



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

**TO:** Full Board

**FROM:** John B. King, Jr.

**SUBJECT:** Proposed Amendment of Section 135.4 of the Regulations of the Commissioner Relating to the Age Eligibility and Four-Year Limitation for Senior Athletic Competition

**DATE:** October 8, 2010

**STRATEGIC GOAL:** Goals 1 and 3

**AUTHORIZATION(S):**

### **SUMMARY**

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

Should the Board of Regents adopt by emergency action the revised amendment to section 135.4 of the Regulations of the Commissioner of Education, relating to the age and four-year limitations for senior athletic competition, to provide a waiver from these limitations to students with disabilities who meet certain criteria?

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

Review of Policy.

#### **Proposed Handling**

The revised amendment will be presented to the Board of Regents for adoption as an emergency action at the October 2010 Regents meeting.

#### **Procedural History**

The proposed amendment was adopted by the full Board as an emergency action at the July 2010 Regents meeting, effective July 27, 2010.

## Background

School sports and other extracurricular activities are often recognized as promoting academic performance and achievement in students. Athletic competition may improve a student's social skills, self-esteem, teamwork, sportsmanship, and other skills and personal abilities associated with these activities. The inclusion of students with disabilities in such activities is important to their overall education and performance in school.

The proposed amendment provides a waiver for students with disabilities, as defined in section 4401 of the Education Law, to the age and four-year limitations for participation in senior high school athletic competition, as set forth in Section 135.4 of the Commissioner's Regulations. The amendment will advance initiatives of inclusion by allowing students with disabilities who would otherwise be unable to participate in interscholastic athletic competition due to their age or years in school to participate in a sport for an additional season if they have not graduated as a result of their disability delaying their education. The amendment is designed to offer students with disabilities continued socialization with teammates during practices and games and to further develop the student's skills and abilities associated with his or her participation in such sport, all while assuring the health and safety of the given student and the other students competing in the sport and preserving fair athletic competition.

Each waiver will be assessed on a case-by-case basis and will only be granted after a determination is made by the superintendent of schools or chief executive officer of a nonpublic school that the student meets all eligibility requirements. The waiver will be limited to non-contact sports 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. These non-contact sports would 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.

Additionally, the student's participation would not be scored for purposes of competition to ensure fair competition among students who may present different levels of physical maturity and athletic ability. The proposed amendment is designed to prevent abuse of the waiver process, for example, by a student seeking an additional year of competition to further his or her athletic career. It is also designed to avoid use of such waiver to fill positions on teams or reward a given student for athletic ability. Instead, the proposed amendment aims to afford students with disabilities continued access to athletic activities for inclusion purposes.

The proposed amendment imposes several requirements which the student must meet in order to qualify for such a waiver. Specifically, the amendment requires that (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 previously was selected for and competed in the sport which he or she is applying for a waiver, (3) the student is otherwise qualified to compete in such sport, (4) the student has not

previously been granted such a waiver, (5) the student has undergone and passed an evaluation by the school physician, and (6) the superintendent of schools or chief executive officer, as applicable, has determined that the student's participation will not adversely affect the opportunity of the other students to successfully compete in the competition.

A Notice of Emergency Adoption and Proposed Rule Making was published in the State Register on August 11, 2010. The proposed amendment has been revised to omit subclause (3) of section 135.4(c)(7)(ii)(d) of the Commissioner's Regulations, which was added by the emergency action on July 27, 2010, to respond to the New York State Public High School Athletic Association's concerns that they were only authorized to review a decision regarding a waiver made by a school that was a member of the Association. It is anticipated that the Association may hear appeals from decisions regarding a waiver where applicable, based on the school's membership status.

Pursuant to the State Administrative Procedure Act, the revised proposed amendment cannot be permanently adopted until after the expiration of a 30-day public comment period as measured from the date of publication of a Notice of Revised Rule Making in the State Register.

The proposed amendment is being presented for adoption as an emergency action to revise the rule, as specified above, and to otherwise ensure the emergency rule remains continuously in effect until it can be presented for adoption as a permanent rule. A Statement of Facts and Circumstances Which Necessitate Emergency Action is attached.

It is anticipated that a second Notice of Emergency Adoption and Proposed Rule Making will be published in the State Register on October 27, 2010, with an effective date of October 26, 2010. Supporting materials are available upon request from the Secretary to the Board of Regents.

### Recommendation

VOTED: That subclause (1) of clause (b) of subparagraph (ii) of paragraph (7) of subdivision (c) of section 135.4 of the Regulations of the Commissioner of Education be amended, and that clause (d) of subparagraph (ii) of paragraph (7) of subdivision (c) of section 135.4 of the Commissioner's Regulations be added, as submitted, effective October 26, 2010, as an emergency action upon a finding by the Board of Regents that such action is necessary for the preservation of the general welfare to continue to implement in the 2010-2011 school year, the process for granting waivers from the age and four-year limitations for senior athletic competition to eligible students with disabilities, and thereby permit their timely participation in non-contact athletic competition for a fifth season in high school.

### Timetable for Implementation

The July emergency action will expire on October 25, 2010. If adopted as an emergency measure at the October 2010 Regents meeting, the proposed amendment will become effective on October 26, 2010. It is anticipated that the proposed amendment will be presented for adoption as a permanent rule at the December 2010 Regents meeting, with a January 4, 2011 effective date.

Attachment

STATEMENT OF FACTS AND CIRCUMSTANCES

WHICH NECESSITATE EMERGENCY ACTION

The proposed amendment establishes a process for granting a waiver from the age and four-year limitations for senior athletic competition prescribed in section 135.4 of the Commissioner's Regulations to students with disabilities, as defined in section 4401 of the Education Law, and thereby permit their participation in non-contact sports for an additional fifth year in school. Under this waiver process, the student must apply for and be granted a waiver by the superintendent of schools or the chief executive officer of a nonpublic school. Such a waiver would be available under limited circumstances to students with disabilities who meet certain criteria specified in the proposed amendment.

The proposed amendment will advance initiatives of inclusion of students with disabilities in the overall academic experience by allowing these students who would otherwise not be able to participate in interscholastic athletic competition due to their age or years in school to participate in a sport for an additional season if they have not yet graduated as a result of their disability delaying their education. This amendment is designed to offer students with disabilities continued socialization with teammates during practice and games and to further develop the student's skills and personal abilities

associated with participation in such sport, all while assuring the safety of the given student and the other students competing in the sport and preserving fair athletic competition.

The proposed amendment was adopted at the July 2010 Regents meeting as an emergency measure, effective July 27, 2010, in order to timely and effectively implement the waiver process for the 2010-2011 school year. A Notice of Emergency Adoption and Proposed Rule Making was published in the State Register on August 11, 2010.

Since publication of the rule in the State Registrar, the Department received public comment warranting a substantial revision to the rule, as set forth in the Revised Regulatory Impact Statement submitted herewith.

Pursuant to the State Administrative Procedure Act section 202(4-a), the revised rule cannot be adopted by regular (non-emergency) action until at least 30 days after publication of the revised rule in the State Register. Since the Board of Regents only meets at fixed intervals, the earliest time the proposed amendment could be adopted by regular action would be the December 2010 Regents meeting. Since the July emergency adoption will expire on October 25, 90 days after its filing with the Department of State on July 27, 2010, there will be a lapse in the rule's effectiveness if adopted by regular action, which will, in turn, disrupt the implementation of this rule.

Therefore, a second emergency adoption is necessary to revise the rule as specified above and to ensure that the emergency rule adopted at the July 2010 Regents meeting remains continuously in effect until the effective date of its adoption as a permanent rule. Emergency action is necessary for the preservation of the general welfare to continue the implementation of the process for granting waivers from the age and four-year limitations for senior athletic competition to eligible students with disabilities.

AMENDMENT TO THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to sections 101, 207, 305, 803, and 3204 of the Education Law.

1. Subclause (1) of clause (b) of subparagraph (ii) of paragraph (7) of subdivision (c) of section 135.4 of the Regulations of the Commissioner of Education is amended, effective October 26, 2010, as follows:

(1) Duration of competition. A pupil shall be eligible for senior high school athletic competition in a sport during each of four consecutive seasons of such sport commencing with the pupil's entry into the ninth grade and prior to graduation, except as otherwise provided in this subclause , or except as authorized by a waiver granted under clause (d) of this subparagraph to a student with a disability. If a board of education has adopted a policy, pursuant to subclause (a)(4) of this subparagraph, to permit pupils in the seventh and eighth grades to compete in senior high school athletic competition, such pupils shall be eligible for competition during five consecutive seasons of a sport commencing with the pupil's entry into the eighth grade, or six consecutive seasons of a sport commencing with the pupil's entry into the seventh grade. A pupil enters competition in a given year when the pupil is a member of the team in the sport involved, and that team has completed at least one contest. A pupil shall be eligible for



interschool competition in grades 9, 10, 11 and 12 until the last day of the school year in which he or she attains the age of 19, except as otherwise provided in subclause (a)(4) or clause (d) of this subparagraph , or in this subclause. The eligibility for competition of a pupil who has not attained the age of 19 years prior to July 1st may be extended under the following circumstances:

(i) If sufficient evidence is presented by the chief school officer to

the section to show that the pupil's failure to enter competition during one or more seasons of a sport was caused by illness, accident, or similar circumstances beyond the control of the student, such pupil's eligibility shall be extended accordingly in that sport. In order to be deemed sufficient, the evidence must include documentation showing that is a direct result of the illness, accident or other circumstance beyond the control of the student, the pupil will be required to attend school or one or more additional semesters in order to graduate.

(ii) If the chief school officer demonstrates to the satisfaction of the section that the pupil's failure to enter competition during one or more seasons of a sport is caused by such pupil's enrollment in a national or international student exchange program or foreign study program, that as a

result of such enrollment the pupil will be required to attend school for one or more additional semesters in order to graduate, and that the pupil did not enter competition in any sport while enrolled in such program, such pupil's eligibility shall be extended accordingly in such sport.

2. Clause (d) of subparagraph (ii) of paragraph (7) of subdivision (c) of section 135.4 of the Regulations of the Commissioner of Education is added, effective October 26, 2010, 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) 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) 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.