



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

**TO:** Full Board  
**FROM:** Johanna Duncan-Poitier  
**SUBJECT:** Proposed Amendment of Section 174.2 of the Regulations of the Commissioner, Relating to State Aid  
*Johanna Duncan-Poitier*  
**DATE:** September 1, 2009  
**STRATEGIC GOAL:** Goals 1 and 2  
**AUTHORIZATION(S):**

### **SUMMARY**

#### **Issue for Decision (Consent Agenda)**

Should the Board of Regents adopt as a permanent rule, and as a third emergency adoption, the amendment to section 174.2 of the Commissioner's Regulations relating to State Aid?

#### **Reason(s) for Consideration**

To conform the Commissioner's Regulations to changes in State statutes and to correct technical deficiencies.

#### **Proposed Handling**

The proposed amendment is being presented to the full Board for adoption as a permanent rule at the September 2009 Regents meeting. A second emergency adoption is also necessary at the meeting to ensure that the July 2009 emergency rule remains continuously in effect until the effective date of its adoption as a permanent rule. A statement of facts and circumstances which necessitate emergency action is attached.

## Procedural History

The proposed amendment was discussed by the EMSC Committee and adopted by the Full Board as an emergency action at the April Regents meeting, and subsequently revised in response to public comment and adopted as an emergency action at the July Regents meeting.

## Background Information

The proposed amendment is necessary to reflect the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with those changes to the law.

Chapter 57 of the Laws of 2007 changed the school funding system by replacing approximately 30 State Aid categories with a single Foundation Aid. Since pupil counts used to compute Operating Aid and other aids replaced by Foundation Aid are referenced in section 174.2 of the Commissioner's Regulations, there is a need to amend this section to correct the existing statutory reference and to provide for the computation of aid on an enrollment-based pupil count rather than the previous attendance-based count. The proposed amendment will enable the Department to accurately reflect the actual cost to districts of educating nonresident pupils.

A Notice of Proposed Rule Making was published in the State Register on May 6, 2009 and a Notice of Revised Rule Making was published on July 29, 2009. An Assessment of Public Comment is attached. Supporting materials are available upon request from the Secretary to the Board of Regents.

## Recommendation

Staff recommend that the Regents take the following action:

VOTED: That section 174.2 of the Regulations of the Commissioner of Education be amended as submitted, effective October 8, 2009; and it is further

VOTED: That section 174.2 of the Regulations of the Commissioner of Education be amended as submitted, effective September 28, 2009, 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 the emergency rule adopted at the April and July 2009 Regents meetings, which established the methodology for computing allowable tuition rates for nonresident pupils for public reporting by school districts, remains continuously in effect until the effective date of its adoption as a permanent rule, and thereby avoid disruption to the preparation and administration of contracts for the reimbursement of school districts which provide instruction to nonresident pupils for the 2009-2010 school year.

### Timetable for Implementation

The proposed amendment was adopted as an emergency rule at the April 20-21, 2009 Regents meeting, effective May 1, 2009. The proposed amendment was revised and readopted as an emergency rule at the July Regents meeting and will expire on September 27, 2009. If adopted by the Board of Regents at their September meeting, the permanent rule will take effect on October 8, 2009 and the third emergency adoption will become effective on September 28, 2009.

Attachment

PROPOSED AMENDMENT OF SECTION 174.2 OF THE REGULATIONS OF  
THE COMMISSIONER OF EDUCATION PURSUANT TO EDUCATION LAW  
SECTIONS 207, 2040, 2041, 2042, 2045 AND 3602, RELATING TO  
COMPUTATION OF NONRESIDENT PUPIL TUITION RATES  
STATEMENT OF FACTS AND CIRCUMSTANCES WHICH NECESSITATE  
EMERGENCY ADOPTION

The proposed amendment is necessary to revise the Commissioner's Regulations to reflect the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes. Chapter 57 of the Laws of 2007 changed the school funding system by replacing approximately 30 State Aid categories with a single Foundation Aid. Since pupils counts used to compute Operating Aid and other aids replaced by Foundation Aid are referenced in section 174.2 of the Commissioner's Regulations, there is need to amend this section to correct the existing statutory reference and to provide for the computation of aid on an enrollment-based pupil count rather than the previous attendance-based count. The proposed amendment will enable the Department to accurately reflect the actual cost to districts of educating nonresident pupils.

The proposed amendment was adopted as an emergency rule at the April 20-21, 2009 meeting of the Board of Regents, effective May 1, 2009. A Notice of Proposed Rule Making was published in the State Register on May 6, 2009. The proposed amendment was revised in response to public comment and, as so revised, adopted as an emergency rule at the July 27-28, 2009 Regents meeting.

A Notice of Revised Rule Making was published in the State Register on July 29, 2009.

The proposed amendment has been adopted as a permanent rule at the September 14-15, 2009 Regents meeting. Pursuant to the State Administrative Procedure Act, the earliest the adopted rule can become effective is after its publication in the State Register on October 8, 2009. However, the emergency rule which took effect on July 30, 2009 will expire on September 27, 2009. The expiration of the emergency could cause disruptions to the preparation and administration of contracts for the reimbursement of school districts which provide instruction to nonresident pupils for the 2009-2010 school year.

Therefore, a third emergency action is necessary for the preservation of the general welfare in order to ensure that the emergency rule that was revised and adopted at the July 2009 Regents meeting, which established the methodology for computing allowable tuition rates for nonresident pupils for public reporting by school districts, remains continuously in effect until the effective date of its adoption as a permanent rule, and thereby avoid disruption to the preparation and administration of contracts for the reimbursement of school districts which provide instruction to nonresident pupils for the 2009-2010 school year.

PROPOSED AMENDMENT OF SECTION 174.2 OF THE REGULATIONS OF  
THE COMMISSIONER OF EDUCATION PURSUANT TO EDUCATION LAW  
SECTIONS 207, 2040, 2041, 2042, 2045 AND 3602, RELATING TO  
COMPUTATION OF NONRESIDENT PUPIL TUITION RATES

ASSESSMENT OF PUBLIC COMMENT

A Notice of Proposed Rule Making was published in the State Register on May 6, 2009, and a Notice of Revised Rule Making was published on July 29, 2009. The State Education Department received the following comments in addition to those included in the Assessment of Public Comment published on July 29, 2009 with the revised rule making.

1. COMMENT:

A comment asked whether the tuition formula change in the proposed rule only applies prospectively.

DEPARMENT RESPONSE:

The proposed rule became effective, as an emergency adoption, on May 1, 2009, and will take effect as a permanent rule on October 8, 2009. However, it is the Department's position that the tuition formula change included in the proposed rule is required by the Foundation Aid statutory provisions enacted by Chapter 57 of the Laws of 2007, and that the proposed rule is merely a conforming change to reflect the statutory requirements. Accordingly, the tuition formula change became effective on July 1, 2007, the effective date of the applicable provisions of Chapter 57 of the Laws of 2007, and applies to the 2007-2008 school year and afterwards. The tuition formula change was used to

determine the final nonresident tuition charge for the 2007-2008 school year and to determine the estimated nonresident tuition calculation for the 2008-09 school year.

**2. COMMENT:**

The proposed rule should be amended to allow the receiving district to charge the Average Daily Membership (ADM) rate on an enrollment-based pupil count rather than on actual student attendance.

**DEPARTMENT RESPONSE:**

The Department believes an amendment is unnecessary because districts are allowed to use an enrollment-based pupil count under section 174.2. The regulation sets forth the methodology used to arrive at a per-pupil charge, but does not prescribe the pupil count used to charge a sending district. In the Department's experience, most districts agree to use a count based on enrollment as the comment suggests, and under the proposed regulation districts would be able to continue that practice.

AMENDMENT OF THE REGULATIONS OF THE COMMISSIONER OF  
EDUCATION

Pursuant to Education Law sections 207, 2040, 2041, 2042, 2045 and  
3602

Section 174.2 of the Regulations of the Commissioner of Education is  
amended, effective October 8, 2009, as follows:

**§ 174.2 Computation of tuition charges for nonresident pupils.**

The provisions of this section shall apply to all contracts [ entered into  
after January 1, 1975, ] for the reimbursement of a school district which provides  
instruction to a nonresident pupil. The charge for the instruction of each  
nonresident pupil shall not exceed the actual net cost of educating such pupil. If  
the accounting records of the school district providing such instruction are not  
maintained in a manner which would indicate the net cost of educating such  
pupil, a board of education, board of trustees or sole trustee of each school  
district shall compute the tuition to be charged for the instruction of each  
nonresident pupil admitted to the schools of such district, or for the education of  
whom such district contracts with a board of cooperative educational services, in  
accordance with the following formulae:

- (a) The tuition to be charged by a school district which provides full-day  
instruction for each nonresident pupil shall be computed as follows:  
(1) . . .  
(2) . . .

(3) The net amount of State aid received by the school district, as defined in this paragraph, shall be distributed among the categories set forth in paragraph (2) of this subdivision in the same proportion that the [aidable pupil units] average daily membership in each of such categories bears to the [total aidable pupil units] average daily membership for the school district. [Such aidable pupil units] For the purposes of this section, such average daily membership shall be computed in accordance with the provisions of paragraph I of subdivision [8] 1 of section 3602 of the Education Law, except that for the purpose of this computation the [additional aidable pupil units for pupils enrolled in special schools] enrollment of pupils attending under the provisions of paragraph c of subdivision 2 of section 4401 of the Education Law and the equivalent attendance of the school district, as computed pursuant to paragraph d of subdivision 1 of section 3602 of the Education Law, shall not be included in such computation. For the purposes of this section, net State aid shall include aid received in the general fund for operating expenses, textbooks, experimental programs, educational television, county vocational boards and boards of cooperative educational services, building aid, and other forms of State aid as approved by the department for inclusion herein, but shall not include transportation aid [ or aid attributable to pupils attending special schools ]. Net State aid shall also include the sum which is withheld from the school district for payment to the teacher's retirement fund.

(4) . . .

(5) The maximum nonresident pupil tuition which may be charged shall be determined by dividing the net cost of instruction of pupils in each category by the estimated average daily [attendance] membership of pupils in each category.

(6) Refunds or additional charges shall be made at the conclusion of the school year based upon actual revenues, expenditures and average daily [attendance] membership.

(b) . . .

(c) . . .

AMENDMENT OF THE REGULATIONS OF THE COMMISSIONER OF  
EDUCATION

Pursuant to Education Law sections 207, 2040, 2041, 2042, 2045 and  
3602

Section 174.2 of the Regulations of the Commissioner of Education is  
amended, effective September 28, 2009, as follows:

**§ 174.2 Computation of tuition charges for nonresident pupils.**

The provisions of this section shall apply to all contracts [ entered into  
after January 1, 1975, ] for the reimbursement of a school district which provides  
instruction to a nonresident pupil. The charge for the instruction of each  
nonresident pupil shall not exceed the actual net cost of educating such pupil. If  
the accounting records of the school district providing such instruction are not  
maintained in a manner which would indicate the net cost of educating such  
pupil, a board of education, board of trustees or sole trustee of each school  
district shall compute the tuition to be charged for the instruction of each  
nonresident pupil admitted to the schools of such district, or for the education of  
whom such district contracts with a board of cooperative educational services, in  
accordance with the following formulae:

(a) The tuition to be charged by a school district which provides full-day  
instruction for each nonresident pupil shall be computed as follows:

(1) . . .

(2) . . .

(3) The net amount of State aid received by the school district, as defined in this paragraph, shall be distributed among the categories set forth in paragraph (2) of this subdivision in the same proportion that the [aidable pupil units] average daily membership in each of such categories bears to the [total aidable pupil units] average daily membership for the school district. [Such aidable pupil units] For the purposes of this section, such average daily membership shall be computed in accordance with the provisions of paragraph I of subdivision [8] 1 of section 3602 of the Education Law, except that for the purpose of this computation the [additional aidable pupil units for pupils enrolled in special schools] enrollment of pupils attending under the provisions of paragraph c of subdivision 2 of section 4401 of the Education Law and the equivalent attendance of the school district, as computed pursuant to paragraph d of subdivision 1 of section 3602 of the Education Law, shall not be included in such computation. For the purposes of this section, net State aid shall include aid received in the general fund for operating expenses, textbooks, experimental programs, educational television, county vocational boards and boards of cooperative educational services, building aid, and other forms of State aid as approved by the department for inclusion herein, but shall not include transportation aid [ or aid attributable to pupils attending special schools ]. Net State aid shall also include the sum which is withheld from the school district for payment to the teacher's retirement fund.

(4) . . .

(5) The maximum nonresident pupil tuition which may be charged shall be determined by dividing the net cost of instruction of pupils in each category by the estimated average daily [attendance] membership of pupils in each category.

(6) Refunds or additional charges shall be made at the conclusion of the school year based upon actual revenues, expenditures and average daily [attendance] membership.

(b) . . .

(c) . . .