



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

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

**SUBJECT:** 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

**DATE:** October 8, 2020

**AUTHORIZATION(S):** *Julius Patrone* *John L. D'Agati* *Billy...*

**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 an emergency rule at its October 2020 meeting. A copy of the proposed rule is included as Attachment A, and a Statement of Facts and Circumstances which necessitate emergency action is included as Attachment B.

**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 the Emergency Adoption and Proposed Rule Making was published in the State Register on June 24, 2020. 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 C. 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. Because the September emergency action will expire on November 13, 2020, an additional emergency action is necessary to ensure that the emergency rule remains continuously in effect until it can be permanently adopted at the December 2020 Regents meeting and take effect as a permanent rule. 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 individualized education program (IEP) under the Individuals with Disabilities Education Act (IDEA) or education plan approved under section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act (ADA). 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 IEP or approved section 504 or ADA plan, 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>)

### **Recommendation**

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

VOTED: That Section 135.4 is amended, as submitted, effective November 14, 2020 as an emergency action upon a finding by the Board of Regents that such action is necessary for the preservation of the public health and general welfare to immediately clarify that schools and associations, etc., are not precluded from considering accommodation requests from otherwise qualified students with disabilities for participation in interschool competition or inclusive athletic activities who, pursuant to an IEP under the IDEA or an approved 504 or ADA plan, are not registered in the equivalent of three regular courses and to ensure that the emergency action taken at the September meeting remains in effect until the proposed rule can be permanently adopted.

### **Timetable for Implementation**

If adopted at the October 2020 Regents meeting, the revised emergency rule will become effective November 14, 2020. It is anticipated that the revised proposed rule will be presented to the Board of Regents for permanent adoption at the December 2020 Regents meeting, after publication of the proposed amendment in the State Register and expiration of the 45-day public comment period required under the State Administrative Procedure Act for revised rulemakings.

## **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.

**8 NYCRR §135.4**

**STATEMENT OF FACTS AND CIRCUMSTANCES  
WHICH NECESSITATE EMERGENCY ACTION**

The proposed amendment to section 135.4 of the Regulations of the Commissioner of Education is necessary to immediately clarify that schools and associations, etc., are not precluded from considering accommodation requests from otherwise qualified students with disabilities for participation in interschool competition or inclusive athletic activities who, pursuant to an individualized education program under the Individuals with Disabilities Education Act (IDEA) or approved 504 (Rehabilitation Act) or Americans with Disabilities Act (ADA) plan, are not registered in the equivalent of three regular courses.

The proposed amendment was presented to the Full Board for adoption as an emergency action at the June 2020 meeting of the Board of Regents, effective June 9, 2020. A second emergency action was taken at the July 2020 Regents meeting to ensure that the proposed amendment remained continuously in effect until it could be permanently adopted, effective September 7, 2020. At its September meeting, the Department revised the proposed amendment to clarify that accommodation requests for participation in interschool competition or inclusive athletic activities from otherwise qualified students who are not registered in the equivalent of three regular courses as a result of his or her individualized education program (IEP) under the IDEA shall also be duly considered by schools and associations, etc. effective September 15, 2020.

Since the Board of Regents meets at fixed intervals, the earliest the proposed rule can be presented for permanent adoption, after expiration of the required 45-day public

comment period provided for in the State Administrative Procedure Act (SAPA) section 201(4-a), would be the December 2020 Regents meeting. Furthermore, pursuant to SAPA 203(1), the earliest effective date of the proposed rule, if adopted at the December meeting, would be December 30, 2020, the date the Notice of Adoption would be published in the State Register. However, the September emergency rule will expire on November 13, 2020.

Therefore, emergency action is necessary at the October 2020 meeting for the preservation of the public health and general welfare in order to immediately clarify that schools and associations, etc., are not precluded from considering accommodation requests from otherwise qualified students with disabilities for participation in interschool competition or inclusive athletic activities who, pursuant to an individualized education program or approved 504 or ADA plan, are not registered in the equivalent of three regular course, and to ensure that the emergency action taken at the September 2020 meeting remains in effect until the proposed rule can be permanently adopted.

It is anticipated that the proposed rule will be presented for adoption as a permanent rule at the December 2020 Regents meeting, which is the first scheduled meeting after the 45-day public comment period prescribed in SAPA for State agency rule makings.

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 regulation. 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.