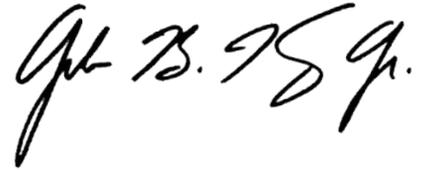




TO: Full Board
FROM: Ken Slentz 
SUBJECT: Proposed Amendment of Sections 200.4, and 200.16 of the Regulations of the Commissioner of Education Relating to Preschool and School-Age Individual Evaluations

DATE: March 5, 2012

AUTHORIZATION(S):



SUMMARY

Issue for Decision (Consent Agenda)

Should the Board of Regents adopt the proposed amendment of sections 200.4 and 200.16 of the Regulations of the Commissioner of Education relating to preschool and school-age individual evaluations?

Reason(s) for Consideration

Review of policy.

Proposed Handling

The proposed amendment will be submitted to the Full Board for adoption at the March 2012 meeting.

Procedural History

The proposed amendment was discussed at the December 2011 Regents meeting. A Notice of Proposed Rule Making was published in the State Register on January 4, 2012. The Department received 49 comments on the proposed amendment, including comments from school district administrators, parents, students with disabilities, school psychologists, preschool providers, special education advocates/advocacy organizations and others. A copy of the proposed rule and the

Assessment of Public Comment are attached. Supporting materials are available upon request from the Secretary to the Board of Regents.

Background Information

Proposals to amend the regulations relating to preschool and school-age individual evaluations were part of the broader mandate relief discussion by the Board of Regents at the February, May and November 2011 meetings. During the summer of 2011, the Department sought public comment and conducted three public hearings on the subject of mandate relief. At the November 2011 Regents meeting, the P-12 Committee directed Department staff to develop proposed regulations to amend requirements for preschool and school-age individual evaluations. The proposed amendment would:

1. Amend section 200.4(b) of the Regulations of the Commissioner of Education to clarify that the 60-day timeline to complete an evaluation pertains to an initial evaluation of a student suspected of having a disability and to repeal the requirement that a school psychologist prepare a written report of his/her determination of the need to administer an individual psychological evaluation for a reevaluation of a student with a disability.
2. Amend section 200.16 of the Regulations of the Commissioner of Education to align the preschool initial evaluation timeline (i.e., 30 school days from receipt of consent) to the federal timeline for initial evaluations and the timeline established in New York for school-age evaluations (i.e., 60 calendar days), to allow school districts additional time to complete preschool initial evaluations, while continuing to ensure the timely provision of programs and services within 60 school days from receipt of consent to evaluate.

Recommendation

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

VOTED: That paragraphs (1) and (2) of subdivision (b) of section 200.4 and paragraph (2) of subdivision (c), paragraph (1) of subdivision (e) and paragraph (1) of subdivision (f) of section 200.16 of the Regulations of the Commissioner of Education be amended, as submitted, effective April 11, 2012.

Timetable for Implementation

If adopted at the March Regents meeting, the proposed amendment will become effective April 11, 2012.

Attachment

AMENDMENT OF THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to Education Law sections 101, 207, 305, 4402, 4403 and 4410.

1. Paragraphs (1) and (2) of subdivision (b) of section 200.4 of the Regulations of the Commissioner of Education is amended, effective April 11, 2012, as follows:

(b) Individual evaluation and reevaluation. (1) Unless a referral for an evaluation submitted by a parent or a school district is withdrawn pursuant to paragraph (a)(7) or (9) of this section, after parental consent has been obtained or a parental refusal to consent is overridden, an individual evaluation of the referred student shall be initiated by a committee on special education. The initial individual evaluation shall be completed within 60 days of receipt of consent unless extended by mutual agreement of the student's parents and the CSE pursuant to subparagraph (7)(i) and paragraph (j)(1) of this subdivision. The individual evaluation shall include a variety of assessment tools and strategies, including information provided by the parent, to gather relevant functional, developmental and academic information about the student that may assist in determining whether the student is a student with a disability and the content of the student's individualized education program, including information related to enabling the student to participate and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities). The individual evaluation must be at no cost to the parent, and the initial evaluation must include at least:

(i) . . .

(ii) . . .

(iii) . . .

(iv) . . .

(v) . . .

(2) A determination by a school psychologist of the need to administer an individual psychological evaluation to a student of school age pursuant to Education Law, section 4402(1)(b)(3)(a) and section 200.1(aa) and (bb) of this Part, shall be based upon an assessment conducted by the school psychologist to substantiate his or her determination. Whenever a school psychologist determines that a psychological evaluation is unnecessary as a component of the initial evaluation, the psychologist shall prepare a written report of such assessment, including a statement of the reasons such evaluation is unnecessary, which shall be reviewed by the committee.

2. Paragraph (2) of subdivision (c) of section 200.16 of the Regulations of the Commissioner of Education is amended, effective April 11, 2012, as follows:

(2) Except as provided in section 200.4(b)(7) of this Part, [The] the initial individual evaluation shall be completed within 60 days of receipt of consent to evaluate and conducted in accordance with section 200.4(b) of this Part. The summary report shall include a detailed statement of the preschool student's individual needs, if any. The summary report shall not include a recommendation as to the general type, frequency, location and duration of special education services and programs that should be provided; shall not address the manner in which the preschool student can be provided with instruction or related services in the least restrictive environment; and shall not make reference to any specific provider of special services or programs. Reports of the assessment and/or evaluation and a summary portion of the evaluation shall be provided to the members of the committee on preschool special education and to the person designated by the municipality in which the preschool student resides [so as to allow for a recommendation by the committee to be made to the board within thirty school days of the receipt of consent]. An approved evaluator shall provide the parent

with a copy of the statement and recommendation provided to the committee. Such statement and recommendation including the summary evaluation shall be provided in English and when necessary, in the native language of the parent or other mode of communication used by the parent unless it is not feasible to do so.

3. Paragraph (1) of subdivision (e) of section 200.16 of the Regulations of the Commissioner of Education is amended, effective April 11, 2012, as follows:

(e) Recommendation. (1) The committee on preschool special education shall [provide a] meet to review the results of the initial evaluation and develop a recommendation [to the board of education] within [30 school days] 60 calendar days of the date of the receipt of consent to evaluate.

4. Paragraph (1) of subdivision (f) of section 200.16 of the Regulations of the Commissioner of Education is amended, effective April 11, 2012, as follows:

(f) Provision of services for preschool students with disabilities. (1) Upon receipt of the recommendation of the committee, the board of education shall arrange for the preschool student with a disability to receive such programs and services commencing with the July, September or January starting date for the approved program, unless such services are recommended by the committee less than 30 school days prior to, or after, such appropriate starting date selected for such preschool student, in which case, such services shall be provided as soon as possible following development of the IEP, but no later than 30 school days from the recommendation of the committee and within 60 school days from receipt of consent to evaluate. If the board disagrees with the recommendation of the committee, it shall send the recommendation back to the committee with notice to the parent and the committee including a statement of the board of education's reasons and that the recommendation will be sent back to the

committee with notice of the need to schedule a timely meeting to review the board's concerns and to revise the IEP as deemed appropriate.

PROPOSED AMENDMENT OF SECTIONS 200.4 and 200.16 OF THE REGULATIONS OF THE COMMISSIONER OF EDUCATION PURSUANT TO SECTIONS 101, 207, 305, 4402, 4403 AND 4410 OF THE EDUCATION LAW, RELATING TO THE PROVISION OF SPECIAL EDUCATION PROGRAMS AND SERVICES TO STUDENTS WITH DISABILITIES

ASSESSMENT OF PUBLIC COMMENT

Since publication of a Notice of Proposed Rule Making in the State Register on January 4, 2012, the State Education Department (SED) received the following substantive comments on the proposed amendment.

General Comments

COMMENT:

Proposal would repeal requirements that exceed federal mandates at a time when revenues and local capacity continue to decrease.

DEPARTMENT RESPONSE:

Comments are generally supportive. No response is necessary.

COMMENT:

Proposal would compromise the quality of evaluation process and negatively impact students with disabilities.

DEPARTMENT RESPONSE:

Nothing in the proposed amendment would relieve districts of their obligation to ensure that students are appropriately evaluated and provided a free appropriate public education (FAPE).

§200.4

COMMENT:

Support eliminating the written report of the psychologist of the need to conduct a psychological as part of a student's reevaluation as it will not have any substantive, negative impact on process or capacity of schools to provide FAPE; will provide some relief, eliminate unnecessary paperwork and reduce psychologists' workloads, allowing more effective utilization of staff resources to meet student needs. No other related service provider is required to write a report on the need to conduct an evaluation. Report is redundant as reevaluation process requires team to review existing data and determine whether formal assessments, including a psychological evaluation, are needed. Reason for psychologist's determination is documented in prior written notice and best practice would be to include this in meeting minutes and "other options considered" section of individualized education program (IEP). Time spent reviewing file and writing justification takes almost as much time as a reevaluation and psychologists often administer new testing to avoid unnecessary paperwork. The decision to conduct a psychological evaluation is a Committee on Special Education (CSE) responsibility and the report should not drive the reevaluation.

DEPARTMENT RESPONSE:

Comments are supportive. No response is necessary.

COMMENT:

Proposal suggests psychologists have nothing valuable to contribute, does not serve public well or provide reasonable benefit in mandate relief discussion. Proposed amendment would curtail psychologists' scope of practice. Report represents culmination of a psychologist's review and supports integrity of process; is more than confirmation that no further data/testing is needed; and provides parents and districts written documentation of how an individual child's needs and progress were examined and why evaluation was unnecessary. Report ensures psychologist's expertise is used

to provide child specific information; informs CSE decisions; supports meaningful participation of parents in process; and documents district's efforts to provide FAPE. Prior notice does not provide record of process relating to an individual child. Report is only place in student's record that documents what information was reviewed and how the determination was made. Report need not be time consuming and could be brief summary. Eliminating report will compromise process; weaken district's ability to defend CSE decisions; and increase school liability. In absence of report there will be no way to hold staff accountable for conducting reviews and there may be pressure to omit process entirely. Concerned proposal could make it easier for districts to decide not to reevaluate for wrong reasons (e.g., staff shortages or the needs of staff, administrators and/or the system).

DEPARTMENT RESPONSE:

Nothing in the proposed rule reflects negatively on the value of a psychologist or in any way affects a psychologist's scope of practice. A psychologist's determination that a psychological evaluation is not necessary as part of a student's reevaluation must, consistent with federal and State regulations, still continue to be considered by the CSE in its determination of what evaluations will be conducted as part of the student's reevaluation. The proposed rule simply repeals the requirement for a written report by the psychologist when he/she determines that a psychological evaluation is not a needed component of an individual student's reevaluation. Nothing would prohibit the district from requiring the psychologist to provide a written report of his/her determination to the CSE.

COMMENT:

Replacing current process with CSE review/meeting could result in psychologists being left out of process and decisions being made by unqualified individuals.

Concerned about lack of specificity in requirement for CSE and “other qualified professionals” to review existing data, and which professionals would conduct this review. Psychologists play a pivotal role in managing the reevaluation process and it is critical that they be part of team that conducts this review. A psychologist is the only trained/qualified professional within school to administer, score and interpret data and to assess whether a psychological evaluation is warranted. The proposal jeopardizes the protections and benefits these professionals provide. If report is eliminated, require school psychologist be one of the professionals on CSE that reviews and interprets psychological data.

DEPARTMENT RESPONSE:

Nothing in the proposed rule would replace the current role of the school psychologist to determine whether a psychological is a necessary component of a student’s initial or reevaluation. For an initial evaluation, the psychologist would continue to be required to prepare a written report for consideration by the CSE when the psychologist’s determination is that a psychological is not necessary. The proposed rule would, however, no longer require the written summary of the psychologist’s determination when it relates to a reevaluation. The CSE, which includes the school psychologist, would continue to be required to consider the psychologist’s determination when the CSE identifies what, if any, evaluations will be conducted for a student’s reevaluation. The phrase “other qualified professionals, as appropriate” is a federal regulation which provides flexibility for districts to determine, on a student-by-student basis, which professionals should be consulted in the determination as to tests and assessments needed as part of a student’s initial or reevaluation.

COMMENT:

The proposed rule is unclear as to whether a psychologist continues to have the responsibility to determine when a psychological evaluation is warranted or merely eliminates the written report for reevaluations. Clarify if the proposed amendment would change the requirement that a psychologist is a mandated member of the CSE.

DEPARTMENT RESPONSE:

The proposed rule would not repeal the requirement that a psychologist make an assessment of the need to administer a psychological evaluation for a school-age student as part of the student's initial or reevaluation; nor would it change the required CSE membership or eliminate the requirement that the psychologist prepare a written report when a psychological evaluation is conducted.

COMMENT:

Oppose the elimination of updated psychological testing.

DEPARTMENT RESPONSE

Nothing in the proposed rule would relieve a district of its responsibility to conduct a psychological evaluation as part of a reevaluation when appropriate for the individual student.

COMMENT:

The proposed rule suggests that the psychologist cannot access information to support his/her determination of the need to conduct a psychological evaluation.

DEPARTMENT RESPONSE:

Nothing in the proposed rule would limit a psychologist's access to information needed to make an assessment as to whether a psychological evaluation is necessary for an individual student.

COMMENT:

Summary of data used to support a psychologist's determination should be included in evaluation section of an IEP so that others understand the decision.

DEPARTMENT RESPONSE:

The IEP documents relevant and current assessment data that informs the student's present level of performance. If a psychological was determined to be unnecessary for an individual student, there is no need to document this in the IEP. When a reevaluation is proposed for an individual student, prior written notice to the parent must include a description of the proposed reevaluation and the uses to be made of the information as well as a description of each evaluation procedure, assessment, record or report the CSE used as a basis for the proposed action. If the psychologist's assessment was that a psychological was not necessary, it would be appropriate that this information be reported to the parent in prior written notice.

COMMENT:

The proposed rule clarifies when the 60-day timeline for initial evaluations is applicable. Add word "only" to further clarify that the timeline pertains only to initial evaluations.

DEPARTMENT RESPONSE:

The proposed language provides sufficient clarification and no further changes are necessary.

COMMENT:

Oppose 60-day timeline for initial evaluations as it will delay proper evaluation. Clarify the timeline when the evaluation is not an initial evaluation.

DEPARTMENT RESPONSE:

The proposed rule is a clarifying amendment that the 60-day timeline applies only to initial evaluations. For evaluations to be conducted when the student is referred for another evaluation, State regulations currently require the evaluation be conducted,

considered by the CSE and changes to the IEP be implemented within 60 school days of the referral for review. Therefore, the proposed rule would not delay the completion of a student's evaluation.

§200.16

COMMENT:

Support aligning preschool timeline with school-age timeline and federal standard. Proposal provides more reasonable, achievable timeline that will not compromise service delivery; reduces burden current timeline places on Committees on Preschool Special Education (CPSEs) by providing additional time to complete evaluations, while maintaining current timeframe for recommendations; allows time to assist parents in understanding the system and guide them through the process; and will result in more comprehensive, higher-quality evaluations and reports. Evaluator shortages (e.g., bilingual evaluators) make it challenging to meet 30 day timeline, especially in rural areas. Most common delays are between 1-10 days. Extending timeline approximately 10-12 days will make compliance possible in more instances.

DEPARTMENT RESPONSE:

Comments are supportive. No response is necessary.

COMMENT:

Evidence supports identifying children and providing services as early as possible. Change from 30 to 60 days is large amount of time in young child's life. Lengthening timeline will reduce time CPSEs have to implement services; could delay provision of services; violates scientific evidence; and is a disservice to children. Children develop quickly and additional 30 days will invalidate evaluation scores. Concerned proposal will: exacerbate NYS' noncompliance regarding early intervention to CPSE transition and implementation of services in timely manner; decrease the

chances that an IEP will be completed by a child's third birthday; and result in a gap in services. Hiring more psychologists would allow districts to complete evaluations within 30 days and less money to be spent reimbursing private evaluators. As NYS' preschool system relies on coordination of many parties, including parents, districts, counties and evaluators, challenge SED's assertion that delays are due in part to evaluators. There are many reasons for not meeting evaluation timeline (e.g., inability to obtain parent consent, scheduling of CPSE and board of education (BOE) meetings, provider shortages). Extending timeline will not necessarily fix problem. Current regulations require a recommendation be made by the CPSE to the BOE within 30 school days of receipt of consent to evaluate, not completion of evaluation. The scheduling of BOE meetings and a timeline triggered by "receipt of consent" will continue to be impediments to timely evaluations. Maintain current regulatory framework and conduct deeper analysis of reasons why evaluations are not timely. To reduce confusion, instead of mixing "school" and "calendar" days, consider always using "calendar days."

DEPARTMENT RESPONSE:

In 2009 federal fiscal year, only 68.4 percent of preschool children had initial evaluations completed within 30 school days of the parent's consent to evaluate. Approximately 35 percent of these delays were between one and ten days. Changing the timeline from 30 school days to 60 calendar days (depending on school calendars) is a difference of approximately 12 calendar days, not an additional 30 days as the commenter suggests. While there are other factors that contribute to delays in completion of the preschool evaluations, the proposed rule would address one substantive factor, without impacting on the timeline required for IEP implementation. Certain timelines (e.g., IEP implementation) require consideration of a school calendar.

COMMENT:

Credentialing requirements limit the capacity of many psychologists to provide preschool evaluations and contribute to evaluator shortages. Assembly Bill 418a would grant licensure to Master level school psychologists, expand pool of qualified evaluators to meet educational needs and allow federal reimbursement for services.

DEPARTMENT RESPONSE:

Comments are beyond scope of proposed regulations.