



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:** Jhone M. Ebert

**SUBJECT:** Proposed Amendment of Section 100.2(ee) of the Commissioner's Regulations, relating to Academic Intervention Services (AIS)

**DATE:** December 7, 2015

**AUTHORIZATION(S):**

## SUMMARY

### Issue for Decision (Consent Agenda)

Should the Regents approve, as a permanent rule, the proposed amendment of Commissioner's Regulations section 100.2(ee) to provide continued flexibility to school districts in the provision of Academic Intervention Services through the 2015-16 school year, as a continuation of the policy adopted for the 2013-14 and 2014-15 school years for those students who performed below Level 3 on the grade 3-8 ELA and Math assessments but at or above cut scores established by the Regents?

### Reason(s) for Consideration

Review of Policy.

### Proposed Handling

This item will come before the Full Board for action at the December 2015 Regents meeting. In addition, a second emergency adoption is necessary to ensure the emergency rule adopted at the September 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 adopted as an emergency action at the September 2015 Regents meeting, effective September 17, 2015. A Notice of Emergency Adoption and Proposed Rule Making was published in the State Register on October 7, 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**

Section 100.2(ee) of the Commissioner's Regulations requires school districts to provide Academic Intervention Services (AIS) to students who score below the State designated performance level on State assessments for English Language Arts and Mathematics and/or who are at risk of not achieving the State learning standards. These requirements have been in place for more than 20 years.

The State assessments for grades 3-8 in ELA and Mathematics have four designated performance levels:

Level 1: Students performing at this level are well below proficient in standards for their grade.

Level 2: Students performing at this level are partially proficient in standards for their grade.

Level 3: Students performing at this level are proficient in standards for their grade.

Level 4: Students performing at this level excel in standards for their grade.

In the past, all students who scored at Levels 1 and/or 2 on the grades 3-8 ELA or Math assessments had been eligible to receive AIS. In 2013, the State Education Department, for the first time, administered assessments in grades 3-8 that were based on the Common Core Learning Standards (CCLS) and aligned to college- and career-readiness standards. As a consequence, there was a significant decline in the percentage of students who scored at or above proficiency on the grades 3-8 ELA and Math assessments.

In September 2013, the Board of Regents adopted emergency regulations that were designed to ensure that districts would not be required to significantly increase the percentage of students to whom they would be required to provide AIS as a

consequence of the implementation of the more rigorous CCLS standards. Pursuant to the regulations, the Department established cut scores for grades 3-8 ELA and Math that resulted in districts being required to provide AIS to approximately the same percentages of students in the 2013-14 school year as received AIS in the 2012-13 school year. This was analogous to the action taken by the Regents in July 2010 to address the raising of the cut scores on the 2010 Grades 3-8 English Language Arts and Mathematics assessments.

In the 2013-14 school year, under the approved Commissioner's Regulation §100.2(ee), districts were required to establish a policy to determine what services, if any, to provide to students who scored above the transitional cut scores established by SED, but below proficiency levels on the 2013 assessments.

Specifically, section 100.2(ee) provided the following for the 2013-14 school year:

- Students who scored below the specified cut scores for Grades 3-8 English Language Arts and Mathematics must receive AIS;
- Students who scored at or above the specified cut scores, but below the 2013 Level 3/proficient cut scores, would not be required to receive AIS and/or student support services unless the school district deemed it necessary;
- Each school district must develop and maintain on file a uniform process by which the district determined whether to offer AIS to students who scored at or above the specified cut scores but below Level 3/proficient on grades 3-8 English Language Arts or Mathematics NYS assessments; and
- By November 1, 2013, each school was required to either post a description of this process to its website or distribute a written description of such process to parents.

In September 2014, the Regents took action to extend these provisions through the 2014-15 school year to continue flexibility in the provisions of AIS.

The proposed amendment would extend flexibility in the provision of AIS for the 2015-16 school year.

### **Current Promotion Determinations**

The Department does not consider retention in grade to constitute an Academic Intervention Service. In addition, Education Law §305(47), as added by Chapter 56 of the Laws of 2014, prohibits school districts from making promotion decisions based solely or primarily on student performance on grades 3-8 ELA or math assessments. However, the statute provides that a school district may consider student performance on the assessments provided it uses multiple measures in addition to the assessments and the assessments do not constitute the major factor in such determinations. Districts should also establish procedures to ensure that parents/students are involved in and may appeal such determinations.

## **Recommendation**

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

VOTED: That paragraph (2) of subdivision (ee) of section 100.2 of the Regulations of the Commissioner of Education be amended as submitted, effective December 30, 2015; and it is further

VOTED: That paragraph (2) of subdivision (ee) of section 100.2 of the Regulations of the Commissioner of Education be amended as submitted, effective December 16, 2015, as an emergency measure upon a finding of 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 2015 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 action at the September 2015 Regents meeting, effective September 17, 2015. The September emergency rule will expire on December 15, 2015. If adopted at the December 2015 Regents meeting, the second emergency action will take effect on December 16, 2015, and the permanent rule will take effect on December 30, 2015.

There were no public comments received in response to the emergency action at the September meeting. In October 2015, a committee was established to examine the effectiveness of AIS and to gather suggestions from the field regarding revisions to the AIS regulations for the 2016-17 school year and beyond. As of December 2015, the committee continues to meet to discuss recommendations for AIS. The Department will be prepared to present its findings to the Board of Regents at a future meeting.

AMENDMENT OF THE REGULATIONS OF THE COMMISSIONER OF EDUCATION  
Pursuant to Education Law sections 101, 207, 305, 308, 309 and 3204

Paragraph (2) of subdivision (ee) of section 100.2 of the Regulations of the Commissioner of Education is amended, effective December 30, 2015, as follows:

(2) Requirements for providing academic intervention services in grade three to grade eight. Schools shall provide academic intervention services when students:

(i) score below:

(a) the State designated performance level on one or more of the State elementary assessments in English Language Arts, Mathematics or Science, provided that for the [2014-2015] 2015-2016 school year only, the following shall apply:

(1) those students scoring below a scale score specified in subclause (3) of this clause shall receive academic intervention instructional services; and

(2) those students scoring at or above a scale score specified in subclause (3) of this clause but below level 3/proficient shall not be required to receive academic intervention instructional and/or student support services unless the school district, in its discretion, deems it necessary. Each school district shall develop and maintain on file a uniform process by which the district determines whether to offer AIS during the [2014-2015] 2015-2016 school year to students who scored above a scale score specified in subclause (3) of this clause but below level 3/proficient on a grade 3-8 English Language Arts or Mathematics State assessment in [2013-2014] 2014-2015, and shall no later than [November 1, 2014] November 1, 2015 either post to its website or distribute to parents in writing a description of such process;

(3)

(b)

(ii) . . .

(iii) . . .

## **8 NYCRR §100.2(ee)**

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

The proposed amendment would extend certain of the provisions in section 100.2(ee) of the Commissioner's Regulations through the 2015-2016 school year, in order to provide continued flexibility to school districts in the provision of Academic Intervention Services (AIS) for those students who performed below Level 3 on the grade 3-8 ELA and Math assessments but at or above cut scores established by the Regents.

The proposed amendment was adopted as an emergency action at the September 16-17, 2015 Regents meeting, effective September 17, 2015. The proposed amendment has now been adopted as a permanent rule at the December 14-15, 2015 Regents meeting. Pursuant to SAPA §203(1), the earliest effective date of the permanent rule is December 30, 2015, the date a Notice of Adoption will be published in the State Register. However, the September emergency rule will expire on December 15, 2015, 90 days after its filing with the Department of State on September 17, 2015. A lapse in the rule could disrupt the provision of AIS to eligible students during the 2015-2016 school year. Emergency action is therefore necessary for the preservation of the general welfare to ensure that the proposed amendment adopted by emergency action at the September 2015 Regents meeting and adopted as a permanent rule at the December 2015 Regents meeting, remains continuously in effect until the effective date of its permanent adoption.

AMENDMENT OF THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to Education Law sections 101, 207, 305, 308, 309 and 3204

Paragraph (2) of subdivision (ee) of section 100.2 of the Regulations of the Commissioner of Education is amended, effective December 16, 2015, as follows:

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(a) the State designated performance level on one or more of the State elementary assessments in English Language Arts, Mathematics or Science, provided that for the [2014-2015] 2015-2016 school year only, the following shall apply:

(1) those students scoring below a scale score specified in subclause (3) of this clause shall receive academic intervention instructional services; and

(2) those students scoring at or above a scale score specified in subclause (3) of this clause but below level 3/proficient shall not be required to receive academic intervention instructional and/or student support services unless the school district, in its discretion, deems it necessary. Each school district shall develop and maintain on file a uniform process by which the district determines whether to offer AIS during the [2014-2015] 2015-2016 school year to students who scored above a scale score specified in subclause (3) of this clause but below level 3/proficient on a grade 3-8 English Language Arts or Mathematics State assessment in [2013-2014] 2014-2015, and shall no later than [November 1, 2014] November 1, 2015 either post to its website or distribute to parents in writing a description of such process;

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