





TO: The Honorable Members of the Board of Regents

FROM: James N. Baldwin 

SUBJECT: Proposed Amendment of Section 136.5 of the Regulations of the Commissioner of Education Relating to Requiring Nonpublic Schools to Follow Concussion Management Protocols

DATE: July 6, 2023

AUTHORIZATION(S): 

SUMMARY

Issue for Decision (Consent)

Should the Board of Regents adopt the proposed amendment of section 136.5 of the Regulations of the Commissioner of Education relating to requiring nonpublic schools to follow concussion management protocols?

Reason(s) for Consideration

Required by State statute (Chapter 617 of the Laws of 2022).

Proposed Handling

This issue will come before for the Full Board for adoption as an emergency rule at the July 2023 Regents meeting. A copy of the proposed rule (Attachment A) and a statement of facts and circumstances which necessitate emergency action (Attachment B) are included.

Procedural History

The proposed amendment was presented to the P-12 Education Committee for discussion and recommendation to the Full Board for adoption as an emergency rule at the June 2023 meeting of the Board of Regents. A Notice of Emergency Adoption and Proposed Rule Making was published in the State Register on June 28, 2023, for a 60-day public comment period.

Because the emergency action will expire on September 10, 2023, a second emergency action is necessary to ensure the emergency rule remains continuously in effect until it can be permanently adopted at the October 2023 Regents meeting. A Notice of Emergency Adoption will be published in the State Register on August 2, 2023. Supporting materials are available upon request to the Secretary of the Board of Regents.

Background Information

The Concussion Management Awareness Act, as added by Chapter 496 of the Laws of 2011, authorizes the Commissioner of Education, in conjunction with the Commissioner of Health, to promulgate and review as necessary rules and regulations relating to pupils who suffer mild traumatic brain injuries, also referred to as concussions, while receiving instruction or engaging in any school-sponsored or related activity. The statute's provisions took effect July 1, 2012. Chapter 617 of the Laws of 2022, effective July 1, 2023, requires nonpublic schools to follow the same requirements as public schools when a student suffers a concussion.

The proposed amendment to section 136.5 requires nonpublic schools' coaches, physical education teachers, school nurses, and athletic trainers to biennially complete a course approved by the Department, related to recognizing the symptoms of mild traumatic brain injuries. It also requires that nonpublic schools include information on concussions and/or reference how to obtain information on concussions from the New York State Education Department and New York State Department of Health websites on their permission or consent forms for students to participate in interscholastic sports.

During school athletic activities, nonpublic schools would be required to remove from activity any student suspected of having sustained a mild traumatic brain injury. The student would not be permitted to return to athletic activity until they have been symptom-free for not less than 24 hours and have been evaluated by and received written signed authorization from a licensed physician. Such authorization is required to be kept in the student's permanent health record. Nonpublic schools are also required to follow any guidance from the student's treating physician regarding limitations on school attendance and activities.

Additionally, the proposed amendment would permit nonpublic schools to choose to establish a concussion management team to oversee the implementation of these requirements and which may establish a program that provides information on mild traumatic brain injuries to parent(s)/guardian(s).

Finally, the proposed rule adds a definition for "athletic activities" consistent with the definition in section 136.9 of the Commissioner's regulations and makes a technical amendment to change the term "medical director" to the correct title of that position used in the Education Law: "director of school health services".

Chapter 617 of the laws of 2022 provides that any rules or regulations necessary for the timely implementation of the amendment to the Concussion Management Awareness Act shall be promulgated on or before July 1, 2023, thus the amendment was adopted on an emergency basis at the June 2023 Board of Regents meeting. Because the emergency action will expire before the October 2023 Regents meeting, an additional emergency action is now presented for adoption. If adopted at the October 2023 meeting, the proposed amendment will become effective as a permanent rule on November 1, 2023.

Related Regents Items

June 2023: [Proposed Amendment of Section 136.5 of the Regulations of the Commissioner of Education Relating to Requiring Nonpublic Schools to Follow Concussion Management Protocols](https://www.regents.nysed.gov/sites/regents/files/623p12a2.pdf)

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Recommendation

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

VOTED: That section 136.5 of the Regulations of the Commissioner of Education be amended, as submitted, effective September 11, 2023, as an emergency action upon a finding by the Board of Regents that such action is necessary for the public health, safety, and general welfare in order to timely implement Chapter 617 of the Laws of 2022, which effective July 1, 2023, requires nonpublic schools to follow the procedures of the Concussion Management Act and to ensure that the emergency action taken at the June 2023 meeting remains continuously in effect.

Timetable for Implementation

If adopted as an emergency rule at the July 2023 Regents meeting, the emergency rule will become effective September 11, 2023. It is anticipated that the proposed amendment will be presented for permanent adoption at the October 2023 Regents meeting, after publication of the proposed amendment in the State Register and expiration of the 60-day public comment period required under the State Administrative Procedure Act. If adopted at the October 2023 meeting, the proposed amendment will become effective as a permanent rule on November 1, 2023.

AMENDMENT OF THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to sections 207, 305, and 2854 of the Education Law and Chapter 617 of the Laws of 2022.

Section 136.5 of the Regulations of the Commissioner of Education is amended to read as follows:

Section 136.5. Concussion management and awareness

(a) Applicability.

(1) The provisions of this section relate to pupils who have sustained or are believed to have sustained, mild traumatic brain injuries (also referred to as a “concussion” while receiving instruction or engaging in any school-sponsored or related activity.

(2) The provisions of this section:

(i) shall apply to [each] all school [district and] districts, charter [school] schools, and nonpublic schools; and

(ii) [may be implemented by nonpublic schools if they so authorize; and

(iii)] shall be deemed to be the minimum standards that must be complied with; provided that nothing in this section shall prohibit any public school or nonpublic school from adopting and implementing more stringent standards.

(b) ...

(c) ...

(d) Removal from athletic activities.

(1) For purposes of this section the term “athletic activities” means participation in sessions for instruction and practice in skills, attitudes, and knowledge through

participation in individual, group, and team activities organized on an intramural, extramural, interschool athletic, or inclusive athletic basis to supplement regular physical education class instruction, otherwise known as extraclass periods in physical education or extraclass activities.

(2) A school shall require the immediate removal from athletic activities of any pupil who has sustained, or who is believed to have sustained a mild traumatic brain injury. In the event that there is any doubt as to whether a pupil has sustained a concussion, it shall be presumed that the pupil has been so injured until proven otherwise.

[(2)] (3) No such pupil shall resume athletic activity until the pupil has been symptom-free for not less than 24 hours, and has been evaluated by and received written and signed authorization from a licensed physician; and for extra class athletic activities in public schools, has received clearance from the [medical director] director of school health services to participate in such activity.

(i) Such authorization shall be kept on file in the pupil's permanent health record.

(ii) The school shall follow any directives issued by the pupil's treating physician with regard to limitations and restrictions on school attendance and activities for the pupil.

(e) Concussion management team.

(1) Each school or school district, at its discretion, may establish a concussion management team.

(2) The concussion management team may be composed of:

(i) the athletic director;

(ii) a school nurse;

(iii) [the school physician] a district's director of school health services;

(iv) a coach of an interscholastic team;

(v) a certified athletic trainer; or

(vi) such other appropriate personnel as designated by the school or school district.

[(3)] (4) The concussion management team shall oversee the implementation of subdivision (42) of Education Law section 305 and the provisions of this section as it pertains to their associated school and may establish and implement a program which provides information on mild traumatic brain injuries to parents and persons in parental relation throughout each school year.

STATEMENT OF FACTS AND CIRCUMSTANCES WHICH NECESSITATE
EMERGENCY ACTION

The Concussion Management Awareness Act, as added by Chapter 496 of the Laws of 2011, authorizes the Commissioner of Education, in conjunction with the Commissioner of Health, to promulgate and review as necessary rules and regulations relating to pupils who suffer mild traumatic brain injuries, also referred to as concussions, while receiving instruction or engaging in any school-sponsored or related activity. The statute's provisions took effect July 1, 2012. Chapter 617 of the Laws of 2022, effective July 1, 2023, requires nonpublic schools to follow the same requirements as public schools when a student suffers a concussion.

The proposed amendment to section 136.5 requires nonpublic schools' coaches, physical education teachers, school nurses, and athletic trainers to biennially complete a course approved by the Department, related to recognizing the symptoms of mild traumatic brain injuries. It also requires that nonpublic schools include information on concussions and/or reference how to obtain information on concussions from the New York State Education Department and New York State Department of Health websites on their permission or consent forms for students to participate in interscholastic sports.

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to follow any guidance from the student's treating physician in regard to limitations on school attendance and activities.

Additionally, the proposed amendment would permit nonpublic schools to choose to establish a concussion management team to oversee the implementation of these requirements and which may establish a program that provides information on mild traumatic brain injuries to parent(s)/guardian(s).

Finally, the proposed rule adds a definition for "athletic activities" consistent with the definition in the section of the Commissioner's regulations and makes a technical amendment to change the term "medical director" to the correct title of that position used in the Education Law: "director of school health services".

Chapter 617 of the Laws of 2022 provides that any rules or regulations necessary for the timely implementation of the amendment to the Concussion Management Awareness Act shall be promulgated on or before July 1, 2023; thus the amendment was adopted on an emergency basis at the June 2023 Board of Regents meeting.

The proposed amendment was presented to the P-12 Education Committee for recommendation to the Full Board for adoption as an emergency rule at the June 2023 meeting of the Board of Regents, effective July 1, 2023. Since the Board of Regents meets at fixed intervals, the earliest the proposed amendment could be adopted by regular (nonemergency) action after expiration of the 60-day public comment period provided for in the State Administrative Procedure Act (SAPA) sections 201(1) and (5) would be the October 2023 Regents meeting. Furthermore, pursuant to SAPA 203(1), the earliest effective date of the proposed rule, if adopted at the October meeting, would

be November 1, 2023, the date the Notice of Adoption would be published in the State Register.

However, the emergency rule will expire on September 10, 2023. Therefore, a second emergency action is necessary at the July 2023 meeting, effective September 11, 2023, for the preservation of public health, safety, and general welfare in order to timely implement Chapter 617 of the Laws of 2022, which effective July 1, 2023, requires nonpublic schools to follow the procedures of the Concussion Management Act and to ensure that the emergency action taken at the June 2023 meeting remains continuously in effect until the rule can be permanently adopted.

It is anticipated that the proposed rule will be presented to the Board of Regents for adoption as a permanent rule at the October 2023 Regents meeting, which is the first scheduled meeting after expiration of the 60-day public comment period mandated by SAPA for state agency rulemaking.