



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: Beth Berlin *Eloise H Berlin*

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

DATE: September 8, 2015

AUTHORIZATION(S): *Richard A. Trentacosta* *MaryEllen Elin*

SUMMARY

Issue for Decision (Consent Agenda)

Should the Board of Regents adopt, as a permanent rule, the 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 Full Board for action at the September 2015 Regents meeting. In addition, a second emergency adoption is necessary to ensure the emergency rule adopted at the June 2015 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 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 was substantially revised in response to public comment and adopted as an emergency action at the June 2015 Regents meeting, effective July 1, 2015. A Notice of Emergency Adoption and Revised Rule Making was published in the State Register on July 15, 2015.

A copy of the proposed amendment is 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 providers were approved to operate 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)¹. 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 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.

¹ 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."

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 a study regarding the preschool special education tuition methodology issued in December of 2014 and the proposed amended regulations.

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 October 7, 2015; and it is further

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 September 28, 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 ensure that the emergency rule adopted at the June 2015 Regents meeting remains continuously in effect until the effective date of its adoption as a permanent rule.

Timetable for Implementation

The proposed rule was adopted as an emergency measure at the June 15-16, 2015 Regents meeting, effective July 1, 2015. The June emergency rule will expire on September 27, 2015. If adopted at the September 2015 Regents meeting, the second emergency rule will take effect on September 28, 2015 and the permanent rule will become effective on October 7, 2015.

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 October 7, 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

STATEMENT OF FACTS AND CIRCUMSTANCES WHICH NECESSITATE EMERGENCY ACTION

The proposed amendment relates to modifications of the reimbursement methodology for preschool Special Education Itinerant Services (SEIS), and is necessary to conform the Commissioner's Regulations with §11 of Part A of Chapter 56 of the Laws of 2014, which amended Education Law §4410 to require that SEIS be reimbursed based on actual attendance. Consistent with §11 of Part A of Chapter 56 of the Laws of 2014, section 200.9(f)(2)(ix)(d) is 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). The proposed amendment would also allow flexibility in how the minimum billable units of service adjustment are applied.

After publication of a Notice of Proposed Rule Making in the State Register on April 1, 2015, the proposed amendment was substantially revised in response to public comment and adopted as an emergency rule at the June 15-16, 2015 Regents meeting, effective July 1, 2015. A Notice of Emergency Adoption and Revised Rule Making was published in the State Register on July 15, 2015.

The proposed amendment has now been adopted as a permanent rule at the September 16-17, 2015 Regents meeting. Pursuant to SAPA §203(1), the earliest effective date of the permanent rule is October 7, 2015, the date a Notice of Adoption will be published in the State Register. However, the June emergency rule will expire on September 27, 2015, 90 days after its filing with the Department of State on June 30, 2015. Emergency action is therefore necessary for the preservation of the general

welfare to ensure that the proposed amendment adopted by emergency action at the June 2015 Regents meeting and adopted as a permanent rule at the September 2015 Regents meeting, remains continuously in effect until the effective date of its permanent adoption.

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(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.

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