approval of the Director of the Budget.

Recommendation

Staff recommends that the Regents take the following action:

VOTED: That section 200.18 of the Regulations of the Commissioner is amended, as submitted, effective October 1, 2016, as an emergency action upon a finding by the Board of Regents that such action is necessary for the preservation of the general welfare by allowing the Commissioner to exercise discretion in setting tuition rates based on an audit to the extent that the Commissioner determines the audit findings and recommendations are warranted and consistent with applicable federal and state Education Law, Commissioner's regulations, and tuition reimbursement guidelines and requirements.

Timetable for Implementation

If adopted at the September Regents meeting, the emergency rule will become effective on October 1, 2016. Following the 45-day public comment period required under the State Administrative Procedure Act, it is anticipated that the proposed rule will be presented for permanent adoption at the December 2016 Regents meeting. If adopted at the December meeting, the proposed amendment will become effective as a permanent rule on December 28, 2016.

8 NYCRR §200.18

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

The proposed amendment clarifies that the Department maintains discretion in establishing tuition rates based on a financial audit, specifically in deciding whether or not to adopt all of the recommended audit fiscal disallowances and/or whether to take further disallowances as deemed warranted upon internal review and desk audits. Pursuant to the proposed amendment, the Department would establish tuition rates based on an audit to the extent that the Commissioner determines the audit findings and recommendations are warranted and consistent with applicable federal and state Education Law, Commissioner's regulations, and tuition reimbursement guidelines and requirements. Upon a determination that a particular finding or recommendation is not warranted, or is not consistent with applicable state and federal Education Law, Commissioner's regulations, or tuition reimbursement guidelines and requirements, discretion will be exercised in establishing a rate based on audit, subject to the approval of the Director of the Budget.

Since the Board of Regents meets at fixed intervals, the earliest the proposed rule can be presented for regular (non-emergency) adoption, after expiration of the required 45-day public comment period provided for in the State Administrative Procedure Act (SAPA) sections 201(1) and (5), would be the September 12-13, 2016 Regents meeting. Furthermore, pursuant to SAPA section 203(1), the earliest effective date of the proposed rule, if adopted at the December meeting, would be December 28, 2016, the date a Notice of Adoption would be published in the State Register.

Therefore, emergency action is necessary at the September 2016 Regents meeting for the preservation of the general welfare to allow the Commissioner to exercise discretion in setting tuition rates based on a financial audit to the extent that the Commissioner determines the audit findings and recommendations are warranted and consistent with applicable federal and state Education Law, Commissioner's regulations, and tuition reimbursement guidelines and requirements.

It is anticipated that the proposed rule will be presented for adoption as a permanent rule at the December 28, 2016 Regents meeting, which is the first scheduled meeting after expiration of the 45-day public comment period prescribed in the State Administrative Procedure Act for State agency rule makings.

AMENDMENT TO THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to Education Law sections 207, 4401, 4402, 4403 and 4410.

Subdivision (c) of section 200.18 of the Regulations of the Commissioner of Education shall be amended, effective October 1, 2016, to read as follows:

(c) *The establishment of tuition rates and repayment of funds resulting from audits performed in accordance with subdivision (a) or (b) of this section.*

(1) A final audit report shall be issued for each such audit. [The final audit report shall be used to establish tuition rates based on audit. The rates based on audit shall be developed by the Commissioner and certified by the Director of the Budget.]

(i) The Commissioner shall review the final audit report, which shall be used to establish tuition rates based on audit to the extent the Commissioner determines that the audit findings and recommended disallowances contained therein are warranted and consistent with the Individuals with Disabilities Education Act (20 U.S.C. sections 1400 et seq.), Articles 81 and 89 of the Education Law, Parts 100 and 200 of the Commissioner's regulations and the Department's tuition reimbursement guidelines and requirements.

(ii) After consideration of the final audit by the Commissioner pursuant to subparagraph (i) of this paragraph, tuition rates based on audit shall then be established by the Commissioner and become final after certification by the Director of Budget.

