



**TO:** The Honorable the Members of the Board of Regents

**FROM:** Kimberly Young Wilkins *Kimberly Young Wilkins*

**SUBJECT:** Proposed Amendment to Section 135.4 of the Regulations of the Commissioner of Education Relating to Eligibility for Participation of Students Who Have Individualized Education Programs (IEPs) or Section 504 of the Rehabilitation Act of 1973 or Americans with Disabilities Act (ADA) Plans in Interschool Competition and Inclusive Athletic Activities

**DATE:** December 3, 2020

**AUTHORIZATION(S):**

*John L. D'Agati* *Tom M. P.* *Billy M.*  
**SUMMARY**

**Issue for Decision (Consent)**

Should the Board of Regents amend Section 135.4 of the Regulations of the Commissioner of Education relating to eligibility for participation of students who have Individualized Education Programs (IEPs) or Section 504 of the Rehabilitation Act of 1973 or Americans with Disabilities Act (ADA) plans in interschool competition and inclusive athletic activities?

**Reason(s) for Consideration**

Review of Policy.

**Proposed Handling**

The proposed amendment will be presented to the Full Board for adoption as a permanent rule at its December 2020 meeting. A copy of the proposed rule is included as Attachment A.

**Procedural History**

The proposed amendment was presented to the Full Board for adoption as an emergency action at its June 2020 meeting, effective June 9, 2020. A Notice of Emergency Adoption and Proposed Rule Making was published in the State Register on June 24, 2020. Because the June 2020 emergency rule was set to expire on September 6, 2020, it was necessary to adopt a second emergency action at the July 2020 Regents meeting, effective

September 7, 2020, to ensure that the emergency rule remained continuously in effect until it could be permanently adopted at the September 2020 Regents meeting. Subsequent to publication of the proposed amendment in the State Register, the Department received public comment on the proposed amendment. An Assessment of Public Comment is included as Attachment B. In response to public comment, the Department revised the proposed amendment at its September meeting. A Notice of Emergency Adoption and Revised Rule Making was published in the State Register on September 30, 2020. The Department did not receive any additional public comment on the revised rule making. Supporting materials are available upon request from the Secretary to the Board of Regents.

### **Background Information**

The current Commissioner's Regulation §135.4(b)(2) provides that a pupil shall be eligible for interschool competition or inclusive athletic activities in a sport during a semester, provided that he or she:

- is a bona fide student, enrolled during the first 15 school days of such semester;
- is registered in the equivalent of three regular courses;
- is meeting the physical education requirement; and
- has been in regular attendance 80 percent of the school time, bona fide absence caused by personal illness excepted.

The current regulation, as written, has been interpreted by schools and athletic associations, etc., as precluding consideration of a request for an accommodation on behalf of an otherwise qualified student with a disability who is not registered in the equivalent of three regular courses as a result of his or her education plan approved under section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act (ADA) or as a result of his or her IEP under the Individuals with Disabilities Education Act (IDEA). The amendment makes it clear that the regulation should not be interpreted as barring consideration of such accommodation requests in accordance with federal law.

### **Proposed Regulatory Change**

The proposed amendment clarifies that the rule shall not be construed to preclude schools and associations, etc., from considering accommodation requests from otherwise qualified students with disabilities for participation in interschool competition or inclusive athletic activities who, pursuant to an approved section 504 or ADA plan or pursuant to an IEP, are not registered in the equivalent of three regular courses.

### **Related Regents Items**

June 2020: [Proposed Amendment of Section 135.4 of the Regulations of the Commissioner of Education Relating to Eligibility for Participation of Students Who Have Section 504 or ADA plans in Interschool Competition and Inclusive Athletic Activities](https://www.regents.nysed.gov/common/regents/files/620bra4.pdf)  
(<https://www.regents.nysed.gov/common/regents/files/620bra4.pdf>)

July 2020: [Proposed Amendment of Section 135.4 of the Regulations of the Commissioner of Education Relating to Eligibility for Participation of Students Who Have Section 504 or ADA plans in Interschool Competition and Inclusive Athletic Activities](https://www.regents.nysed.gov/common/regents/files/720brca9.pdf)  
(<https://www.regents.nysed.gov/common/regents/files/720brca9.pdf>)

September 2020: [Proposed Amendment of Section 135.4 of the Regulations of the Commissioner of Education Relating to Eligibility for Participation of Students Who Have Individualized Education Programs \(IEPs\) or Section 504 of the Rehabilitation Act of 1973 or Americans with Disabilities Act \(ADA\) Plans in Interschool Competition and Inclusive Athletic Activities](https://www.regents.nysed.gov/common/regents/files/920bra4.pdf)  
(<https://www.regents.nysed.gov/common/regents/files/920bra4.pdf>)

October 2020: [Proposed Amendment of Section 135.4 of the Regulations of the Commissioner of Education Relating to Eligibility for Participation of Students Who Have Individualized Education Programs \(IEPs\) or Section 504 of the Rehabilitation Act of 1973 or Americans with Disabilities Act \(ADA\) Plans in Interschool Competition and Inclusive Athletic Activities](https://www.regents.nysed.gov/common/regents/files/1020brca6.pdf)  
(<https://www.regents.nysed.gov/common/regents/files/1020brca6.pdf>)

### **Recommendation**

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

VOTED: That Section 135.4 of the Regulations of the Commissioner of Education, be amended, as submitted, effective December 30, 2020.

### **Timetable for Implementation**

If adopted at the December 2020 Regents meeting, the proposed amendment will become effective December 30, 2020.

## **Attachment A**

### AMENDMENT OF THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to sections 101, 207, 305, 803, and 3204 of the Education Law, Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §794, Americans with Disabilities Act, 42 U.S.C. §12101, et. seq., Individuals with Disabilities Education Act, 20 U.S.C. §1400, et. seq.

1. Subclause (2) 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 to read as follows:

(2) Registration. A pupil shall be eligible for interschool competition or inclusive athletic activities in a sport during a semester, provided that he is a bona fide student, enrolled during the first 15 school days of such semester, is registered in the equivalent of three regular courses, is meeting the physical education requirement, and has been in regular attendance 80 percent of the school time, bona fide absence caused by personal illness excepted. Nothing in this clause shall be construed to preclude a chief school officer, athletic association, league or section from duly considering a request for an accommodation on behalf of an otherwise qualified student with a disability who is not registered in the equivalent of three regular courses as a result of his or her individualized education program under the Individuals with Disabilities Education Act or education plan approved under section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act.

ASSESSMENT OF PUBLIC COMMENT

Following publication of the Notice of Emergency Adoption and Proposed Rule Making in the State Register on June 24, 2020, the Department received the following comments on the proposed amendment. These comments were previously published as part of the September 2020 Board of Regents Item:

COMMENT: The commenter expresses that their concern is that the regulation fails to address students with disabilities who do not participate in at least three “regular courses” as a result of an Individualized Education Program (IEP) pursuant to the Individuals with Disabilities Education Act (IDEA). The commenter writes that although they “fully support the Department’s effort to amend section 135.4 to accommodate students with 504 Plans, students with IEPs must likewise be accommodated.” They add that federal law requires states and schools to provide students with disabilities equal opportunity to participate in physical education and extracurricular athletics and that a refusal to consider a reasonable accommodation request for an otherwise qualified student with an IEP would violate Section 504 regardless of the fact that the student had an IEP rather than a 504 Plan. Moreover, the commenter writes that waiving the same requirement for students with IEPs would neither alter the nature of the program nor impose an undue burden. Accordingly, the commenter recommends the Department amend the regulation to include a waiver of the three “regular class” requirement as an accommodation to include students with IEPs pursuant to the IDEA.

DEPARTMENT RESPONSE: The Department has revised the proposed amendment to address the commenter's concern by including a waiver of the three-regular-class requirement as an accommodation to include students with IEPs who are otherwise qualified for participation in interschool competition or inclusive athletic activities.