



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

TO: Higher Education Committee

FROM: John L. D'Agati 

SUBJECT: Proposed Amendment to Section 102.4 of the Regulations of the Commissioner of Education Relating to Mandatory Reporting Requirements and Testing Misconduct

DATE: April 21, 2014

AUTHORIZATION(S):  

SUMMARY

Issue for Decision

Should the Board of Regents amend Section 102.4 of the Regulations of the Commissioner of Education Relating to Mandatory Reporting Requirements and Testing Misconduct?

Reason(s) for Consideration

Review of Policy.

Proposed Handling

This item will come before the Higher Education Committee for action at its April 2014 meeting. A copy of the proposed amendment is submitted as Attachment A.

Procedural History

A Notice of Proposed Rule Making concerning the proposed amendment was published in the State Register on November 6, 2013. Based on public comment received during the 45-day public comment period for the Proposed Rule Making and the 30-day public comment period on the Revised Rule Making, the proposed amendment was revised to include charter schools (A copy of the Assessment of Public Comment is submitted as Attachment B). A Notice of Revised Rule Making was

published in the State Register on February 12, 2014. Supporting materials are available upon request to the Secretary to the Board of Regents.

Background Information

In November 2011, pursuant to Education Law §104 and section 3.9 of the Rules of the Board of Regents, the Commissioner appointed Henry “Hank” Greenberg as a Special Investigator, and tasked him with performing a review of the Department’s processes and procedures for handling and responding to reports of allegations of misconduct related to the administration and scoring of New York State assessments. In this capacity, Special Investigator Greenberg performed an exhaustive review of the Department’s processes and procedures for the intake, review, referral, investigation, findings, response, follow-up, and records retention policy regarding allegations of educator misconduct during the administration and scoring of State assessments. The review included interviews of Department personnel and others involved in testing investigations, and the review of pending and closed investigative case files, guidance materials, manuals, statutes, and regulations, among other relevant items.

On March 19, 2012, Special Investigator Greenberg reported his findings and recommendations to the Board. See Greenberg, H., Review of the New York State Education Department’s (‘NYSED’) Processes and Procedures for Handling and Responding to Reports of Alleged Irregularities in the Administration and Scoring of State Assessments. The Board accepted all of the Special Investigator’s recommendations, which included the creation of a new Test Security Unit (“TSU”) that would focus on the detection and deterrence of security breaches and other testing irregularities.

Another significant recommendation from Special Investigator Greenberg that the Board adopted was that the Department establish a mandatory reporting requirement for school personnel who learn of any security breach or other testing misconduct, define specific context based examples of prohibited testing misconduct, and sanction those who fail to comply. (Greenberg Report, pgs. 10 and 14, emphasis in original). Pursuant to this recommendation, the TSU incorporated a mandatory reporting requirement in the Department’s testing manuals for Regents and Grades 3 through 8 examinations. The TSU recommends that the Board formalize Special Investigator Greenberg’s recommendations by amending Section 102.4 of the Commissioner’s Regulations to prohibit certain testing misconduct and that the regulation be amended to include specific concrete examples of what constitutes “testing misconduct.”

Additionally, Special Investigator Greenberg recommended that NYSED “[p]rotect from retribution persons who report security breaches and other testing irregularities.” (Greenberg Report, p. 11). Therefore, the TSU recommends that the Board formalize this recommendation for protecting persons who report test security violations to the TSU by amending Section 102.4 of the Commissioner’s Regulations to include such protection. Under Civil Service Law § 75-b, protections exist for public employees who report violations of “a law, rule, or regulation” that the reporting person

reasonably believes has occurred.¹ While Civil Service Law 75-b does not apply to charter schools, we would encourage charter schools to not take any retaliatory actions against an employee for reporting under this section of the regulations.

The proposed amendment also clarifies that certified individuals who take retaliatory action against a person who makes a test fraud report in compliance with the proposed amendment may be subject to Part 83 sanctions.²

The proposed amendments enhance the security of the State Assessment program in several ways. First, the regulation defines specific types of testing misconduct, prohibits such misconduct and requires that incidents of suspected testing misconduct be reported to the Department so that they can be investigated and addressed. Second, the proposed amendment serves to protect district personnel, educators and others who file reports of suspected cheating from retaliation by prohibiting them from being disciplined and/or from any other adverse action as the result of the filing of a report while at the same time deterring misconduct and encouraging a culture of ethical testing by serving notice that any ethical testing breaches will be reported to the Department if they become known. The mandatory reporting requirements in the proposed amendment are consistent with the requirements of several other states, including but not limited to, Virginia, Illinois, Texas and Nevada.

Following the 45-day public comment period required by the State Administrative Procedure Act, the Department received one comment on the proposed amendment. The commenter requested clarification on whether the proposed amendment applies to charter schools. An assessment of public comment is attached as Attachment B.

Recommendation

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

VOTED: That section 102.4 of the Regulations of the Commissioner of Education be amended, effective May 14, 2014, as submitted.

Timetable for Implementation

If adopted at the April 2014 meeting, the proposed amendment will become effective on May 14, 2014.

¹ The primary NYS whistleblower protection law is found in New York Civil Service Law § 75-b.

² Civil Service Law § 75-b provides in pertinent part: (a) A public employer shall not dismiss or take other disciplinary or other adverse personnel action against a public employee regarding the employee's employment because the employee discloses to a governmental body information: (i) regarding a violation of a law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety; or (ii) which the employee reasonably believes to be true and reasonably believes constitutes an improper governmental action. "Improper governmental action" shall mean any action by a public employer or employee, or an agent of such employer or employee, which is undertaken in the performance of such agent's official duties, whether or not such action is within the scope of his employment, and which is in violation of any federal, state or local law, rule or regulation.

AMENDMENT TO THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to sections 207, 225 and 305 of the Education Law and section 75-b of the Civil Service Law.

1. Section 102.4 of the Regulations of the Commissioner of Education is amended, effective May 14, 2014, to read as follows:

Section 102.4. Fraud in examinations.

(a) Prohibited Student Fraud. If, in the judgment of the principal responsible for administration of an examination under the authority of the Regents, upon the basis of evidence deemed by him to be sufficient, a student has been found guilty of having committed or attempted to commit fraud in the examination, the principal shall be authorized to cancel the examination and to exclude this student from any subsequent Regents examination until such time as the student has demonstrated by exemplary conduct and citizenship, to the satisfaction of the principal, that the student is entitled to restoration of this privilege. As used in this [section] subdivision, fraud shall include the use of unfair means to pass an examination, giving aid to, or obtaining aid from, another person in any examination, alteration of any Regents passcard or other credential, and intentional misrepresentation in connection with examinations or credentials. Before such penalty shall be applied, the student accused of fraud shall be given an opportunity to make satisfactory explanations, including the right to appear before the board of education or a person or persons designated by such board, together with his parent or parents and, if so desired by the parent or parents, an attorney, all of whom shall be given the opportunity to ask questions of the examiner or examiners and any other person having direct personal knowledge of the facts. The board of education or

the person or persons designated by the board for the purpose of such inquiry may affirm, modify or reverse the findings or penalty, if any, imposed by the principal. The principal shall report promptly to the commissioner the name of each student penalized under this regulation, together with a brief description of circumstances.

(b) Prohibited Testing Misconduct. Testing misconduct, assisting in the engagement of, or soliciting another to engage in testing misconduct, and/or the knowing failure to report testing misconduct in accordance with subdivision (d) of this section when committed by an employee of a school district, board of cooperative educational services or charter school in a position for which a teaching or school leader certificate is required, shall be deemed to raise a reasonable question of moral character under Part 83 of this Title and shall be subject to referral to the Office of School Personnel Review and Accountability at the State Education Department to the extent provided in Section 83.1 of this Title. Each school district, board of cooperative educational services or charter school employee in a position for which a teaching or school leader certificate is not required who commits an unlawful act in respect to examination and records that is prohibited by Education Law §225 shall be subject to disciplinary action by the board of education, the board of cooperative educational services or charter school in accordance with subdivision 11 of Education Law §225.

(c). For purposes of this section, testing misconduct shall include, but need not be limited to, the following acts or omissions:

(1) Accessing secure test booklets and/or answer sheets prior to the time allowed by New York State testing rules;

(2) Duplicating, reproducing, or keeping any part of any secure examination materials without obtaining prior written authorization from the State Education

Department;

(3) Reviewing test booklets prior to test administration in order to:

(i) determine and record correct responses for use during testing;

(ii) create pre-test lessons or discussions with students about concepts being tested; and/or

(iii) create a “cheat sheet” for students to use during any State assessment, including but not limited to, sharing formulas, concepts, or definitions, necessary for the test;

(4) Providing students clues or answers during test administration, including, but not limited to, one or more of the following actions:

(i) coaching students about correct answers;

(ii) defining terms and concepts contained in the test;

(iii) pointing out wrong answers to a student and suggesting that the student reconsider or change the recorded response;

(iv) reminding students during testing of concepts they learned in class; and/or

(v) making facial or other non-verbal suggestions regarding answers.

(5) Allowing any student more time to take an examination than is allowed for that student;

(6) Leaving any materials displayed in the room containing topics being tested;

(7) Writing test specific formulas, concepts, or definitions on the board prior to and while a State assessment is administered;

(8) Reviewing a student answer sheet for wrong answers and returning it to a student with instructions to change or reconsider wrong responses;

(9) Altering, erasing, or in any other way changing a student's recorded responses after the student has handed in his/her test materials; or

(10) Rescoring portions of the test solely to add or find points so a student will pass the test or earn a higher score on the test, other than legitimate rescoring activities authorized by the superintendent of a public school district or chief administrative officer of a nonpublic or charter school or by the State Education Department; and/or

(11) Encouraging or assisting an individual to engage in the conduct described in paragraphs (1) through (10) of this subdivision.

(d) Mandatory Reporting of Testing Misconduct. Each school district, board of cooperative educational services or charter school employee shall be required to report to the Department any known incident of testing misconduct by a certified educator or any known conduct by a non-certified individual involved in the handling, administration or scoring of State assessments that may reasonably be considered to be in violation of section 225 of the Education Law, in accordance with directions and procedures established by the Commissioner for the purpose of maintaining the security and confidential integrity of State assessments.

(e) Prohibition Against Taking Adverse Action Against Certain Employees for Filing a Report. In accordance with section 75-b of the Civil Service Law, a school district or board of cooperative educational services shall not dismiss or take other disciplinary or adverse action against an employee because he/she submitted a report pursuant to subdivision (d) of this section. Any such adverse action by an individual holding a teaching or school leader certificate shall be deemed to raise a reasonable

question of moral character under Part 83 of this Title and may be referred to the Office of School Personnel Review and Accountability at the State Education Department.

ASSESSMENT OF PUBLIC COMMENT

Since publication of a Notice of Revised Rule Making in the State Register on November 6, 2013 and the publication of the Revised Rule Making in the State Register on February 12, 2014, the State Education Department received the following comments:

1. COMMENT:

One commenter asked what the Department's intent was regarding the applicability of the rules to teachers, administrators and other staff of charter schools who are involved in the administration and scoring of student assessments. Does the Department intend the prohibition of testing misconduct to apply to these individuals? How are charter school staff meant to be covered by the mandatory misconduct reporting requirement? If subject to the reporting mandate, how are staff intended to be protected from retaliatory actions?

DEPARTMENT RESPONSE:

In order to protect the integrity of the State assessments and to eliminate any testing and/or security breaches on such assessments, the Department has revised the proposed amendment to require employees of charter schools to be covered by the reporting requirement and to make the prohibition of testing misconduct apply to charter school employees. While Civil Service Law 75-b does not apply to charter schools, we would encourage charter schools to not take any retaliatory actions against an employee for reporting under this section of the regulations.

2. COMMENT:

The proposed amendment would impose requirements on school employees that are inconsistent with existing school governance and reporting structures. Specifically,

the Proposed Rule would require employees to report suspected incidents of academic dishonesty directly to the SED Executive Director of the Test Security and Educator Integrity Unit (“SED Director”). This reporting requirement, however, conflicts with demonstrated methods of effective school governance, and would unnecessarily delay the prompt resolution of any suspected cases of testing misconduct.

The Rule should be amended so that school employees are required to report to school leadership (*i.e.*, the principal) any suspected incidents of academic dishonesty. School leadership would then conduct an investigation, make a determination based on the facts, and report substantiated incidents to the SED Director. School employees should only be required to bypass the procedure described above when:

1. Principals are implicated in the suspected misconduct; and/or
2. School leadership declines to report the incident to the SED Director after conducting an investigation, where the employee continues to believe that a reportable incident took place.

Bypassing school-level reporting structures undermines good school governance and inhibits effective school management, which requires that school leadership serve as the first point of contact for school-level allegations. Additionally, the Rule as currently written would impose an unnecessary delay to the start of the investigation. School leadership, on the other hand, is positioned to investigate and resolve or address such incidents immediately as they are raised.

DEPARTMENT RESPONSE:

A significant recommendation from Special Investigator Greenberg that the Board adopted was that the Department establish a mandatory reporting requirement for school personnel, who learn of any security breach or other testing misconduct,

define specific context based examples of prohibited testing misconduct, and sanction those who fail to comply. (Greenberg Report, pgs. 10 and 14, emphasis in original). Pursuant to this recommendation, the Department's Test Security Unit incorporated a mandatory reporting requirement in the Department's testing manuals for Regents and Grades 3 through 8 examinations. The proposed amendment merely formalizes Special Investigator Greenberg's recommendations by amending Section 102.4 of the Commissioner's Regulations to prohibit certain testing misconduct and provides specific concrete examples of what constitutes "testing misconduct."

There is nothing in the proposed amendment that prohibits a school district, BOCES or charter school from conducting its own internal investigation of any testing misconduct for purposes of discipline and/or enhancing its own testing procedures. However, the Department also has a significant interest in protecting the integrity of the State assessments. The proposed amendment merely formalizes a current requirement that school districts and BOCES report testing misconduct to the Department's Test Security Unit and requires charter school employees to do the same

3. COMMENT: We write to comment on the Revised Rule Making issued by the State Education Department ("SED") relating to Mandatory Reporting Requirements and Testing Misconduct, I.D. No. EDU-45-13-00033-RP, which was published in the February 12, 2014, New York State Register (the "Revised Proposed Rule"). We wish to reiterate that we fully support New York State's commitment to ensuring the security of the State Assessment program. We uncompromisingly believe that schools must be free of cheating and any other form of academic dishonesty.

However, we object to the requirement on charters schools to the extent that are inconsistent with Education Law. Specifically, Education Law § 2854 expressly states

that public charter schools are exempt from all state regulations “governing public or private schools, boards of education and school districts, *including those relating to school personnel . . .*” N.Y. Educ. Law § 2854(1)(b) (emphasis supplied).

The Revised Proposed Rule would impose requirements on charter schools with regard to their school personnel. Such requirements conflict with the Education Law and are therefore impermissible under the law. *See Trump-Equitable Fifth Ave. Co. v. Gliedman*, 57 N.Y.2d 588, 595, 457 N.Y.S.2d 466, 469 (1982) (“It is well established that in exercising its rule-making authority an administrative agency cannot extend the meaning of the statutory language to apply to situations not intended to be embraced within the statute. Nor may an agency promulgate a rule out of harmony with or inconsistent with the plain meaning of the statutory language.”) (internal citations omitted).

First, the sub-section explains that “[t]esting misconduct, assisting in the engagement of, or soliciting another to engage in testing misconduct and/or the knowing failure to report testing misconduct” when committed by a charter school employee “in a position for which a teaching or school leader certificate is required, shall be deemed to raise a reasonable question of moral character under Part 83 of this Title and *shall be subject to referral to the Office of School Personnel Review and Accountability at the [SED] to the extent provided in Section 83.1 of this Title.*” Proposed Rule 8 NYCRR § 102.4(b) (emphasis added). Section 83.1(a) requires that the “chief school administrator” make the referral to SED. 8 NYCRR § 83.1(a). The language in the revised sub-section, therefore, appears to require the charter school to refer its own personnel for discipline to SED. Such a policy clearly relates to the charter school’s relationship with its school personnel,” an area in which charter schools are explicitly

exempt from state regulations and are outside SED's jurisdiction. As such, the Proposed Rule is "out of harmony with" and "inconsistent with the plain meaning of" Education Law § 2854, and is therefore invalid. See *Trump-Equitable Fifth Ave. Co.*, 57 N.Y.2d at 595, 457 N.Y.S.2d at 469.

Second, the revised sub-section requires that "charter school employee[s] in a position for which a teaching or school leader certificate is not required who commit[] an unlawful act in respect to examination and records . . . shall be subject to disciplinary action by the . . . charter school in accordance with subdivision 11 of Education Law § 225."^[1] (emphasis added). While charter schools are committed to ensuring that their employees do not commit unlawful acts, including those in respect to examination and records, SED lacks jurisdiction to impose such obligations on charter schools vis-a-vis their own employees. As above, this revised sub-section contradicts the express language in Education Law § 2854 and is therefore impermissible under the law. See *Trump-Equitable Fifth Ave. Co.*, 57 N.Y.2d at 595, 457 N.Y.S.2d at 469.

The Revised Proposed Rule should be amended so that charter schools are not subject to state regulations "relating to school personnel," in accordance with Education Law § 2854.

DEPARTMENT RESPONSE: Education Law § 2854 provides that a charter school shall meet the same health and safety, civil rights and student assessment requirements applicable to other public schools. A significant recommendation from Special Investigator Greenberg on the security of the State's student assessments that the Board of Regents adopted was that the Department establish a mandatory reporting requirement for school personnel, who learn of any security breach or other testing misconduct, define specific context based examples of prohibited testing misconduct,

and sanction those who fail to comply. (Greenberg Report, pgs. 10 and 14, emphasis in original). Pursuant to this recommendation, the Department's Test Security Unit incorporated a mandatory reporting requirement in the Department's testing manuals for Regents and Grades 3 through 8 examinations, as a critical student assessment requirement needed to protect the integrity of the testing process applicable to all schools that administer the State assessments. The proposed amendment merely formalizes Special Investigator Greenberg's recommendations by amending Section 102.4 of the Commissioner's Regulations to prohibit certain testing misconduct and provides specific concrete examples of what constitutes "testing misconduct."

There is nothing in the proposed amendment that prohibits a charter school from conducting its own internal investigation of any testing misconduct for purposes of discipline and/or enhancing its own testing procedures. However, the Department also has a significant interest in protecting the integrity of the State assessments. Education Law §225 specifically addresses unlawful acts relating to student assessments and charter schools are subject to the same student assessment requirements as public schools (Education Law §2854[1][b]) and in order to protect the State assessment program, all school personnel must be subject to disciplinary action for unlawful acts relating to improper conduct on student assessments. No specific disciplinary measures or procedures are prescribed in the regulation—all that is required is that schools make testing misconduct, which is criminal conduct constituting a misdemeanor under Education Law §225(10), grounds for disciplinary action.