





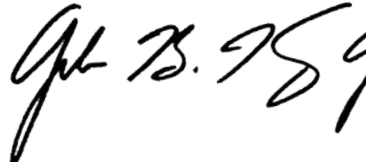
THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK / ALBANY, NY 12234

TO: The Honorable the Members of the Board of Regents

FROM: Ken Slentz 

SUBJECT: Proposed amendment to section 135.4 of the Regulations of the Commissioner, Relating to Allowing for Additional Waivers from the Age Requirement and Four-Year Limitation for Senior Athletic Competition for Students with Disabilities.

DATE: November 8, 2013

AUTHORIZATION(S):  

SUMMARY

Issue for Decision (Consent Agenda)

Should the Board of Regents adopt as a second emergency action, the proposed amendment to section 135.4 of the Regulations of the Commissioner of Education, relating to eliminating the one additional season restriction for the waiver from the age requirement and four-year limitation for senior athletic competition for students with disabilities?

Reason(s) for Consideration

Review of Policy.

Proposed Handling

The proposed amendment will be presented to the Full Board at the November 2013 Regents meeting for adoption as a second emergency action. A statement of the facts and circumstances which necessitate emergency action is attached.

Procedural History

The proposed amendment was adopted as an emergency action at the September 2013 Regents meeting, effective September 17, 2013. A Notice of Emergency Adoption and Proposed Rule Making was published in the State Register on October 2, 2013. The September emergency rule will expire on December 15, 2013. A second emergency action is necessary at the November Regents meeting in order to ensure that the emergency rule remains continuously in effect until it can be adopted as a permanent rule. A copy of the proposed amendment is attached. Supporting materials are available upon request from the Secretary to the Board of Regents.

Background Information

Section 135.4(c)(7)(ii)(b)(1), relating to duration of competition, generally provides, with certain exceptions, that a student shall be eligible for senior high school athletic competition in a sport during each of four consecutive seasons of such sport commencing with the student's entry into ninth grade and prior to graduation, and shall be eligible for interschool competition in grades 9, 10, 11 and 12 until the last day of the school year in which the student attains the age of 19.

Section 135.4(c)(7)(ii)(d) currently provides a process for obtaining a waiver from the age requirement and four-year limitation for senior high school athletic competition to allow students with disabilities, who would otherwise not be able to participate in interscholastic athletic competition due to their age and/or years in school, to participate in a senior high school non-contact athletic competition for an additional season.

The waiver is limited to non-contact sports¹ to ensure the safety of the given student as well as the other students competing in the sport who may be younger and less physically developed, and the participation of the student competing under the waiver is not scored for purposes of competition to ensure fair competition among students who may present different levels of physical maturity and athletic ability.

The waiver is assessed on a case-by-case basis by the superintendent of schools or chief executive officer of a non-public school in order to ensure that the student meets the following eligibility requirements: (1) the student has not graduated from high school as a result of his or her disability delaying his or her education for one year or more; (2) the student is otherwise qualified to compete in the athletic competition and has been selected for such competition in the past; (3) the student has not already participated in an additional season of athletic competition pursuant to the waiver; (4) the student has undergone and passed a physical evaluation by the school

¹ Non-contact sports include swimming and diving, golf, track and field, cross country, rifle, bowling, gymnastics, skiing and archery, and any other such non-contact sport deemed appropriate by the Commissioner.

physician; and (5) the superintendent of schools or chief executive officer of the school or school system has determined that the given student's participation in the athletic competition will not adversely affect the opportunity of the other students competing in the sport to successfully participate in such competition.

The proposed amendment will eliminate the one additional season restriction by allowing students with disabilities to participate in a non-contact sport for one or more additional seasons if they meet all the other specified criteria for this waiver. This amendment will advance initiatives of inclusion by offering students with disabilities continued socialization with teammates and continued opportunity to develop the skills and abilities associated with such students' participation in such sports.

Recommendation

Staff recommends that the Board of Regents take the following action:

VOTED: That clause (d) of subparagraph (ii) of paragraph (7) of subdivision (c) of section 135.4 of the Commissioner's Regulations be amended, as submitted, effective December 16, 2013 as an emergency rule upon a finding by the Board of Regents that such action is necessary for the preservation of the general welfare to ensure that the emergency rule adopted at the September 16-17, 2013 Regents meeting remains continuously in effect until the effective date of its adoption as a permanent rule.

Timetable for Implementation

The proposed amendment was adopted as an emergency rule at the September 2013 Regents meeting, effective September 17, 2013, and will expire on December 15, 2013. If adopted at the November Regents meeting, the second emergency action will take effect on December 16, 2013. It is anticipated that the proposed amendment will be presented for adoption as a permanent rule at the December Regents meeting, after expiration of the 45-day public comment period for proposed rule makings.

8 NYCRR §135.4

STATEMENT OF FACTS AND CIRCUMSTANCES WHICH NECESSITATE EMERGENCY ACTION

The proposed amendment will eliminate the one additional season restriction in Commissioner's Regulations §135.4(c)(7)(ii)(d) to allow students with disabilities to participate in a non-contact sport for one or more additional seasons if they meet the criteria for a waiver as specified in the regulation.

The proposed amendment was adopted as an emergency action at the September 16-17, 2013 Regents meeting, effective September 17, 2013. Because the Board of Regents meets at monthly intervals, the earliest the proposed amendment could be adopted by regular action after publication of a Notice of Proposed Rule Making and expiration of the 45-day public comment period prescribed in State Administrative Procedure Act (SAPA) section 202 would be the December 16-17, 2013 Regents meeting. Furthermore, because SAPA section 203(1) provides that an adopted rule may not become effective until a Notice of Adoption is published in the State Register, the earliest the proposed amendment could become effective if adopted at the December Regents meeting, is December 31, 2013. However, the September emergency rule will expire on December 15, 2013, 90 days after its filing with the Department of State on September 17, 2012. A lapse in the rule's effective date could disrupt participation of eligible students with disabilities in senior high school non-contact athletic competition during the 2013-2014 school year.

Emergency action is therefore necessary for the preservation of the general welfare to ensure that the proposed rule adopted by emergency action at the

September Regents meeting remains continuously in effect until the effective date of its permanent adoption.

It is anticipated that the proposed amendment will be presented for adoption as a permanent rule at the December 16-17, 2013 Regents meeting, which is the first scheduled Regents meeting after publication of the proposed rule in the State Register and 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 sections 101, 207, 305, 803 and 3204 of the Education Law.

Clause (d) of subparagraph (ii) of paragraph (7) of subdivision (c) of section 135.4 of the Regulations of the Commissioner of Education is amended, effective December 16, 2013, as follows:

(d) Waiver from the age requirement and four-year limitation for interschool athletic competition for students with disabilities in senior high school grades 9, 10, 11, and 12. For purposes of this clause, the term non-contact sport shall include swimming and diving, golf, track and field, cross country, rifle, bowling, gymnastics, skiing and archery, and any other such non-contact sport deemed appropriate by the Commissioner. A student with a disability, as defined in section 4401 of the Education Law, who has not yet graduated from high school may be eligible to participate in a senior high school noncontact athletic competition [for a fifth year] under the following limited conditions:

(1) such student must apply for and be granted a waiver to the age requirement and four-year limitation prescribed in subclause (b) (1) of this subparagraph. A waiver shall only be granted upon a determination by the superintendent of schools or chief executive officer of the school or school system, as applicable, that the given student meets the following criteria:

(i) such student has not graduated from high school as a result of his or her disability delaying his or her education for one year or more;

(ii) such student is otherwise qualified to compete in the athletic competition for which he or she is applying for a waiver and the student must have been selected for such competition in the past;

[(iii) such student has not already participated in an additional season of athletic competition pursuant to a waiver granted under this subclause;]

[(iv)] (iii) such student has undergone a physical evaluation by the school physician, which shall include an assessment of the student's level of physical development and maturity, and the school physician has determined that the student's participation in such competition will not present a safety or health concern for such student; and

[(v)] (iv) the superintendent of schools or chief executive officer of the school or school system has determined that the given student's participation in the athletic competition will not adversely affect the opportunity of the other students competing in the sport to successfully participate in such competition.

(2) Such student's participation in the additional season of such athletic competition shall not be scored for purposes of such competition.