



**TO:** P-12 Education Committee

**FROM:** Beth Berlin *Eloise B Berlin*

**SUBJECT:** Proposed Amendment of Section 200.9 of the Commissioner's Regulations, Relating to Reimbursement for Preschool Special Education Itinerant Services

**DATE:** June 8, 2015

**AUTHORIZATION(S):** *Richard A. Trenton*

## SUMMARY

### Issue for Decision

Should the Board of Regents adopt, as an emergency action, the revised proposed amendment of section 200.9 of the Regulations of the Commissioner of Education, relating to the reimbursement methodology for preschool Special Education Itinerant Services (SEIS)?

### Reason(s) for Consideration

Required by Statute (L. 2014, Ch. 56, Part A, §11) and review of policy

### Proposed Handling

This item will come before the P-12 Education Committee and the full Board for adoption as an emergency action at the June Regents meeting. A statement of the facts and circumstances which necessitate emergency action is attached.

### Procedural History

The proposed amendment was discussed by the P-12 Education Committee at the March 2015 Regents meeting. A Notice of Proposed Rule Making was published in the State Register on April 1, 2015.

The proposed amendment has been substantially revised in response to public comment. It is anticipated that a Notice of Emergency Adoption and Revised Rule Making will be published in the State Register on July 15, 2015. 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**

The Department has oversight responsibilities for the preschool special education program, which includes approximately 500 approved providers, private and public schools and boards of cooperative educational services (BOCES), and their provision of preschool special education services annually to approximately 80,000 preschoolers with disabilities, ages 3-4. Special Education Itinerant Services (SEIS) programs are instructional services provided by a special education teacher on an itinerant basis (i.e., the teacher goes to the setting where the child is - for example: Universal Prekindergarten Program (UPK), Head Start; other day care or regular preschool program; hospital or another child care location arranged for by the parent). In instances where the child has documented medical or other special needs indicating that the child cannot be transported to another site, the child could receive SEIS in the student's home. For the 2013-14 school year, 334 approved providers operated SEIS programs.

The proposed amendment would:

- (1) provide that reimbursement is to be paid upon the actual provision of SEIS to the student, in conformity with Chapter 56 of the Laws of 2014;
- (2) allow flexibility in how the minimum billable units of service adjustment are applied.

#### *Chapter 56 of the Laws of 2014 – SEIS reimbursement based on service provision*

Currently, pursuant to Commissioner's Regulation section 200.9(f)(2)(ix)(d), SEIS rates are paid on the basis of enrollment as defined in section 175.6(a)(1) and (2)<sup>1</sup>. Chapter 56 of the Laws of 2014 amended Education Law §4410(10)(a)(i) to provide that, commencing with the 2015-16 school year, approved programs providing SEIS must be reimbursed based on the actual attendance of preschool children receiving SEIS services. According to the legislative intent contained in the 2014-15 Executive Budget Briefing Book, this provision was recommended by the Executive in order to limit "payment to program operators only for services that are actually provided, incentivizing delivery of these mandated services to children."

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<sup>1</sup> The definition of enrollment pursuant to §175.6(a)(2) includes "the period commencing on the first day a pupil is enrolled in and is physically present at, or legally absent from, a special education program or service... and terminating on the last day such pupil is enrolled in and is physically present at, or legally absent from, such program or service."

In order to effectuate the statutory requirement that SEIS be reimbursed based on actual attendance, section 200.9(f)(2)(ix)(d) would be amended to require SEIS rates be paid for each unit of service delivered, not to exceed the recommendations for such services in the student's individualized education program (IEP). Although mandated and actual provided SEIS units are currently reported by providers on their annual Consolidated Fiscal Reports, and therefore data reporting in that regard does not need to be changed, the Department will issue updated guidance to Counties regarding the reporting of both the number of SEIS units expected to be delivered based on student IEPs and the number of SEIS units actually delivered.

#### *Greater Flexibility Regarding the Minimum Billable Adjustment*

Section 200.9(f)(2)(ix)(c) currently requires that that SEIS billable time may not be less than 66 percent or more than 72 percent of any special education itinerant teacher's total employment hours in order to ensure that a certain percentage of teacher time is spent directly providing instructional services to students. Billable time includes time spent providing SEIS. The difference between the total number of hours a special education itinerant teacher is employed and the hours of direct and/or indirect SEIS provided must be spent on "required functions" such as the coordination of services; preparation for and attendance at committee on preschool special education (CPSE) meetings; conferencing with the student's parents; classroom observation; and/or travel. Data analysis and stakeholder discussions conducted as part of a preschool tuition reimbursement study issued by the Department in December 2014 demonstrated that there are certain circumstances in which meeting this billable time threshold may be difficult, for example depending on varying travel time that may be required in certain regions of the State.

In order to allow for individual factors to be considered when applying the billable time adjustment, section 200.9(f)(2)(ix)(c) would be amended to provide that the approved tuition reimbursement methodology, developed by the Commissioner and approved by the Director of the Budget, may alter the billable time threshold.

#### **Preschool Special Education Fiscal Advisory Committee Meetings**

In the fall of 2014, the Department held six meetings of the preschool special education fiscal advisory committee comprised of individuals representing programs, students, counties, and New York City Department of Education. Among the topics discussed was the transition to reimbursement upon the delivery of SEIS service in conformance with Chapter 56 of the Law of 2014 and potential adjustments that could be made to SEIS rates (such as the billable time adjustment). These discussions helped to inform as study regarding the preschool special education tuition methodology issued in December of 2014 and the proposed amendment regulations.

In May of 2015, the Department held two additional meetings with the preschool special education fiscal advisory committee in order to discuss the Department's recommendation to 2015-16 SEIS rates. Based on comments made at these meetings and public comments received in response to the Department's proposed regulation, the Department seeks to make two revisions to the amendments originally proposed.

## *Revisions to Proposed Amendment*

The proposed amendment has been revised in response to public comment as follows:

- Section 200.9(f)(2)(ix)(c) has been revised to remove “consultation with the student’s regular early childhood provider” as one of the required functions of a special education itinerant teacher, for purposes of determining billable time for reimbursement for SEIS. Pursuant to current regulation, “consultation with the student’s regular early childhood provider” is a separate SEIS service defined in regulation as indirect SEIS<sup>2</sup> and is included in the definition of billable time. Therefore, it would create a conflict to include this function as both a “billable time” service and a separate “required function” of a SEIS provider. The Department may seek to make this amendment in the future if the definition of SEIS as an indirect service is revisited.
- Section 200.9(f)(2)(ix)(c) has been revised to retain that billable time shall not be more than 72 percent of any special education itinerant teacher’s total employment hours to ensure that all required functions of a special education itinerant teacher are provided for each student as part of the provision of SEIS.

## **Recommendation**

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

VOTED: that subparagraph (ix) of paragraph 2 of subdivision (f) of section 200.9 of the Regulations of the Commissioner of Education be amended as submitted, effective July 1, 2015, as an emergency action upon a finding of 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 in response to public comment, and to otherwise ensure that the proposed amendment is timely implemented pursuant to statutory requirements.

## **Timetable for Implementation**

If adopted at the June meeting, the revised emergency rule will take effect on July 1, 2015. It is anticipated that the proposed amendment will be presented for adoption as a permanent rule at the September 2015 Regents meeting, after publication of the proposed revised rule in the State Register and expiration of the 30-day public

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<sup>2</sup> *Indirect special education itinerant services* means consultation provided by a certified special education teacher to assist the child’s teacher in adjusting the learning environment and/or modifying their instructional methods to meet the individual needs of a preschool student with a disability who attends an early childhood program.

comment period prescribed in the State Administrative Procedure Act for State agency revised rule makings.

## **8 NYCRR §200.9**

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

Currently, pursuant to Commissioner's Regulation section 200.9(f)(2)(ix)(d), Special Education Itinerant Services (SEIS) rates are paid on the basis of enrollment as defined in section 175.6(a)(1) and (2). Chapter 56 of the Laws of 2014 amended Education Law §4410(10)(a)(i) to provide that, commencing with the 2015-16 school year, approved programs providing SEIS must be reimbursed based on the actual attendance of preschool children receiving SEIS services. According to the legislative intent contained in the 2014-15 Executive Budget Briefing Book, this provision was recommended by the Executive in order to limit "payment to program operators only for services that are actually provided, incentivizing delivery of these mandated services to children."

In order to effectuate the statutory requirement that SEIS be reimbursed based on actual attendance, section 200.9(f)(2)(ix)(d) would be amended to require SEIS rates be paid for each unit of service delivered, not to exceed the recommendations for such services in the student's IEP.

Section 200.9(f)(2)(ix)(c) currently requires that that SEIS billable time may not be less than 66 percent or more than 72 percent of any special education itinerant teacher's total employment hours in order to ensure that a certain percentage of teacher time is spent directly providing instructional services to students. Data analysis and stakeholder discussions conducted as part of a preschool tuition reimbursement study issued by the Department in December 2014 demonstrated that there are certain

circumstances in which meeting this billable time threshold may be difficult, for example depending on varying travel time that may be required in certain regions of the State.

In order to allow for individual factors to be considered when applying the billable time adjustment, section 200.9(f)(2)(ix)(c) would be amended to provide that the approved tuition reimbursement methodology, developed by the Commissioner and approved by the Director of the Budget, may alter the billable time threshold.

Since publication of a Notice of Proposed Rule Making in the State Register on April 1, 2015, the proposed amendment has been substantially revised in response to public comment, as set forth in the Revised Regulatory Impact Statement submitted herewith. Since the Board of Regents meets at fixed intervals, and does not meet during the month of August, the earliest the proposed rule can be presented for regular (non-emergency) adoption, after expiration of the required 30-day public comment period provided for in State Administrative Procedure Act (SAPA) section 202(4-a), would be the September 16-17, 2015 Regents meeting. Furthermore, pursuant to SAPA section 203(1), the earliest effective date of the proposed rule, if adopted at the March meeting, would be October 7, 2015, the date a Notice of Adoption would be published in the State Register. However, Section 11 of Part A of Chapter 56 of the Laws of 2014 amended Education Law §4410(10)(a)(i) to provide that, commencing with the 2015-16 school year, approved programs providing SEIS must be reimbursed based on the actual attendance of preschool children receiving SEIS services. The 2015-2016 school year begins on July 1, 2015.

Therefore, emergency action is necessary at the June 2015 Regents meeting for the preservation of the general welfare in order to immediately adopt revisions to the proposed amendment in response to public comment, and to otherwise ensure that the

proposed amendment is timely implemented pursuant to statutory requirements.

It is anticipated that the proposed rule will be presented for adoption as a permanent rule at the September 16-17, 2015 Regents meeting, which is the first scheduled meeting after expiration of the 30-day public comment period prescribed in the State Administrative Procedure Act for State agency revised rule makings.

AMENDMENT OF THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to Education Law sections 207, 4003, 4401, 4403, 4405, 4408 and 4410 and section 11 of Part A of Chapter 56 of the Laws of 2014

Subparagraph (ix) of paragraph (2) of subdivision (f) of section 200.9 of the Regulations of the Commissioner of Education is amended, effective July 1, 2015, as follows:

(ix) The tuition rate for programs for preschool students with disabilities receiving special education itinerant services pursuant to section 4410(1)(k) of the Education Law, shall be established using the reimbursement methodology as set forth in paragraph (1) of this subdivision and subparagraphs (i) through (viii) of this paragraph, with the following modifications:

(a) . . .

(b) . . .

(c) Rates for the certified special education teacher providing special education itinerant services shall be published as half hour rates and billing by providers to municipalities must be done in half hour blocks of time. Billable time includes time spent providing direct and/or indirect special education itinerant services as defined in section 200.16(i)(3)(ii) of this Part in accordance with the student's individualized education program (IEP). The difference between the total number of hours employed in the special education itinerant teacher's standard work week minus the hours of direct and/or indirect special education itinerant service hours must be spent on required functions. Such functions include but are not limited to: coordination of service when both special education itinerant services and related services are provided to a student pursuant to section 4410(1)(j) of the Education Law; preparation for and attendance at

committee on preschool special education meetings; conferencing with the student's parents; classroom observation; and/or travel for the express purposes of such functions as stated above. For the purpose of this subparagraph, parent conferencing may include parent education for the purpose of enabling parents to perform appropriate follow-up activities at home. Billable time shall not be less than 66 percent or more than 72 percent of any special education itinerant teacher's total employment hours; provided that the approved reimbursement methodology, developed by the commissioner and approved by the Director of the Budget, may adjust this billable time threshold. Providers shall maintain adequate records to document direct and/or indirect service hours provided as well as time spent on all other activities related to each student served.

(d) Special education itinerant service rates will be calculated so that reimbursable expenditures shall be divided by the product of the number of days in session for which the program operates times the number of direct and/or indirect special education itinerant service hours per day times two. In instances where the special education itinerant services are provided in a group session, *i.e.*, two or more students with a disability within the same block of time, the half hour rate must be prorated to each student receiving services. Special education itinerant service rates shall be paid [on the basis of enrollment as defined in section 175.6(a)(1) and (2) of this Title for the period of enrollment as defined by the student's IEP] based on the number of half hour units delivered, provided that the total number of units delivered shall not exceed the recommendations for such services in the student's IEP.

(e) . . .

## **8 NYCRR §200.9**

### **ASSESSMENT OF PUBLIC COMMENT**

Since publication of a Notice of Proposed Rule Making in the State Register on April 1, 2015, the State Education Department received the following comments:

#### **1. COMMENT:**

There is a lack of specificity in the proposed regulation regarding the circumstance in which a teacher travels to the location where services are to be dispensed but the student is absent or unavailable to receive those services on that day. The proposed regulation is silent as to what costs (notably travel and time spent in transit, but also reports and other associated paperwork to account for the missing session) shall be reimbursed and how these costs shall be accounted for. There is no mention of make-up sessions and the costs associated with that. Such circumstances and reimbursements must be standardized and not left to the whims of each individual county creating unequal policies throughout the State.

#### **DEPARTMENT RESPONSE:**

The reimbursable expenditures per the regulations will remain the same. Specifically, the rate includes reimbursement for time spent as “billable time” and other required functions which include: “coordination of service when both special education itinerant services and related services are provided to a student pursuant to section 4410(1)(j) of the Education Law; preparation for and attendance at committee on preschool special education meetings; conferencing with the student's parents; classroom observation; and/or travel for the express purposes of such functions as stated above.” The change to reimbursement upon the delivery of service will result in providers not being reimbursed for missed sessions or time associated with the missed

session. The 2015-16 certified rate will be paid upon the delivery of the service whether the service be performed as a regularly scheduled session or make-up session and should not be subject to individual county policies.

2. COMMENT:

It is unclear to what extent “consultation with the student’s regular early childhood provider” will be reimbursed or under what circumstances. There is no mention of whether the student or parent must be present during such consultation.

DEPARTMENT RESPONSE:

Section 200.9(f)(2)(ix)(c) has been revised to delete “consultation with the student’s regular early childhood provider” as a required function of special education itinerant teachers. Pursuant to current regulation, “consultation with the student’s regular early childhood provider” is a separate SEIS service defined in regulation as indirect SEIS and is included in the definition of billable time. Therefore, it would create a conflict to include this function as both a “billable time” service and a separate “required function” of a SEIS provider. However, The Department may seek to make this amendment in the future if the definition of SEIS as an indirect service is revisited.

3. COMMENT:

The proposed regulation lifts the current ceiling (72 percent) of the amount of the “total employment hours” that a special education itinerant teacher may bill for a session, but there is no indication as to what the new ceiling will be adjusted to so as to know whether those percentages will allow for full inclusion of actual costs incurred for services delivered or attempted to be delivered.

DEPARTMENT RESPONSE:

Section 200.9(f)(2)(ix)(c) has been revised to retrain the current regulation that requires that billable time shall not be more than 72 percent of an special education itinerant teacher's total employment hours to ensure that all required functions of a special education itinerant teacher are provided for each student as part of the provision of SEIS. The Department will review data trends and program monitoring to determine whether a different ceiling should be considered at a future date or whether a rate adjustment pertaining to this requirement is warranted.

4. COMMENT:

There is a substantial question as to what will be allowed for travel time costs. There is a misconception that the travel time and cost is always greater in rural areas where the distance between locations tends to be greater. However, in some urban and suburban areas the travel time may actually be greater even though the distance is less because of traffic congestion. Because the proposed regulation defers these policy determinations for a later time, to be decided by the Commissioner and the Director of the State Budget, it is impossible to assess the adequacy and effectiveness of what is being proposed.

DEPARTMENT RESPONSE:

The revised rule is intended to give administrative flexibility to allow for different circumstances to be reflected in SEIS provider's certified rates. This would be subject to annual recommendation of the Commissioner and approval of the rate-setting methodology by the Division of the Budget.

5. COMMENT:

The proposed regulation states there will be no additional costs to local governments or regulated parties, but there is no mention made as to whether local

governments will have the necessary software and aptitude to facilitate the new billing protocol. Should they not be prepared by July 1, 2015, the financial impact to providers in terms of interrupted cash flow from delayed reimbursements could be dire. This potential problem to some extent is caused by the lateness of the proposed regulation, which will not be promulgated until literally days before the statutory effective date. More than just a few days or weeks between the final promulgation and its effective date is needed for a smooth transition.

**DEPARTMENT RESPONSE:**

This component of the regulation that amends the billing protocol for local governments and regulated parties so that reimbursement is based upon the delivery of services is in conformance with an amendment to section 4410 of the Education Law as amended by Section 11 of Part A of Chapter 56 of the Laws of 2014 (signed into law on March 31, 2014). The new billing protocol will replace the existing billing protocol which is similar in all aspects except that rather than reimbursement for all mandated sessions reimbursement will be provided upon the actual delivery of sessions. This is similar to the protocol local governments utilize for reimbursement of related services and the Department has worked to ensure that SEIS reporting requirements to the Department remain constant or duplicate existing requirements used for related services. Prior to the proposed regulations, the Department held six stakeholder meetings with members of the Preschool Special Education Fiscal Advisory Committee, comprised of provider organizations and representatives of the counties, in the fall of 2014. The change to “fee for service” reimbursement was discussed in detail at these meetings and included in a study the Department released in December of 2014 on the preschool special education tuition rate methodology. With the statutory effective date of July 2015, the public

stakeholder discussions, and public release of the study, the Department believes that local governments and regulated parties have had sufficient notice of the proposed changes in order to make appropriate plans in preparation for July 2015 implementation.

6. COMMENT:

Given that the recently enacted 2015-2016 State budget requires a new “Regional Rate” structure for the SEIS program to be implemented on or before July 1, 2016, it is disconcerting and confusing that there is no mention as to how such new rates will impact the entire Fee for Service structure including reconciliation/clawbacks and related SED procedures. Since the change to regional rates will occur within close proximity, if not simultaneously, to the commencement of Fee for Service, the procedures involving a regional rate and how that might impact the Fee for Service conversion should be discussed in the regulation, including providing a time frame as to when a regional rate will replace the individually calculated rate for each agency and provider of service. It is requested that SED take the necessary steps to insure that the implementation of the final regulation provides sufficient time for providers and counties to successfully and seamlessly transition to the Fee for Service paradigm. As a matter of good public policy and best practice, there should be at least 90 days lead time between the final adoption of the regulation and its implementation.

DEPARTMENT RESPONSE:

The “fee for service” amendment to the regulation is in conformance with an amendment to section 4410 of the Education Law as amended by Chapter 56 of the Laws of 2014. July 1, 2015 is the internal effective date of the statute which was signed into law on March 31, 2014. The Department is mindful that, in addition to the

“fee for service” change in reimbursement as required by statute, further changes to SEIS reimbursement, such as regional rates and adjustments to reimbursable costs, should be phased-in over time in order to allow SEIS providers lead time to transition to the new rates. The Department will be developing a recommendation to gradually phase-in these elements over a four year period as required by the 2015-16 enacted state budget.

#### 7. COMMENT:

Concern was expressed that the proposed regulation reflects only limited elements of the substantive changes anticipated to be necessary upon the redesign of the reimbursement methodology. As the redesign has not yet been finalized, concern was expressed that the revision to the programmatic standards and policies in support of the redesign may be premature. Support was expressed for the redefinition of the parameters of “billable time”, removing the upward parameter of 72% to allow greater flexibility. However, again without a fuller understanding of the context within which this specific proposal shall be set, concern was expressed that the initiative may be premature. Support was also expressed for the clarification that only “direct” services shall be recognized as discretely billable events, but further amendment of the regulations which define direct/indirect services is urged to assure consistency. The implementation of Chapter 56 will require significant changes to current regulations and Departmental guidance, and the Department is encouraged to proceed in measured steps. A good number of policies must be established before meaningful revision of the regulations including: determination of whether SEIS retains its “program” designation; the effect of the reimbursement changes on provider eligibility for 611/619 funding; and whether the “enrollment” process is still warranted.

DEPARTMENT RESPONSE:

Traditionally, many aspects of methodology are included within the administrative process of the annually approved tuition rate-setting methodology rather than specified in regulation. The Department agrees that, following required changes to State regulations, additional policy related aspects of the approved methodology will be developed and related policy guidance released.