




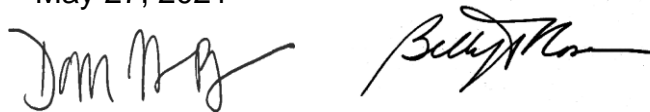
**TO:** The Honorable the Members of the Board of Regents

**FROM:** Kimberly Young Wilkins 

**SUBJECT:** Proposed Amendment to Section 135.4 of the Regulations of the Commissioner of Education Relating to High School Students' Eligibility to Participate in Interscholastic Competition Until the Conclusion of the Interscholastic Athletic Spring Season

**DATE:** May 27, 2021

**AUTHORIZATION(S):**



**SUMMARY**

**Issue for Decision (Consent Agenda)**

Should the Board of Regents adopt the proposed amendment of section 135.4 of the Regulations of the Commissioner of Education relating to high school students' eligibility to participate in interscholastic competition until the conclusion of the interscholastic athletic spring season?

**Reason(s) for Consideration**

Review of Policy.

**Proposed Handling**

The proposed amendment is being presented to the Full Board for adoption as an emergency rule at its June 2021 meeting. A copy of the proposed rule is attached (Attachment A), as well as a statement of facts and circumstances justifying emergency action (Attachment B).

**Procedural History**

The proposed rule was presented to the P-12 Education Committee for discussion and to the Full Board for adoption as an emergency rule at its April 2021 Regents meeting, effective April 13, 2021. A Notice of the Emergency Adoption and Proposed Rule Making was published in the State Register on April 28, 2021 for a 60-day public comment period. Because the April emergency action will expire on July 11, 2021, a second emergency action is necessary to ensure the emergency rule remains

continuously in effect until it can be permanently adopted. Supporting materials are available upon request to the Secretary to the Board of Regents.

### **Background Information**

Due to the COVID-19 crisis, the New York State Public High School Athletic Association has extended the interscholastic athletics spring season until June 30, 2021. The Department received inquiries on whether students who graduate prior to June 30, 2021 would be able to complete participation in their spring sports. Moreover, many of the student athletes in nonpublic schools graduate in May and/or early June, prior to the end of the spring interscholastic season. Currently, section 135.4 of the Commissioner's regulations does not permit participation in athletic competition after a student graduates. Commissioner's regulation §135.4(b)(1) states that "[a] pupil shall be eligible for senior high school athletic competition in a sport during each of four consecutive seasons of such sport commencing with the pupil's entry into the ninth grade and **prior to graduation...**"

Therefore, the Department proposes to amend section 135.4 of the Commissioner's regulations to clarify that eligible student athletes may participate in interscholastic sports and complete their spring season during the year in which they graduate, including when such students' graduation ceremony occurs prior to the end of the interscholastic athletic spring season. No other eligibility requirements are altered by this proposed amendment.

### **Related Regents Items**

April 2021: [Proposed Amendment to Section 135.4 of the Regulations of the Commissioner of Education Relating to High School Students' Eligibility to Participate in Interscholastic Competition Until the Conclusion of the Interscholastic Athletic Spring Season](https://www.regents.nysed.gov/common/regents/files/421p12a2.pdf)  
(<https://www.regents.nysed.gov/common/regents/files/421p12a2.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 July 12, 2021, as an emergency action upon a finding by the Board of Regents that such action is necessary for the preservation of the general welfare to ensure that eligible students are able to complete their interscholastic athletic spring season during the year in which they graduate and to ensure the emergency action taken at the April 2021 Regents meeting remains continuously in effect until the rule can be permanently adopted.

### **Timetable for Implementation**

If adopted as an emergency rule at the June 2021 Regents meeting, the emergency rule will become effective July 12, 2021. It is anticipated that the proposed rule will be presented to the Board of Regents for permanent adoption at the September 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. Because the emergency action will expire before the September 2021 Regents meeting, it is anticipated that an additional emergency action will be presented for adoption at the July 2021 meeting. If adopted at the September 2021 meeting, the proposed amendment will become effective as a permanent rule on September 29, 2021.

## Attachment A

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

Pursuant to sections 101, 207, 305, 803 and 3204 of the Education Law.

1. The opening paragraph of subclause (1) of clause (b) of subparagraph (ii) of paragraph (7) of subdivision (c) of section 134.5 of the Regulations of the Commissioner of Education is amended to read as follows:

(1) Duration of competition. A pupil shall be eligible for senior high school athletic competition in a sport during each of four consecutive seasons of such sport commencing with the pupil's entry into the ninth grade and prior to graduation, except that otherwise eligible students graduating at the end of the spring semester may continue to participate in athletics until the conclusion of the spring interscholastic athletic season, or except as otherwise provided in this subclause, or except as authorized by a waiver granted under clause (d) of this subparagraph to a student with a disability, or as authorized for participation in inclusive athletic activities pursuant to clause (e) of this paragraph. If a board of education has adopted a policy, pursuant to subclause (a)(4) of this subparagraph, to permit pupils in the seventh and eighth grades to compete in senior high school athletic competition, such pupils shall be eligible for competition during five consecutive seasons of a sport commencing with the pupil's entry into the eighth grade, or six consecutive seasons of a sport commencing with the pupil's entry into the seventh grade. A pupil enters competition in a given year when the pupil is a member of the team in the sport involved, and that team has completed at least one contest. A pupil shall be eligible for interschool competition in grades 9, 10, 11 and 12 until the last day of the school year in which he or she attains the age of 19, except as otherwise provided in subclause (a)(4) or clause (d) of this subparagraph, or

in this subclause. The eligibility for competition of a pupil who has not attained the age of 19 years prior to July 1st may be extended under the following circumstances.

2. Subclause (2) of clause (b) of subparagraph (ii) of paragraph (7) of subdivision (c) of section 134.5 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 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, has not graduated from high school, except that otherwise eligible students graduating at the end of the spring semester may continue to participate in athletics until the conclusion of the spring interscholastic athletic season 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.

3. Clauses (d) and (e) of subparagraph (ii) of paragraph (7) of subdivision (c) of section 134.5 of the Regulations of the Commissioner of Education is amended to read as follows:

(d) Waiver from the age requirement and four-year limitation for interschool athletic competition for students with disabilities in senior high school grades 9, 10, 11, and 12. For purposes of this clause, the term non-contact sport shall include swimming and diving, golf, track and field, cross country, rifle, bowling, gymnastics, skiing and archery, and any other such non-contact sport deemed appropriate by the Commissioner. A student with a disability, as defined in section 4401 of the Education Law, who has not yet graduated from high school, except that otherwise eligible students graduating at the end of the spring semester may continue to participate in athletics until the conclusion of the spring interscholastic athletic season, may be eligible to participate in a senior high school noncontact athletic competition under the following limited conditions:

(1) ...

(i) such student has not graduated from high school as a result of his or her disability delaying his or her education for one year or more;

(ii) ...

(iii) ...

(iv) ...

(2) ...

(e) Exemption from the age requirement and four-year limitation for inclusive athletic activities. A student who is enrolled in grades 9 through 12 and has not yet graduated from high school, except that otherwise eligible students graduating at the end of the spring semester may continue to participate in athletics until the conclusion of the spring interscholastic athletic season, may be eligible to participate in inclusive athletic activities under the following limited conditions:

(1) such student may be granted an exemption to the age requirement and four-year limitation prescribed in subclause (b)(1) of this subparagraph. An exemption shall only be granted upon a determination by the superintendent of schools or chief executive officer of the school or school system, as applicable, that the given student meets the following criteria:

(i) such student is a bona fide student of the high school for which the student wishes to participate in inclusive athletic activities and has not graduated from high school, except that otherwise eligible students graduating at the end of the spring semester may continue to participate in athletics until the conclusion of the spring interscholastic athletic season; and

(ii) ...

(iii) ...

(2) ...

STATEMENT OF FACTS AND CIRCUMSTANCES WHICH  
NECESSITATE EMERGENCY ACTION

Due to the COVID-19 crisis, the New York State Public High School Athletic Association has extended the interscholastic athletics spring season until June 30, 2021. The Department received inquiries on whether students who graduate prior to June 30, 2021 would be able to complete participation in their spring sports. Moreover, many of the student athletes in nonpublic schools graduate in May and/or early June, prior to the end of the spring interscholastic season. Currently, section 135.4 of the Commissioner's regulations does not permit participation in athletic competition after a student graduates. Commissioner's regulation §135.4(b)(1) states that "[a] pupil shall be eligible for senior high school athletic competition in a sport during each of four consecutive seasons of such sport commencing with the pupil's entry into the ninth grade and ***prior to graduation...***" The proposed amendment would permit eligible student athletes to participate in interscholastic sports and complete their spring season during the year in which they graduate, including when such students' graduation ceremony occurs prior to the end of the interscholastic athletic spring season.

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 April 2021 meeting of the Board of Regents. Because the Board of Regents meets at fixed intervals, the earliest the proposed amendment could be adopted by regular (nonemergency) action, pursuant to the requirements of the State Administrative Procedure Act, including publication in the State Register and expiration of a 60-day public comment period, is the September 2021 Regents meeting, and the earliest an



adoption at such meeting could be made effective would be September 29, 2021, the date the Notice of Adoption would be published in the State Register. However, the April emergency rule will expire on July 11, 2021.

Therefore, a second emergency action is necessary at the June 2021 meeting, effective July 12, 2021, for the preservation of the general welfare in order to ensure that eligible students are able to participate in interscholastic competition until conclusion of the interscholastic athletic spring season and to ensure the emergency action taken at the April 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 September 2021 meeting, which is the first scheduled meeting after expiration of the 60-day public comment period mandated by the State Administrative Procedure Act. However, since the emergency regulation will expire before the September 2021 Regents meeting, it is anticipated that an additional emergency action will be presented for adoption at the July 2021 Regents meetings.