

## 8 NYCRR §135.4(c)(7)(ii)

### ASSESSMENT OF PUBLIC COMMENT

Since publication of a Notice of Proposed Rule Making in the State Register on November 9, 2016, the State Education Department received the following comments:

#### Athletic Placement Process- §135.4(c)(7)(ii)(a)

##### 1. COMMENT:

Commenter enthusiastically supports the amendment stating that seventh and eighth grade students who attend a K-8 school district should be afforded the same opportunity for the athletic placement process. The current regulation is ambiguous and adversely affects gifted athletes seeking levels of safe training and competition commensurate with their outstanding physiological maturity and performance ability. The proposed amendment is in the best interest of exceptional student athletes who attend seventh or eighth grade in a K-8 school district.

##### DEPARTMENT RESPONSE:

No response necessary as the comment is supportive.

##### 2. COMMENT:

Commenter supports the proposed amendment and the limitation on eligibility if following participation on a high school interscholastic team, the student chooses to attend a different high school with which the K-8 district contracts for the education of high school students.

##### DEPARTMENT RESPONSE

No response necessary as the comment is supportive.

##### 3. COMMENT:

Commenter seeks additional language to the proposed amendment which would permit seventh and eighth grade students who are bona fide residents of a K-8 school district, but who attend nonpublic schools, to be eligible for the athletic placement process at the high school(s) with which the K-8 district contracts.

**DEPARTMENT RESPONSE:**

The intended scope of this amendment is designed to clarify the conditions under which K-8 public school districts may employ the APP protocol to allow the opportunity for exceptional student athletes to participate in interscholastic sports at the high school(s) with which the K-8 school district contracts for the education of its high school students, when such students are bona fide students of the K-8 school district. Therefore, this comment is outside the scope of the proposed amendment and no amendments are necessary.

**4. COMMENT:**

Commenter, an athletic director in a K-8 district, supports the proposed amendment because of the artificial limits placed on exceptional student athletes who are denied the opportunity to play at a challenging and competitive level. In contrast there are no such limits on students who excel academically and wish to attend one of the high schools with which the K-8 district contracts to take calculus or physics. This does not make sense and seems extremely unfair to discriminate against someone who has athletic talents and yet has no opportunity to excel, where is the equity here? Commenter further expressed understanding about the potential for recruitment

problems, but has not seen it occur at the eighth grade level now and doesn't foresee a change in that behavior.

DEPARTMENT RESPONSE:

No response necessary as the comment is supportive.

5. COMMENT:

All concerns raised by NYSPHSAA in the implementation of the APP for K-8 schools can be addressed through collaboration among partner districts, and policies enacted by the respective boards of education to ensure compliance with the regulations. Furthermore, there are some K-8 districts that already have such policies to govern this very issue.

DEPARTMENT RESPONSE:

The Department appreciates this supportive comment and understands that additional revisions to the comprehensive APP protocol guidance will be necessary to provide these few K-8 school districts and the districts with which they contract for the education of their high school students with the necessary guidance to safely and appropriately implement the APP, if they choose.

6. COMMENT:

Commenter supports the amendment because the bona fide students of the K-8 districts are at a disadvantage compared with their peers who are enrolled in the K-12 district and will attend the same high school with which the K-8 district contracts, as they are not afforded the same opportunity for higher level competition.

DEPARTMENT RESPONSE:

No response necessary as the comment is supportive.

7. COMMENT:

A restrictive transfer policy enacted by the board of education who chooses to implement the APP addresses conditions that could lead to recruitment, as students would not be able to move back and forth between programs without penalty.

DEPARTMENT RESPONSE:

No response necessary as the comment is supportive.

8. COMMENT:

Several commenters expressed concern that the proposed amendments would jeopardize student safety and equal opportunity for participation.

DEPARTMENT RESPONSE:

Commissioner's regulation §135.4(c)(7)(ii) establishes the parameters for participation in interscholastic athletic competition for students in grades 7 through 12. The underlying spirit of Commissioner's regulations governing interscholastic athletics is to provide for the safety and equal opportunity for participation for public school students. These principles guide athletic eligibility determinations for students in seventh or eighth grade who wish to participate in high school athletics pursuant to the athletic placement process (8 NYCRR §135.4(c)(7)(ii)(a)); as well as for purposes of mixed competition (8 NYCRR §135.4(c)(7)(ii)(c)); and for students with disabilities who wish to extend eligibility to participate in non-contact sports (8 NYCRR

§135.4(c)(7)(ii)(d)). The proposed amendments are designed to continue these principles of safety and opportunity for competition for all public school students.

#### 9. COMMENT:

Several commenters expressed concern with the proposed amendments stating that being a member of the “school district” in which the student wishes to participate is an integral and critical aspect of the APP.

#### DEPARTMENT RESPONSE:

The proposed amendments are designed to clarify the conditions under which K-8 public school districts may employ the APP protocol to allow the opportunity for exceptional student athletes to participate in interscholastic sports at the high school(s) with which the K-8 school district contracts for the education of its high school students, when such students are bona fide students of the K-8 school district.

Presently, there are 13 public school districts in the State that operate to serve students in grades K-8 only, and contract for the education of their high school students with other public school districts pursuant to the provisions of Education Law §§2040, 2045 and Commissioner’s regulation §174.4. The unique configuration of these 13 public school districts without a “district high school,” makes it impossible for these students to be enrolled in the district within which they will attend high school when they are in 7<sup>th</sup> or 8<sup>th</sup> grade. The proposed amendment relates only to enabling bona fide students enrolled in a public K-8 school district to participate in the APP only if the boards of education of the sending school district and the receiving school district(s) adopt a resolution to permit such participation. Therefore, because these student

athletes are bona fide students of the public K-8 school district, the Department does not share this concern.

10. COMMENT:

Commenters asserted that some K-8 school districts were permitted by NYSED to allow students to participate in APP on a case by case basis with no rationale or consistency, which has led to confusion. Commenter asserted that the majority of these “waivers” were provided to K-8 districts that have a contract with a “single” school district making the transition more traditional and like K-12 districts.

DEPARTMENT RESPONSE:

Because of their unique configuration, these 13 K-8 public school districts do not have their own “district high school,” and as a result, questions have arisen regarding the ability of students who are enrolled in K-8 public school districts to participate in the APP because they are not “enrolled” in a district with its own high school. The proposed regulation is therefore designed to clarify the conditions under which K-8 public school districts may employ the APP protocol to allow the opportunity for exceptional student athletes to participate in interscholastic sports at the high school(s) with which the K-8 school district contracts for the education of its high school students, when such students are bona fide students of the K-8 school district.

Additionally, Education Law §2040 provides that school districts that do not maintain a home high school may contract for the education of its high school students with one or more school districts. Therefore, limiting the proposed amendments as suggested by the commenter would be inconsistent with the authority to contract with one or more

school districts provided by the statute. The proposed amendments also ensure that, where a district contracts with more than one neighboring school district, its 7<sup>th</sup> and 8<sup>th</sup> grade students may select only one high school in which to compete during their seventh and eighth grade participation. The proposed amendments also require that, if, following participation in a high school team during seventh and/or eighth grade, such student chooses to attend a different high school with which the student's K-8 school district contracts for the education of its high school students, such student shall be ineligible to participate in any interscholastic athletic contest in a particular sport for a period of one year.

11. COMMENT:

Commenters expressed concern relating to the practical implementation of APP in K-8 school districts. Particularly, which medical director will be responsible for approving the student for participation? Which school administrator will be responsible for approving the student for participation? Which school district will be responsible for transportation? Which school district will be responsible for any disciplinary action? Which school district will be responsible in the event of an injury?

DEPARTMENT RESPONSE:

See response to Comment #5.

12. COMMENT:

Commenter expressed support for the amendments and that indicated any implementation concerns could be easily resolved through cooperation between the K-8 and the high school districts.

DEPARTMENT RESPONSE:

No response necessary as the comment is supportive.

13. COMMENT:

Although K-8 school districts represent a small portion of districts, commenter expressed fears if K-8 students are granted the ability to go through the APP to participate at a school in which they are not a bona fide student, this will ultimately lead to other students (nonpublic, homeschooled etc.) requesting similar privileges.

DEPARTMENT RESPONSE:

The proposed amendment relates only to enabling bona fide students enrolled in a public K-8 school district to participate in the APP, and then only if the boards of education of the sending school district and the receiving school district(s) adopt a resolution to permit such participation. Therefore, because these student athletes are bona fide students of the public K-8 school district, the Department does not share this concern.

14. COMMENT:

Commenter supports the clear language of the amendments which clearly limit the availability of APP to public school students attending a K-8 district. The purpose is to provide these public school students with the same opportunity currently enjoyed by public school students attending K-12 districts. Commenter expressed that treating these public school students differently simply because of the geographic and historic anomaly of their attendance in a K-8 district does not make sense. The fact that there

are relatively few K-8 districts in the State and, thus, relatively few students who will be discriminated against does not justify continuing such an unequitable policy.

DEPARTMENT RESPONSE:

No response necessary as the comment is supportive.

15. COMMENT:

Commenters expressed concern that this could lead to other students requesting similar privileges if their school district does not offer opportunities they wish to receive (i.e. swimming program for a lack of a natatorium, football team for a lack of interest, baseball for a lack of field, etc.).

DEPARTMENT RESPONSE:

The proposed amendment is expressly limited to the APP as presently permitted by Commissioner's regulation §135.4(c)(7)(ii)(a)(4). The proposed amendment merely makes the APP available to bona fide seventh or eighth grade students who are regularly enrolled in a public school district organized for pupils in grades K-8 that contracts with a neighboring school district or districts on a tuition basis for the education of its high school students pursuant to Education Law §§2040 and 2045 and Commissioner's regulation §174.4.

16. COMMENT:

Commenters expressed concern surrounding the one year period of ineligibility for a K-8 student who participates at the high school level and then transfers to a

different high school with which the K-8 district contracts for 9<sup>th</sup> grade. Because the current regulations do not impose such restrictions in other circumstances, commenters were concerned that this could lead to the Department being asked to implement and interpret other “eligibility” rules pertaining to transfers (change in residency, corresponding and non-corresponding transfers, waivers, exemptions, etc.) established by NYSPHSAA.

DEPARTMENT RESPONSE:

The Department believes this is an important safeguard to protect against concerns raised about improper recruitment activities in connection with the APP process for K-8 school districts, within the applicable statutory authority of the Commissioner to promulgate regulations which govern interscholastic athletics. The Department does not share the concern that this opens the door to the Commissioner’s interpretation of other rules of athletic competition.

Duration of Competition §135.4(c)(7)(ii)(b)(1)(i)

17. COMMENT:

Commenter supports the proposed amendments that provides for extended eligibility in limited circumstances with appropriate documentation. Commenter expressed frustration with a student who faced challenging familial circumstances which caused the interruption of his education, yet was denied an extension of eligibility because of the narrowly amended regulation in 2015 which removed “other such circumstances” as a potential qualifying circumstance for extended eligibly.

DEPARTMENT RESPONSE:

No response is necessary as the comment is supportive.

18. COMMENT:

Commenters expressed concern that proposed amendments will place an undue burden on superintendents and will require them to make individual assessments to determine whether a fifth year student's participation will result in an unfair advantage in competition and whether the safety of the pupil or others is not at risk. There is great concern among the membership of NYSPHSAA regarding requiring a superintendent to make a determination that a student who is older, likely bigger and/or more skilled, would not be a potential safety risk or create an unfair advantage.

DEPARTMENT RESPONSE:

The underlying spirit of Commissioner's regulations governing interscholastic athletics is to provide for the safety and equal opportunity for participation for public school students. These principles presently guide athletic eligibility determinations for students in seventh or eighth grade who wish to participate in high school athletics pursuant to the athletic placement process (8 NYCRR §135.4(c)(7)(ii)(a)); for purposes of mixed competition (8 NYCRR §135.4(c)(7)(ii)(c)); and for students with disabilities who wish to extend eligibility to participate in non-contact sports (8 NYCRR §135.4(c)(7)(ii)(d)). The existing regulations governing the above circumstances presently require superintendents to make such determinations and the Department has issued appropriate guidance. The proposed amendments are designed to continue these principles of safety and opportunity for competition. However, in light of the concerns raised by the public comment, the Department has revised the regulation to condition the eligibility extension on the same standard used for mixed competition, a

determination that such participation would not have a significant adverse effect upon the opportunity of other pupils to participate successfully in interschool athletic competition in the sport.

19. COMMENT:

Commenter expressed concern that the amendments may create inequities with respect to students who are deemed eligible and those who are not granted an extension. Specifically, commenter was concerned that consideration of safety and opportunity for competition might allow a student who is not a talented player an extension of eligibility but would not allow a student who is bigger and more skilled the same opportunity. It would be helpful if objective criteria were added to the regulation to provide for consistent interpretation.

DEPARTMENT RESPONSE:

See response to Comment #18. Specifically, those determinations are presently made in the context of male and female pupils in interscholastic athletic teams that balance the need for safety and opportunity for completion for all student athletes. Additionally, in response to public comment the Department has revised the amendment to further guide the circumstances under which an eligibility extension may be granted.

20. COMMENT:

Several commenters oppose the proposed amendments expressing concern that the proposal reverts to wording the Board of Regents amended in 2015 which

previously also allowed extension when the student was unable to play because of an accident, illness or “other similar circumstances.”

DEPARTMENT RESPONSE:

The Department continuously reviews the impact of regulations and implementation of policy. As a result of such review, the Department proposed to amend the duration of competition regulation to clarify and further define the circumstances under which extended eligibility may be granted.

21. COMMENT:

Several commenters were concerned that the proposed changes could result in potential litigation against districts that permit a student to participate and another student is injured by that student, or by students who are denied an extension of eligibility challenging the determination in court or before the Commissioner.

DEPARTMENT RESPONSE:

See response to Comment #18. However, to the extent that determinations relating to participation in interscholastic athletics are presently disputed, the proposed amendment makes no changes to the availability of the avenues for judicial or administrative review.

22. COMMENT:

Commenter suggested amending the proposed amendments to include a clear definition and criteria for which “other circumstances” might warrant an extension of eligibility. This would provide for consistent and uniform interpretation throughout the State.

DEPARTMENT RESPONSE:

In response to public comment, the Department has revised the amendment to clarify and further define the circumstances under which extended eligibility may be granted. Furthermore, the Department anticipates issuing guidance relating to the implementation of the proposed amendments.

23. COMMENT:

Commenters expressed concern surrounding the role of the athletic sections in determining eligibility indicating that each of the eleven Section Athletic Councils takes this responsibility seriously and reviews each application to make determinations within the parameters of the regulation. Commenters expressed that recent amendments to the regulation have helped make eligibility determinations consistent throughout the state and were concerned that these amendments would result in a more subjective and inconsistent process.

DEPARTMENT RESPONSE:

See response to Comment #18. In response to public comment, the Department has revised the amendment to clarify and further define the circumstances under which extended eligibility may be granted. .

24. COMMENT:

Commenters expressed concern about specifying the Commissioner's de novo review of the record in a challenge to an eligibility determination by a section of athletic association. Commenters believe that it conflicts with the legal standard of review used by the Commissioner in §310 appeals. They are concerned that it puts schools, sections and NYSPHSAA in an unfair position of having to follow the Commissioner's regulations

only to be overturned by the Commissioner, not because they made the “wrong” decision, but because the Commissioner would decide the case differently.

DEPARTMENT RESPONSE:

The Commissioner has always had, and continues to have, the authority to determine that a decision challenged pursuant to Education Law §310 was not reasonable and to substitute his/her judgment (see e.g., Appeal of the Board of Education of the Byron-Bergen Central School District, 25 Ed Dept Rep 404, Decision No. 11,628 (1986); Appeal of Kraft, 24 id. 243, Decision No. 11,566 (1986)). Therefore, the phrase “de novo review” has been eliminated from the proposed amendments as unnecessary.