



TO: The Honorable the Members of the Board of Regents

FROM: Angelica Infante-Green *A. Infante - Green*

SUBJECT: Proposed Amendments to Section 100.5 and 200.4 of the Commissioner's Regulations to Require Superintendents to Make a Local Determination as to Academic Proficiency for Certain Students with Disabilities to Graduate with a Local Diploma

DATE: December 7, 2016

AUTHORIZATION(S):  

SUMMARY

Issue for Decision (Consent Agenda)

Should the Board of Regents adopt the proposed amendment to sections 100.5 and 200.4 of the Commissioner's regulations to require superintendents to make a local determination as to academic proficiency for certain students with disabilities to graduate with a local diploma?

Reason(s) for Consideration

Implementation of policy.

Proposed Handling

The proposed amendment is submitted to the full Board for adoption as an emergency rule and a permanent adoption at its December 2016 meeting. A statement of facts and circumstances justifying the emergency is included as Attachment A.

Procedural History

At its June 2016 Regents meeting, the Board of Regents adopted the proposed amendment. A Notice of Emergency Adoption and Proposed Rule Making was published in the State Register on July 6, 2016. Following the 45-day public comment period required under the State Administrative Procedure Act, the Department received several comments on the proposed amendment. A second emergency adoption was taken at the September 2016 meeting, effective September 18, 2016, to ensure that the proposed amendment adopted at the June 2016 Regents meeting remained continuously in effect until it could be revised and adopted as a permanent rule.

The proposed amendment was then revised in response to public comment and a third emergency adoption was taken at the October Regents meeting to ensure that the proposed amendment adopted at the September meeting, with the revisions made as a result of public comment, remained continuously in effect until it could be permanently adopted. A Notice of Emergency Adoption and Revised Rule Making was published in the State Register on November 2, 2016. Following the 30-day public comment period, the Department received some additional comments on the proposed amendment. The proposed amendment is being presented to the Board of Regents at its December meeting for permanent adoption. If adopted at the December meeting, the proposed amendment will become effective as a permanent rule on December 28, 2016. However, the emergency action taken at the October Regents meeting will expire on December 16, 2016. Therefore, a fourth emergency adoption is also necessary to ensure that the amendment adopted at the October meeting, with the revisions made as a result of public comment, remains continuously in effect until it can be permanently adopted. A copy of the proposed amendments and the Assessment of Public Comment are attached (see Attachments B, C and D). Supporting materials for the proposed amendment are available upon request from the Secretary to the Board of Regents.

Background Information

It is essential that we have high expectations for what students with disabilities can learn and to provide reasonable accommodations for them to demonstrate that they have reached the standards. With these high expectations for students, we must also have high expectations for teaching with appropriate opportunities, supports, services and instruction provided to students with disabilities.

Safety Net Options for Students with Disabilities

Over the past several years, the Board of Regents has reviewed and revised the safety net options available to students with disabilities. Currently, there are three safety net options available to students with disabilities to graduate with a local diploma:

1. **Low Pass Rate Safety Net Option:** 5 required Regents exams with a score of 55 – 64.

2. **Low Pass Rate Safety Net Option with Appeal:** Students who score up to three points below a score of 55 on a Regents exam would be eligible to receive the local diploma via appeal if all of the conditions of appeal are met.
3. **Compensatory Safety Net Option:** A student with a disability may receive a local diploma if he/she scores between 45-54 on one or more of the Regents exams required for graduation, other than English language arts (ELA) or mathematics, but achieves a score of 65 or higher on another required Regents exam which can compensate for the lower score. A score of 65 or higher on a single examination may not be used to compensate for more than one examination for which a score of 45-54 is earned.

Summary of Amendments Adopted in June and September 2016

Superintendent's Review

All students with disabilities must be held to high expectations and be provided meaningful opportunities to participate and progress in the general education curriculum to prepare them to graduate with a regular high school diploma. The majority of students with disabilities can meet the State's learning standards for graduation. However, there are some students who, because of their disabilities, are unable to demonstrate their proficiency on standard State assessments, even with testing accommodations. For these students, at its June 2016 Regents meeting, the Board of Regents adopted an amendment to the Commissioner's regulations to ensure that students with disabilities have demonstrated that they have met the State's learning standards. The amendment required superintendents (or the principal/head of school of a registered nonpublic school or charter school, as applicable) to review, document and provide a written certification/assurance that there is evidence that the student has otherwise met the standards for graduation with a local high school diploma. Because ELA and math are foundation skills for which there must be a standardized measure of achievement, this option does require a minimum score on the ELA and math Regents exams. However, for the other three exams required for graduation, this option allows review of other documentation of proficiency when the student cannot pass one or more of these exams.

The conditions of the review are detailed below:

Applicability

This option is open to students with disabilities with a current Individualized Education Program (IEP) only. It does not apply to students with section 504 accommodation plans or students who have been declassified from special education.

Superintendent Review

At its June meeting, the Board of Regents adopted regulations to require a superintendent to conduct an automatic review of an eligible student with a disability for a local diploma if the student otherwise met the standards for graduation with a local diploma, but he/she was not successful, because of his/her disability, at demonstrating his/her proficiency on the Regents exams required for graduation. However, in response to public comment, the proposed amendment was revised to require that for reviews conducted on or after October 18, 2016, the superintendent may only consider an eligible student for a local diploma through the superintendent determination pathway *upon receipt of a written request from the student's parent or guardian*. Such request must be submitted in writing to the student's school principal or chairperson of the district's Committee on Special Education (CSE). A written request received by the school principal, chairperson of the district's CSE, or any other employee of the school, must be forwarded to the school superintendent immediately upon its receipt.

Process

Under this pathway, a school superintendent has the responsibility to determine if a student with a disability has otherwise met the standards for graduation with a local diploma when such student has not been successful, because of his/her disability, at demonstrating his/her proficiency on the Regents exams required for graduation.

Conditions

1. The student has a current IEP and is receiving special education programs and/or related services.
2. The student did not meet the graduation requirements through the low pass (55-64) safety net option¹ or the compensatory option² [section 100.5(b)(7)(vi)(c) and (d)(7)].
3. The student must have earned the required course credits and have passed, in accordance with district policy, all courses required for graduation, including the Regents courses to prepare for the corresponding required Regents exam areas (ELA, math, social studies, and science).
4. The student must have received a minimum score of 55 on both the Regents ELA and math exams or a successful appeal of a score between 52 and 54.

¹ A student also has the option to appeal a score of 52-54 on up to two Regents exams pursuant to section 100.5(b)(7)(vi)(c). While the appeal option exists, it is not required in order for a student to be considered for the superintendent's determination option.

² A student also has the option to appeal the ELA and/or math scores pursuant to section 100.5(d)(7). While the appeal option exists, it is not required in order for a student to be considered for the superintendent's determination option.

5. There must be evidence that the student participated in the other exams required for graduation pursuant to section 100.5(a)(5), but has not passed one or more of these as required for graduation.
6. In a subject area where the student was not able to demonstrate his/her proficiency of the State's learning standards through the corresponding Regents assessment required for graduation, there must be evidence that the student has otherwise demonstrated graduation level proficiency in the subject area.

Review and Documentation

In conducting a review to ensure the student has met the academic standards, the superintendent must consider evidence that demonstrates that the student:

1. Passed courses culminating in the exam required for graduation, in accordance with the grading policies of the district. In making this determination, the superintendent may consider the student's final course grade as well as student work completed throughout the school year and/or interim grades on homework, projects, class work, quizzes, tests, etc., that demonstrate that the student has met the learning standards for the course; and
2. Actively participated in the exam required for graduation.

The superintendent must sign an assurance on the form that certifies that the information is accurate and the superintendent attests that the student has met graduation requirements. A copy of the form must be placed in the student's record and a copy must be submitted to the Department no later than August 31st following the student's graduation.

Decision

A determination by the superintendent is final.

Audit

The Commissioner shall periodically audit the determinations granted by superintendents to ensure that conditions described above are being met.

Allowance of Low Pass Appeal in Addition to Compensatory Option

Prior to the adoption of the emergency rule at the June Regents meeting, students with disabilities who made use of the compensatory option described above were not eligible to also make use of the low pass appeal wherein they are able to

appeal scores of 52-54. The amendment adopted in June removes this prohibition and allows these students to make use of both options in meeting graduation requirements.

October Revisions to proposed amendment as a result of public comment

In response to public comment and questions raised by the field, the following major revisions were made to the proposed amendment:

- Section 100.5(d)(12) of the proposed amendment was revised to require that on or after October 18, 2016 (the effective date of the revised rule), a superintendent may only make a determination whether an eligible student has met the requirements for graduation through the superintendent determination pathway option upon receipt of a written request from an eligible student's parent or guardian.
- The proposed amendment has been further revised to do the following:
 - Require that the student and the parent of the student receive written notice of the superintendent's determination with the copy of the completed superintendent's determination form and, where the superintendent determines that the student has met the requirements for graduation, the district must provide prior written notice that the student is not eligible to receive a free appropriate public education after graduation with a local diploma. Where the superintendent determines that the student has not met the requirements for graduation, the written notice shall inform the student and his/her parent that the student has the right to attend school until receipt of a local or Regents diploma or until the end of the school year in which the student turns age 21, whichever shall occur first;
 - Clarify that the definition of superintendent for purposes for this regulation only shall include the principal or head of school of charter schools and non-public schools, as applicable.
- In addition, in order to ensure appropriate transition planning, amendments to section 200.4(d)(2)(ix) are proposed to require that, for students of transition age, the development of transition goals and services at a CSE meeting must include a discussion with the student's parents of the student's progress toward receiving a diploma and that parents be provided with information explaining graduation requirements, including eligibility criteria and process for requesting the superintendent determination.

Related Regents Item(s)

<http://www.regents.nysed.gov/meetings/2016/2016-06/p-12-education>

<http://www.regents.nysed.gov/meetings/2016/2016-09/meeting-board-regents-0>

<http://www.regents.nysed.gov/meetings/2016/2016-10/p-12-education>

Recommendation

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

VOTED: That a new paragraph (12) be added to subdivision (d) of section 100.5 of the Regulations of the Commissioner and clause (c) of subparagraph (i) of paragraph (7) of subdivision (d) of section 100.5, and subparagraph (ix) of paragraph (2) of subdivision (d) of section 200.4 of the Regulations of the Commissioner of Education be amended, as submitted, effective December 17, 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 in order to ensure that certain students with disabilities who are graduating from high school and their parents are aware that if they do not meet the graduation standards through the existing appeal and safety net options, that the parent may request that the superintendent make a determination as to whether the student has met the academic standards and is eligible for a diploma; and to further ensure that superintendents are on notice that they must make a determination as to whether certain students with disabilities are eligible for a local diploma if the student meets the requirements of the proposed amendment upon receipt of a written request from an eligible student's parent; and to further ensure that the emergency rule adopted at the June and September Regents meetings and as further revised at the October Regents meeting remain in effect until it can be adopted as a permanent rule; and

VOTED: That a new paragraph (12) be added to subdivision (d) of section 100.5 of the Regulations of the Commissioner and clause (c) of subparagraph (i) of paragraph (7) of subdivision (d) of section 100.5, and subparagraph (ix) of paragraph (2) of subdivision (d) of section 200.4 of the Regulations of the Commissioner of Education be amended, as submitted, effective December 28, 2016.

Timetable for Implementation

If adopted at the December meeting, the revised emergency rule will become effective on December 17, 2016. If adopted as a permanent rule at the December 2016 Regents meeting, the proposed amendment will be effective as a permanent rule on December 28, 2016.

Attachments

8 NYCRR §§ 100.5 & 200.4

STATEMENT OF FACTS AND CIRCUMSTANCES WHICH NECESSITATE
EMERGENCY ACTION

All students with disabilities must be held to high expectations and be provided meaningful opportunities to participate and progress in the general education curriculum to prepare them to graduate with a regular high school diploma. The majority of students with disabilities can meet the State's learning standards for graduation. However, there are some students who, because of their disabilities, are unable to demonstrate their proficiency on standard State assessments, even with testing accommodations. For these students, the proposed amendment, which was adopted by the Board of Regents at its June 2016 meeting, provides a superintendent review option in order for certain students with disabilities to graduate with a local diploma, beginning with students graduating in June 2016.

The proposed amendment was readopted as a second emergency measure, effective September 18, 2016, to ensure that the emergency rule adopted at the June Regents meeting remained continuously in effect until it could be adopted as a permanent rule.

The proposed amendment was then substantially revised in response to public comment. For instance, section 100.5(d)(12)(iii) of the proposed amendment has been added to provide that on or after October 18, 2016 a superintendent may only make a determination whether a student has met the requirements for graduation through the superintendent determination pathway option upon receipt of a written request from an

eligible student's parent or guardian. In order to ensure appropriate transition planning, section 200.4 has also been amended to require that the development of transition goals and services must include a discussion with the student's parents of the student's progress toward receiving a diploma and that parents be provided with information explaining graduation requirements, including eligibility criteria and process for requesting the superintendent determination. The proposed amendment was readopted as a third emergency measure, effective October 18, 2016, to ensure that the emergency rule adopted at the June Regents meeting remained continuously in effect until it could be adopted as a permanent rule.

A Notice of Emergency Adoption and Revised Rule Making was published in the State Register on November 2, 2016. Following the 30 day public comment period prescribed in the State Administrative Procedure Act for revised rule makings, the proposed amendment will be presented to the Board of Regents at its December meeting for permanent adoption. If adopted, the proposed amendment will become effective on December 28, 2016 and the emergency action taken at the October Regents meeting will expire on December 16, 2016. Therefore, a fourth emergency adoption is necessary to ensure that the rule adopted at the October meeting remains continuously in effect until the effective date of its adoption as a permanent rule, and thereby ensure that certain students with disabilities who are graduating from high school and their parents are aware that if they do not meet the graduation standards through the existing appeal and safety net options, that the student's parent may request that the superintendent make a determination as to whether the student has met the academic standards and is eligible for a diploma if the student meets the

requirements of the proposed amendment. It is also necessary to ensure that superintendents are on notice that upon receipt of a written request from an eligible student's parent, they must make a determination as to whether certain students with disabilities are eligible for local diploma if the student meets the requirements of the proposed amendment.

Attachment B

AMENDMENT OF THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to Education Law sections 101, 207, 208, 209, 305, 308, 309 and 3204

1. A new paragraph (12) shall be added to subdivision (d) of section 100.5 of the Regulations of the Commissioner of Education, effective December 17, 2016, to read as follows:

(12) Superintendent determination pathway for certain students with disabilities for eligibility for a local diploma.

(i) For purposes of this paragraph only, superintendent shall mean the superintendent of a school district or the principal, head of school, or their equivalent, of a charter school or nonpublic school, as applicable.

(ii) School districts, registered nonpublic high schools and charter schools shall ensure that every student who is identified as a student with a disability as defined in Education Law section 4401(1) and section 200.1(zz) of this Title and who does not meet the assessment requirements for graduation through the existing appeal options, including the compensatory score option or the 55-64 low pass safety net option available under this section but who is otherwise eligible to graduate in June 2016 and thereafter shall be considered for a local diploma through the superintendent determination pathway in accordance with the requirements of this paragraph, provided that the student:

(a) has a current individualized education program and is receiving special education programs and/or related services pursuant to Education Law section 4402 and section 200.4 of this Title; and

(b) took the English Regents examination required for graduation pursuant to this section and achieved a minimum score of 55 or successfully appealed a score of between 52 and 54 on such examination pursuant to paragraph (7) of this subdivision; and

(c) took a mathematics Regents examination required for graduation pursuant to this section and achieved a minimum score of 55 or successfully appealed a score of between 52 and 54 on such examination pursuant to paragraph (7) of this subdivision; and

(d) participated in the remaining Regents examinations required for graduation pursuant to clauses (c), (d), (e) and (f) of subparagraph (a)(5)(i) of this section, but was unable to achieve a minimum score of 55 on one or more of the remaining assessments required for graduation or did not initiate an appeal of a score of between 52 and 54 on one or more such examinations pursuant to paragraph (7) of this subdivision, or was unable to use the compensatory score option for one or more such examinations pursuant to clause (b)(7)(vi)(c) of this section, and

(e) has earned the required course credits pursuant to this section and passed, in accordance with district policy, all courses required for graduation.

(iii) For each eligible student under this paragraph, the superintendent shall conduct a review to determine whether the student has otherwise demonstrated proficiency in the knowledge, skills and abilities in the subject area(s) where the student was not able to demonstrate his/her proficiency of the State's learning standards as measured by the corresponding Regents examination(s) and document such determination in accordance with the following procedures:

(a) the superintendent shall consider evidence that the student attained a grade for the course that meets or exceeds the required passing grade by the school for the subject area(s) under review and such grade is recorded on the student's official transcript with grades achieved by the student in each quarter of the school year. Such evidence may include, but need not be limited to, the student's final course grade, student work completed throughout the school year and/or any interim grades on homework, class work, quizzes and tests; and

(b) the superintendent shall consider the evidence that demonstrates that the student actively participated in the Regents examination(s) for the subject area(s) under review; and

(c) the superintendent shall, as soon as practicable, in a form and manner prescribed by the commissioner, document the evidence reviewed for an eligible student with disability under this paragraph and make a determination as to whether the student met the requirements for issuance of a local diploma pursuant to this paragraph and certify that the information provided is accurate; and

(d) the superintendent shall, as soon as practicable, provide each student and parent or person in parental relation to the student with a copy of the completed form and written notification of the superintendent's determination, and place a copy of the completed form in the student's record.

(1) Where the superintendent determines that the student has not met the requirements for graduation pursuant to this paragraph, the written notice shall inform the student and parent or person in parental relation to the student that the student has

the right to attend school until receipt of a local or Regents diploma or until the end of the school year in which the student turns age 21, whichever shall occur first.

(2) Where the superintendent determines that the student has met the requirements for graduation pursuant to this paragraph, the parent shall receive prior written notice pursuant to the requirements of section 200.5(a)(5)(ii) of this Title indicating that the student is not eligible to receive a free appropriate public education after graduation with the receipt of the local diploma pursuant to this paragraph; and

(e) the superintendent shall, no later than August 31 of each year, provide the commissioner with a copy of the completed form for each student; and

(f) the commissioner may conduct audits of compliance with the requirements of this paragraph.

(iv) On or after October 18, 2016, a superintendent shall only make a determination under this paragraph upon receipt of a written request from an eligible student's parent or guardian. Such request shall be submitted in writing to the student's school principal or chairperson of the district's committee on special education. A written request received by the school principal, chairperson of the district's committee on special education, or any other employee of the school as applicable, shall be forwarded to school superintendent immediately upon its receipt.

2. Clause (c) of subparagraph (i) of paragraph (7) of subdivision (d) of section 100.5 of the Regulations of the Commissioner is amended, effective December 17, 2016, as follows:

(c) A student who is otherwise eligible to graduate in January 2016 or thereafter, is identified as a student with a disability as defined in section 200.1(zz) of this Title, and

fails, after at least two attempts, to attain a score of 55 or above on up to two of the required Regents examinations for graduation shall be given an opportunity to appeal such score in accordance with the provisions of this paragraph for purposes of graduation with a local diploma, provided that the student:

(1) has scored within three points of a score of 55 on the required Regents examination under appeal and has attained at least a 65 course average in the subject area of the Regents examination under appeal; and

(2) has met the criteria specified in subclauses (a)(2)-(4) of this subparagraph.

[Notwithstanding the provisions of this clause, a student with a disability who makes use of the compensatory option in clause (b)(7)(vi)(c) of this section to obtain a local diploma may not also appeal a score below 55 on the English language arts or mathematics Regents examinations pursuant to this clause.]

3. Subparagraph (ix) of paragraph (2) of subdivision (d) of section 200.4 of the Regulations of the Commissioner is amended, effective December 17, 2016, as follows:

(ix) Transition services. (a) For those students beginning not later than the first IEP to be in effect when the student is age 15 (and at a younger age, if determined appropriate), and updated annually, the IEP shall, under the applicable components of the student's IEP, include:

[(a)] (1) ...

[(b)] (2) ...

[(c)] (3) ...

[(d)] (4) ...

[(e)] (5) ...

(b) To ensure appropriate transition planning for the student, the development of transition goals and services pursuant to subclause (a) of this clause, shall include a discussion with the student's parents of:

(1) the graduation requirements that apply to the student depending upon the year in which he or she first enters grade nine;

(2) how the student is progressing toward receipt of a diploma including:

(i) the courses the student has passed and the number of credits the student has earned as required for graduation;

(ii) the assessments required for graduation that the student has taken and passed; and

(3) the appeal, safety net and superintendent determination pathway options that may be available to the student through section 100.5 of this Title to allow the student to meet the graduation assessment requirements.

(c) At the CSE meeting in which transition services will be discussed, the student's parents shall be provided with written information explaining the graduation requirements. Such information must include the eligibility criteria and processes for seeking an appeal to graduate with a lower score on a Regents examination and for requesting that a student be considered for a local diploma through the superintendent determination pathway pursuant to section 100.5 of this Title. Parents shall also be informed that graduation from high school with a local diploma or Regents diploma shall terminate their child's entitlement to a free public education pursuant to Education Law section 3202(1) and their eligibility for special education services pursuant to this Part.

Attachment C

AMENDMENT OF THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to Education Law sections 101, 207, 208, 209, 305, 308, 309 and 3204

1. A new paragraph (12) shall be added to subdivision (d) of section 100.5 of the Regulations of the Commissioner of Education, effective December 28, 2016, to read as follows:

(12) Superintendent determination pathway for certain students with disabilities for eligibility for a local diploma.

(i) For purposes of this paragraph only, superintendent shall mean the superintendent of a school district or the principal, head of school, or their equivalent, of a charter school or nonpublic school, as applicable.

(ii) School districts, registered nonpublic high schools and charter schools shall ensure that every student who is identified as a student with a disability as defined in Education Law section 4401(1) and section 200.1(zz) of this Title and who does not meet the assessment requirements for graduation through the existing appeal options, including the compensatory score option or the 55-64 low pass safety net option available under this section but who is otherwise eligible to graduate in June 2016 and thereafter shall be considered for a local diploma through the superintendent determination pathway in accordance with the requirements of this paragraph, provided that the student:

(a) has a current individualized education program and is receiving special education programs and/or related services pursuant to Education Law section 4402 and section 200.4 of this Title; and

(b) took the English Regents examination required for graduation pursuant to this section and achieved a minimum score of 55 or successfully appealed a score of between 52 and 54 on such examination pursuant to paragraph (7) of this subdivision; and

(c) took a mathematics Regents examination required for graduation pursuant to this section and achieved a minimum score of 55 or successfully appealed a score of between 52 and 54 on such examination pursuant to paragraph (7) of this subdivision; and

(d) participated in the remaining Regents examinations required for graduation pursuant to clauses (c), (d), (e) and (f) of subparagraph (a)(5)(i) of this section, but was unable to achieve a minimum score of 55 on one or more of the remaining assessments required for graduation or did not initiate an appeal of a score of between 52 and 54 on one or more such examinations pursuant to paragraph (7) of this subdivision, or was unable to use the compensatory score option for one or more such examinations pursuant to clause (b)(7)(vi)(c) of this section, and

(e) has earned the required course credits pursuant to this section and passed, in accordance with district policy, all courses required for graduation.

(iii) For each eligible student under this paragraph, the superintendent shall conduct a review to determine whether the student has otherwise demonstrated proficiency in the knowledge, skills and abilities in the subject area(s) where the student was not able to demonstrate his/her proficiency of the State's learning standards as measured by the corresponding Regents examination(s) and document such determination in accordance with the following procedures:

(a) the superintendent shall consider evidence that the student attained a grade for the course that meets or exceeds the required passing grade by the school for the subject area(s) under review and such grade is recorded on the student's official transcript with grades achieved by the student in each quarter of the school year. Such evidence may include, but need not be limited to, the student's final course grade, student work completed throughout the school year and/or any interim grades on homework, class work, quizzes and tests; and

(b) the superintendent shall consider the evidence that demonstrates that the student actively participated in the Regents examination(s) for the subject area(s) under review; and

(c) the superintendent shall, as soon as practicable, in a form and manner prescribed by the commissioner, document the evidence reviewed for an eligible student with disability under this paragraph and make a determination as to whether the student met the requirements for issuance of a local diploma pursuant to this paragraph and certify that the information provided is accurate; and

(d) the superintendent shall, as soon as practicable, provide each student and parent or person in parental relation to the student with a copy of the completed form and written notification of the superintendent's determination, and place a copy of the completed form in the student's record.

(1) Where the superintendent determines that the student has not met the requirements for graduation pursuant to this paragraph, the written notice shall inform the student and parent or person in parental relation to the student that the student has

the right to attend school until receipt of a local or Regents diploma or until the end of the school year in which the student turns age 21, whichever shall occur first.

(2) Where the superintendent determines that the student has met the requirements for graduation pursuant to this paragraph, the parent shall receive prior written notice pursuant to the requirements of section 200.5(a)(5)(ii) of this Title indicating that the student is not eligible to receive a free appropriate public education after graduation with the receipt of the local diploma pursuant to this paragraph; and

(e) the superintendent shall, no later than August 31 of each year, provide the commissioner with a copy of the completed form for each student; and

(f) the commissioner may conduct audits of compliance with the requirements of this paragraph.

(iv) On or after October 18, 2016, a superintendent shall only make a determination under this paragraph upon receipt of a written request from an eligible student's parent or guardian. Such request shall be submitted in writing to the student's school principal or chairperson of the district's committee on special education. A written request received by the school principal, chairperson of the district's committee on special education, or any other employee of the school as applicable, shall be forwarded to school superintendent immediately upon its receipt.

2. Clause (c) of subparagraph (i) of paragraph (7) of subdivision (d) of section 100.5 of the Regulations of the Commissioner is amended, effective December 28, 2016, as follows:

(c) A student who is otherwise eligible to graduate in January 2016 or thereafter, is identified as a student with a disability as defined in section 200.1(zz) of this Title, and

fails, after at least two attempts, to attain a score of 55 or above on up to two of the required Regents examinations for graduation shall be given an opportunity to appeal such score in accordance with the provisions of this paragraph for purposes of graduation with a local diploma, provided that the student:

(1) has scored within three points of a score of 55 on the required Regents examination under appeal and has attained at least a 65 course average in the subject area of the Regents examination under appeal; and

(2) has met the criteria specified in subclauses (a)(2)-(4) of this subparagraph.

[Notwithstanding the provisions of this clause, a student with a disability who makes use of the compensatory option in clause (b)(7)(vi)(c) of this section to obtain a local diploma may not also appeal a score below 55 on the English language arts or mathematics Regents examinations pursuant to this clause.]

3. Subparagraph (ix) of paragraph (2) of subdivision (d) of section 200.4 of the Regulations of the Commissioner is amended, effective December 17, 2016, as follows:

(ix) Transition services. (a) For those students beginning not later than the first IEP to be in effect when the student is age 15 (and at a younger age, if determined appropriate), and updated annually, the IEP shall, under the applicable components of the student's IEP, include:

[(a)] (1) ...

[(b)] (2) ...

[(c)] (3) ...

[(d)] (4) ...

[(e)] (5) ...

(b) To ensure appropriate transition planning for the student, the development of transition goals and services pursuant to subclause (a) of this clause, shall include a discussion with the student's parents of:

(1) the graduation requirements that apply to the student depending upon the year in which he or she first enters grade nine;

(2) how the student is progressing toward receipt of a diploma including:

(i) the courses the student has passed and the number of credits the student has earned as required for graduation;

(ii) the assessments required for graduation that the student has taken and passed; and

(3) the appeal, safety net and superintendent determination pathway options that may be available to the student through section 100.5 of this Title to allow the student to meet the graduation assessment requirements.

(c) At the CSE meeting in which transition services will be discussed, the student's parents shall be provided with written information explaining the graduation requirements. Such information must include the eligibility criteria and processes for seeking an appeal to graduate with a lower score on a Regents examination and for requesting that a student be considered for a local diploma through the superintendent determination pathway pursuant to section 100.5 of this Title. Parents shall also be informed that graduation from high school with a local diploma or Regents diploma shall terminate their child's entitlement to a free public education pursuant to Education Law section 3202(1) and their eligibility for special education services pursuant to this Part.

8 NYCRR §§100.5 & 200.4

ASSESSMENT OF PUBLIC COMMENT

Since publication of a Notice of Emergency Adoption and Revised Rule Making in the State Register on November 2, 2016, the State Education Department (SED) received the following comments on the proposed amendment.

1. COMMENT:

Generally support providing more flexibility to students who master New York State (NYS) standards but struggle to demonstrate knowledge and skills on Regents exams. Support superintendent determination as revised, particularly revisions made in response to concerns raised regarding the automatic review process possibly denying students their entitlement to a free appropriate public education (FAPE). Also support language concerning transition planning to require discussion of graduation requirements, availability of appeal, and safety net and superintendent determination options as it will help ensure families are aware of options available to their children and can plan accordingly.

DEPARTMENT RESPONSE:

Comments are supportive in nature and no response is necessary.

2. COMMENT:

While requirement for a “local determination” is imposed equally upon public school superintendents and principals of nonpublic and charter schools, the title of the determination, language in the rule, and the various descriptors and communications from the department, imply that only a public school superintendent shall make such

determinations. Singular and cursory reference to “registered nonpublic high schools and charter schools” is insufficient in conveying the fact that this requirement is imposed on such schools principals.

To eliminate confusion, in the proposed rule and other communications (e.g., Superintendent Determination form), change “superintendent determination” to “local determination”; and change references to “superintendent” to “superintendent or principal of the registered nonpublic or charter school, as the case may be.” On the certification form, change heading to “Local Determination...” and “Name of School District” to “Name of School District, Nonpublic School or Charter School” and clarify that the name and signature of the school superintendent is not required for students enrolled in a registered nonpublic school or charter school.

DEPARTMENT RESPONSE:

The emergency rule was revised at the October 2016 Board of Regents meeting to clarify for purposes of section 100.5(d)(12) that the superintendent shall mean “the superintendent of a school district or the principal, head of school, or their equivalent, of a charter school or nonpublic school, as applicable.” We believe this additional clarification and the existing language in the proposed rule is sufficiently clear that registered nonpublic high schools and charter schools are required to conduct a superintendent determination upon parent request. The mandatory superintendent determination form has also been revised to provide additional clarity as to what information is to be included on the form for students enrolled in charter and nonpublic high schools.

3. COMMENT:

Concerned about parents needing to submit a written request for Superintendent Determination, especially parents who do not speak English or are not involved. Concerned about unintended consequences of change that the determination be initiated only upon written request by the parent and that for students whose parents are not available for whatever reasons (e.g. parent is missing or a district is unable to reach or engage a parent or get them to respond) this process will not be available. Most students eligible for determination are likely to be 18, age of majority, and not allowing a student to initiate this process seems inconsistent with SED's *Blueprint for Improved Results for Students with Disabilities*, which identifies student self-advocacy as a core priority. Suggest having process for a superintendent's determination be initiated in a manner similar to that for the appeals process, whereby the request for a superintendent's determination be initiated by the student, a parent or guardian, a teacher or principal, or additionally, when recommended by the committee on special education (CSE).

DEPARTMENT RESPONSE:

The proposed rule was revised at the October 2016 Board of Regents (BOR) meeting to require a superintendent determination only upon the written request of the parent. This change by the Department was in response to several comments from the field on the initial proposed amendment that requiring the superintendent to automatically consider all eligible students with disabilities for the superintendent determination could inadvertently deny students their entitlement to FAPE. Under federal and State law/regulations, graduation with a regular school diploma constitutes a change in placement and ends a student's entitlement to FAPE. In addition, once a

student is determined eligible for a local or Regents diploma, parents and students do not have the right to decline such diploma. In addition, because NYS law does not allow procedural rights under the Individuals with Disabilities Education Act and Part 200 of the Regulations of the Commissioner of Education to transfer from parents to students with disabilities when they reach the age of majority, a student may not request a superintendent determination that could result in graduation with a regular diploma, unless such student is an emancipated minor in accordance with State law. Therefore, we decline to allow a student's teacher, principal or CSE to make a request for a superintendent determination that could end a student's eligibility for FAPE.

4. COMMENT:

Recommend individualized education program (IEP) form be revised so that transition section documents student progress towards a high school diploma and steps to be taken to help students work towards a diploma.

DEPARTMENT RESPONSE:

SED will take this comment under advisement when considering any possible changes to the State's mandatory IEP form. Although not required by law or regulation to be included in a student's IEP, nothing would preclude the CSE from documenting a student's progress towards a high school diploma in the optional Student Information Summary form as a supplement to a student's IEP.

5. COMMENT:

Urge Department to extend superintendent determination to all students as students with disabilities are not the only population that struggles with Regents exams and students should not be penalized for not being able to demonstrate mastery of NYS

standards on high-stakes standardized exams. All students who pass English and Math and otherwise met NYS standards in required subjects as evidenced by classroom performance should have opportunity to graduate with a local diploma and not have to fail Regents exams to have access to the superintendent determination.

Concerned superintendent determination pathway continues to operate on one size fits all framework that unfairly penalizes students who struggle on high-stakes tests. Urge SED to develop performance-based assessments and make them available to all students in lieu of Regents exams.

DEPARTMENT RESPONSE:

The proposal recognizes that the majority of students, including students with disabilities, can meet State's learning standards for graduation but that there are certain students with disabilities with an IEP who, because of their disability, are unable to demonstrate proficiency on standard State assessments. The BOR will continue to discuss multiple diploma pathways for all students and alternative ways to assess proficiency toward State's learning standards for purposes of graduation, including the use of performance-based assessments.