



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

TO: The Honorable the Members of the Board of Regents

FROM: Angélica Infante-Green *h. Infante - Green*

SUBJECT: Proposed Amendments to Sections 100.5 and 200.4 of the Commissioner's Regulations Relating to the Superintendent Determination Option for Certain Students with Disabilities to Graduate with a Local Diploma

DATE: May 31, 2018

AUTHORIZATION(S):  

SUMMARY

Issue for Decision (Consent Agenda)

Should the Board of Regents adopt the proposed amendment to §100.5 and §200.4 of the Commissioner's regulations relating to the superintendent determination option for certain students with disabilities to graduate with a local diploma?

Reason(s) for Consideration

Implementation of policy.

Proposed Handling

The proposed rule is being presented to the full Board at the June 2018 Regents meeting for adoption as an emergency measure and for adoption as a permanent rule. A copy of the proposed amendment is included as Attachment B.

Procedural History

In June 2016, the Board of Regents adopted regulations to automatically require superintendents to make a determination for every student with a disability who did not meet the graduation requirements through the existing appeal and safety net options. In response to public comment and questions raised by the field, the regulations were

subsequently revised and adopted on an emergency basis at the October 2016 Board of Regents meeting to require that on or after October 18, 2016 (the effective date of the revised rule), a superintendent may only make a determination whether an eligible student has met the requirements for graduation through the superintendent determination option upon receipt of a written request from an eligible student's parent or guardian; the district must provide prior written notice that the student is not eligible to receive a free appropriate public education after graduation with a local diploma; and that the development of transition goals and services at a committee on special education meeting include a discussion with the student's parents of the student's progress toward receiving a diploma and that parents be provided with information explaining graduation requirements, including eligibility criteria and process for requesting the superintendent determination option. The regulation, as revised, was adopted as a permanent rule at the December 2016 Board of Regents meeting.

At the December 2017 Board of Regents Meeting, the Board adopted the proposed amendments as an emergency measure, effective December 12, 2017. Following the 60-day public comment period required under the State Administrative Procedure Act, the Department received significant comment on the proposed amendment. A second emergency adoption was taken at the February 2018 Board of Regents meeting, effective March 11, 2018, to ensure that the proposed amendment adopted at the December 2017 Board of Regents meeting remained continuously in effect until it could be revised and adopted as a permanent rule. The proposed amendment was revised in response to public comment and adopted by emergency action at the April 2018 Board of Regents Meeting. A notice of Proposed Rulemaking was published in the State Register on April 25, 2018 for a 30-day public comment period. One comment was received but did not result in any changes to the proposed amendment. The proposed amendment is being presented to the Board of Regents at its June meeting for permanent adoption. If adopted at the June meeting, the proposed amendment will become effective as a permanent rule on June 27, 2018. A copy of the proposed amendment is attached. Supporting materials for the proposed amendment are available upon request from the Secretary to the Board of Regents.

Background Information

All students with disabilities must be held to high expectations and be provided meaningful opportunities to participate and progress in the general education curriculum to prepare them to graduate with a regular high school diploma. The majority of students with disabilities can meet the State's learning standards for graduation. However, there are some students who, because of their disabilities, are unable to demonstrate their proficiency on standard State assessments, even with testing accommodations. For these students, the State provided a superintendent determination option for eligible students to graduate with a local diploma, beginning in June 2016 and thereafter.

Prior to the amendments adopted as an emergency measure at the December 2017 Board of Regents meeting, effective December 12, 2017, to be eligible for the superintendent determination option to graduate with a local diploma, a student with a disability was required to meet the following conditions:

- The parent/guardian submitted a written request that their child be considered for a superintendent determination;
- The student has a current individualized education program and is receiving special education programs and/or related services;
- The student did not meet the graduation requirements through the low pass (55-64) safety net option or the compensatory safety net option;
- The student has earned the required course credits and has passed, in accordance with district policy, all courses required for graduation, including the Regents courses to prepare for the corresponding required Regents examination areas (English language arts (ELA), mathematics, social studies, and science);
- The student has earned a minimum score of 55 on both the ELA and mathematics Regents examinations or a successful appeal of a score between 52 and 54;
- The student has participated in other Regents examinations, but has not passed one or more of these examinations as required for graduation; and
- The student has otherwise demonstrated competency in the subject area where the student was not able to demonstrate his/her proficiency of the State's learning standards through the Regents examination.

Summary of Amendments Adopted in December 2017 and February 2018

The proposed amendment allowed students with disabilities, otherwise eligible to graduate beginning January 2018 and thereafter, who have not earned a minimum score of 55 on the ELA and/or mathematics Regents examinations or did not initiate an appeal of a score between 52 and 54 to meet the ELA and/or mathematics Regents examinations eligibility conditions for the superintendent determination option by completing the requirements for the New York State Career Development and Occupational Studies (CDOS) Commencement Credential. For these students, the superintendent must conduct a review to determine whether such student has otherwise demonstrated proficiency in the knowledge, skills and abilities in ELA and/or mathematics, in addition to any other subject areas where the student was not able to demonstrate his/her proficiency of the State's learning standards as measured by the corresponding Regents examination(s) required for graduation.

In addition, because some students may not have had the opportunity to work towards earning the CDOS Commencement Credential and would be unable to use the credential to meet the ELA and mathematics Regents examinations eligibility conditions for the superintendent determination option, the proposed rule includes an exception to certain requirements to allow appropriate discretion to school principals to determine

whether students have otherwise demonstrated the knowledge and skills related to the CDOS learning standards sufficient for entry-level employment. Specifically, for students with disabilities who are otherwise eligible to graduate during the 2017-18 and 2018-19 school years, the exception would allow school districts, registered nonpublic high schools and charter schools to award the CDOS Commencement Credential to a student with a disability who has not fully met all of the requirements, for purposes of eligibility for the superintendent determination option, provided that the school principal, in consultation with relevant faculty, has determined that the student has otherwise demonstrated knowledge and skills in the commencement level CDOS learning standards 1, 2 and 3a. The principal must have evidence that the student has successfully completed relevant instructional and work-based learning activities during the student's secondary school years that demonstrates the student has readiness skills for entry-level employment. However, for students who are otherwise eligible to graduate during the 2017-18 and 2018-19 school years, the total hours of the career and technical education coursework and/or work-based learning activities may be less than the required equivalent of two units of study (216 hours).

Students who are awarded the CDOS Commencement Credential under this exception may not use such credential to meet the requirements for the career development and occupational studies graduation pathway to a local or Regents diploma.

April Revisions to Proposed Amendment as a Result of Public Comment

At the April 2018 Regents meeting, the following substantial revisions were made to address public comment and to clarify the proposed rule:

- Sections 100.5(d)(12) and 200.4(d)(2)(ix)(b)(3) of the Commissioner's Regulations have been amended to replace the term "superintendent determination pathway" with "superintendent determination option" to clarify that the superintendent determination is an option, not a pathway, for students with disabilities to graduate with a local diploma.
- Section 100.5(d)(12)(ii)(d) has been revised to clarify that students with disabilities who use the CDOS Commencement Credential to meet the ELA and/or mathematics Regents examinations eligibility conditions for the superintendent determination option but have met all the assessment requirements for the remaining Regents examinations required for graduation, would be eligible for consideration of a local diploma through the superintendent determination option.

Related Regents Item(s)

[P12 Education April 2018](http://www.regents.nysed.gov/meetings/2018/2018-04/p-12-education)

(<http://www.regents.nysed.gov/meetings/2018/2018-04/p-12-education>)

[Meeting of the Board of Regents February 2018](http://www.regents.nysed.gov/meetings/2018/2018-02/meeting-board-regents-0)

(<http://www.regents.nysed.gov/meetings/2018/2018-02/meeting-board-regents-0>)

[P12 Education December 2017](http://www.regents.nysed.gov/meetings/2017/2017-12/p-12-education)

(<http://www.regents.nysed.gov/meetings/2017/2017-12/p-12-education>)

[Meeting of the Board of Regents September 2016](http://www.regents.nysed.gov/meetings/2016/2016-09/meeting-board-regents-0)

(<http://www.regents.nysed.gov/meetings/2016/2016-09/meeting-board-regents-0>)

Recommendation

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

VOTED: That paragraph (12) of subdivision (d) of §100.5 of the Regulations of the Commissioner of Education and subclause (3) of clause (a) of subparagraph (ix) of paragraph (2) of subdivision (d) of §200.4 of the Regulations of the Commissioner of Education be amended, as submitted, effective June 12, 2018, as an emergency action upon a finding by the Board of Regents that such action is necessary for the preservation of the general welfare in order to ensure that the emergency rule adopted by the Board of Regents at its April 2018 meeting until it can be adopted as a permanent rule on June 27, 2018.

VOTED: That paragraph (12) of subdivision (d) of §100.5 of the Regulations of the Commissioner of Education and subclause (3) of clause (a) of subparagraph (ix) of paragraph (2) of subdivision (d) of §200.4 of the Regulations of the Commissioner of Education be amended, as submitted, effective June 27, 2018.

Timetable for Implementation

If adopted at the June 2018 meeting, the proposed amendment will become effective as an emergency rule on June 12, 2018 and as a permanent rule on June 27, 2018.

Attachments

Attachment A

AMENDMENT OF THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to Education Law sections 101, 207, 208, 209, 305, 308, 309 and 3204

1. Paragraph (12) of subdivision (d) of section 100.5 of the Regulations of the Commissioner of Education is amended as follows:

(12) Superintendent determination [pathway] option for certain students with disabilities for eligibility for a local diploma.

(i) For purposes of this paragraph only, superintendent shall mean the superintendent of a school district; or the principal, head of school, or their equivalent, of a charter school or nonpublic school, as applicable.

(ii) School districts, registered nonpublic high schools and charter schools shall ensure that every student who is identified as a student with a disability as defined in Education Law section 4401(1) and section 200.1(zz) of this Title and who does not meet the assessment requirements for graduation through the existing appeal options, [including] the compensatory score option, and/or the 55-64 low pass safety net option available under this section but who is otherwise eligible to graduate in June 2016 and thereafter shall be considered for a local diploma through the superintendent determination [pathway] option in accordance with the requirements of this paragraph, provided that the student:

(a) has a current individualized education program and is receiving special education programs and/or related services pursuant to Education Law section 4402 and section 200.4 of this Title;

(b) took the English Regents examination required for graduation pursuant to this section and achieved a minimum score of 55 or successfully appealed a score of between 52 and 54 on such examination pursuant to paragraph (7) of this subdivision, except as otherwise provided in subparagraph (v) of this paragraph; and

(c) took a mathematics Regents examination required for graduation pursuant to this section and achieved a minimum score of 55 or successfully appealed a score of between 52 and 54 on such examination pursuant to paragraph (7) of this subdivision, except as otherwise provided in subparagraph (v) of this paragraph; and

(d) participated in the remaining Regents examinations required for graduation pursuant to clauses (c), (d), (e) and (f) of subparagraph (a)(5)(i) of this section, but was unable to achieve a minimum score of 55 on one or more of the remaining assessments required for graduation or did not initiate an appeal of a score of between 52 and 54 on one or more such examinations pursuant to paragraph (7) of this subdivision, or was unable to use the compensatory score option for one or more such examinations pursuant to clause (7)(vi)(c) of this subdivision; provided that nothing in this clause shall prohibit a student who uses the New York State career development and occupational studies commencement credential to meet requirements of clauses (b) and/or (c) of this subparagraph from requesting a review by the superintendent to determine whether the student has otherwise demonstrated proficiency in the knowledge, skills and abilities only for the subject area(s) of English language arts and/or mathematics; and

(e) has earned the required course credits pursuant to this section and passed, in accordance with district policy, all courses required for graduation.

(iii) For each eligible student under this paragraph, the superintendent shall conduct a review to determine whether the student has otherwise demonstrated proficiency in the knowledge, skills and abilities in the subject area(s) where the student was not able to demonstrate his/her proficiency of the State's learning standards as measured by the corresponding Regents examination(s) and document such determination in accordance with the following procedures:(a) the superintendent shall consider evidence that the student attained a grade for the course that meets or exceeds the required passing grade by the school for the subject area(s) under review and such grade is recorded on the student's official transcript with grades achieved by the student in each quarter of the school year. Such evidence may include, but need not be limited to, the student's final course grade, student work completed throughout the school year and/or any interim grades on homework, class work, quizzes and tests; and

(b) the superintendent shall consider the evidence that demonstrates that the student actively participated in the Regents examination(s) for the subject area(s) under review; and

(c) the superintendent shall, as soon as practicable, in a form and manner prescribed by the commissioner, document the evidence reviewed for an eligible student with disability under this paragraph and make a determination as to whether the student met the requirements for issuance of a local diploma pursuant to this paragraph and certify that the information provided is accurate; and

(d) the superintendent shall, as soon as practicable, provide each student and parent or person in parental relation to the student with a copy of the completed form and

written notification of the superintendent's determination, and place a copy of the completed form in the student's record.

(1) Where the superintendent determines that the student has not met the requirements for graduation pursuant to this paragraph, the written notice shall inform the student and parent or person in parental relation to the student that the student has the right to attend school until receipt of a local or Regents diploma or until the end of the school year in which the student turns age 21, whichever shall occur first.

(2) Where the superintendent determines that the student has met the requirements for graduation pursuant to this paragraph, the parent shall receive prior written notice pursuant to the requirements of section 200.5(a)(5)(ii) of this Title indicating that the student is not eligible to receive a free appropriate public education after graduation with the receipt of the local diploma pursuant to this paragraph; and

(e) the superintendent shall, no later than August 31 of each year, provide the commissioner with a copy of the completed form for each student; and

(f) the commissioner may conduct audits of compliance with the requirements of this paragraph.

(iv) On or after October 18, 2016, a superintendent shall only make a determination under this paragraph upon receipt of a written request from an eligible student's parent or guardian. Such request shall be submitted in writing to the student's school principal or chairperson of the district's committee on special education. A written request received by the school principal, chairperson of the district's committee on special education, or any other employee of the school as applicable, shall be forwarded to school superintendent immediately upon its receipt.

(v) On or after December 12, 2017, a student who was unable to achieve a minimum score of 55 or did not initiate an appeal of a score of between 52 and 54 on the English and/or mathematics Regents exams shall be considered an eligible student for the superintendent determination option pursuant to this paragraph, provided that the student has completed the requirements for the New York State career development and occupational studies commencement credential pursuant to section 100.6(b) of this Part.

(a) For students with disabilities who are otherwise eligible to graduate in either the 2017-2018 school year or the 2018-2019 school year only, the school district, registered nonpublic high school or charter school may award the career development and occupational studies commencement credential to a student who has not met all of the requirements in section 100.6(b)(3)(ii) of this Part, for purposes of eligibility for the superintendent determination option pursuant to this paragraph, provided that the school principal, in consultation with relevant faculty, has determined that the student has otherwise demonstrated knowledge and skills relating to the commencement level career development and occupational studies learning standards. The principal must have evidence that the student has successfully completed relevant instructional and work-based learning activities during the student's secondary school years that demonstrate the student has readiness skills for entry-level employment. Students who are awarded the career development and occupational studies commencement credential pursuant to this clause may not use such credential to meet the requirements set forth in section 100.5(d)(11) of this Part for the career development and occupational studies pathway to a local or Regents diploma.

(b) The superintendent shall, in accordance with the requirements of subparagraph (iii) of this paragraph, conduct a review to determine whether such student has otherwise demonstrated proficiency in the knowledge, skills and abilities in English language arts and/or mathematics, in addition to reviewing any other subject areas required for graduation where the student was not able to demonstrate his/her proficiency of the State's learning standards as measured by the corresponding Regents examination pursuant to clause (ii)(d) of this paragraph.

2. Subclause (3) of clause (b) of subparagraph (ix) of paragraph (2) of subdivision (d) of section 200.4 of the Regulations of the Commissioner of Education is amended, effective April 25, 2018, as follows:

(3) the appeal, safety net and superintendent determination [pathway] options that may be available to the student through section 100.5 of this Title to allow the student to meet the graduation assessment requirements.

8 NYCRR §§100.5 & 200.4

STATEMENT OF FACTS AND CIRCUMSTANCES WHICH NECESSITATE
EMERGENCY ACTION

The proposed amendment is necessary to implement Regents policy to permit students with disabilities to meet the Regents English language arts (ELA) and/or mathematics examinations eligibility conditions for the superintendent determination option by completing the requirements for the New York State Career Development and Occupational Studies (CDOS) Commencement Credential. In addition, the proposed rule would allow, for students with disabilities who are otherwise eligible to exit from high school in either the 2017-18 school year or 2018-19 school year only, a school district, registered nonpublic high school and charter school to award the CDOS Commencement Credential to a student with a disability who has not met all of the requirements, for purposes of eligibility for the superintendent determination option, provided that the school principal, in consultation with relevant faculty, has determined that the student has otherwise demonstrated knowledge and skills in the commencement level CDOS learning standards. Students who are awarded the CDOS commencement credential under this exception may not use such credential to meet the requirements for the career development and occupational studies graduation pathway option.

The proposed amendment was revised and adopted as an emergency measure, effective April 25, 2018. Such emergency action was necessary to adopt the revisions made in response to public comment and to otherwise ensure that the rule remains continuously in effect until the rule can be adopted as a permanent rule and to ensure

that certain students with disabilities who are otherwise eligible to graduate from high school in January 2018 and thereafter are aware that they may be considered an eligible student for the superintendent determination option if they meet the requirements of the proposed rule. It is also necessary to ensure that superintendents are on notice that they must make a determination as to whether certain students with disabilities are eligible for a local diploma, if the student meets the requirements of the proposed rule.

A Notice of Emergency Adoption and Revised Rule Making was published in the State Register on April 25, 2018. It is anticipated that the rule will be adopted at the June 2018 Board of Regents meeting and become effective as a permanent rule on June 27, 2018, the date which the Notice of Adoption will be published in the State Register. Emergency action is therefore necessary at the June 2018 meeting for the preservation of general welfare to ensure that provisions of the emergency action taken at the April 2018 Regents meeting remain in effect until they become effective as a permanent rule on June 27, 2018.

Attachment C

8 NYCRR §§100.5 & 200.4

ASSESSMENT OF PUBLIC COMMENT

Since publication of a Notice of Emergency Adoption and Revised Rule Making in the State Register on April 25, 2017, the State Education Department (SED) received the following comments on the proposed amendment from one commenter.

1. COMMENT:

Commenter expressed support for expanding pathways to graduation for students who have mastered State standards, but struggle to demonstrate knowledge and skills on Regents examinations. However, commenter expressed a general concern about the risk of discrimination, stigma, and devaluation of the local diploma for any graduation option limited to students with disabilities.

DEPARTMENT RESPONSE:

See Response to Comment #19 in the Assessment of Public Comment published in the State Register on April 25, 2018.

2. COMMENT:

Commenter recommends that the Department review all graduation requirements and diploma options with stakeholders to ensure that all students have the opportunity to demonstrate college and career readiness on the basis of rigorous, meaningful assessments within a more coherent system. Commenter further suggests a reduction in the number of required exit exams, to develop and support performance-based assessments in lieu of high-stakes exams and ensure that all pathways and options are available to all students.

DEPARTMENT RESPONSE:

Comment is beyond the scope of the revised rulemaking. However, the Department will consider such request. See also, Response to Comment #23 in the Assessment of Public Comment published in the State Register on April 25, 2018. SED will consider these recommendations in discussions regarding graduation requirements.

3. COMMENT:

Commenter expressed concern about the Department's existing guidance related to the Career Development and Occupational Studies (CDOS) Commencement Credential. Specifically, that the guidance does not address the eligibility conditions related to the Superintendent Determination option or the 2017-18 and 2018-19 CDOS requirements as proposed in this rulemaking. Additionally, commenter requests the development of simple, family-facing materials, available in languages other than English, to explain all graduation pathways, including options for students with disabilities and multilingual learners and clarify which options are available to students who are assessed using NYS Alternate Assessments.

DEPARTMENT RESPONSE:

The Department anticipates issuing updated guidance on the Superintendent Determination option following the permanent adoption of this proposed amendment. Additional information regarding the CDOS Commencement Credential, work-based learning and CTE are available at SED's Office of Curriculum website (<http://www.p12.nysed.gov/ciai/> and <http://www.p12.nysed.gov/cte/>). Additionally, the Department will consider these recommendations in the development of future guidance documents.

4. COMMENT:

Commenter is concerned that the CDOS Commencement Credential is not available to all students and requests that the Department provide current, clear resources to assist schools and districts in creating and expanding CDOS programs, including guidance for implementation of CDOS.

DEPARTMENT RESPONSE:

To the extent that commenter raises concerns about the availability of the CDOS Commencement Credential please see the Response to Comment #18 in the Assessment of Public Comment published in the State Register on April 25, 2018.

To the extent that commenter raises new concerns such concerns are not related to the revisions published in the April 25, 2018 State Register, therefore, no revisions are necessary at this time as these comments are beyond the scope of the proposed rulemaking and are related to the implementation of the rule. However, SED will consider these recommendations in the development of future guidance documents.

5. COMMENT:

Commenter requests that the Department monitor the use of use of CDOS Commencement Credential as and for meeting requirements for the Superintendent Determination option, and publicly report on the use of each pathway and option when releasing annual graduation data.

DEPARTMENT RESPONSE:

To the extent that commenter seeks the collection and release of data on the Superintendent Determination Option, the Department will review such request. See also, Response to Comment #14 in the Assessment of Public Comment published in the State Register on April 25, 2018.

