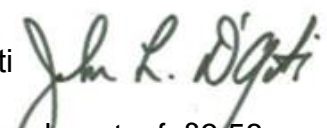




TO: Higher Education Committee
FROM: John L. D'Agati 
SUBJECT: Proposed Amendment of §3.58 and Addition of a New §3.59 to the Rules of Board of Regents to Establish Procedures and Fees for Institutional Authorization to Offer Degree Programs
DATE: November 2, 2017

AUTHORIZATION(S):



SUMMARY

Issue for Discussion

Should the Board of Regents amend §3.58 and add a new §3.59 to the Rules of the Board of Regents to establish fees and procedures for the review of applications for new institutional authorization to offer degree programs?

Reason(s) for Consideration

Review of Policy.

Proposed Handling

The proposed amendment is submitted to the Higher Education Committee for discussion at the November 2017 Board of Regents meeting (Attachment A is a copy of the proposed amendment).

Procedural History

A Notice of Proposed Rule Making will be published in the State Register on November 29, 2017. Supporting materials are available upon request from the Secretary to the Board of Regents.

Background Information

Over the past several years, there has been a dramatic increase in the number of entities seeking to establish new degree-granting institutions in New York State. In addition, the reviews and analyses necessary to make decisions concerning these entities have become increasingly complex and time consuming; sometimes involving the review of multi-state or international corporations, organizations with opaque financial conditions, mergers of more than one corporate entity, and/or the conversion of a for-profit corporation to a proposed not-for-profit college. Resources (professional staff and funds to secure external expert peer reviewers) available to the Department do not meet the need and render the Department unable to conduct the quality review necessary to accurately inform the Board of Regents in its decision to authorize new colleges and universities.

In addition to the challenge of insufficient resources to support quality review, the current processes for the review of independent/not-for-profit organizations seeking to establish new degree-granting institutions have been largely guided by past practice and are not clearly defined in regulation. The application process and standards for review and approval are not clear or transparent to applicant entities.

In 2006, the Board of Regents adopted §3.58 of the Rules of the Board of Regents which established requirements and processes for proprietary/for-profit organizations seeking initial degree-conferring authority (establishing a new college). Similar provisions related to organizations seeking to become a new independent/not-for-profit institution have not been enacted. The Department is proposing the addition of a new §3.59 of the Rules of the Board of Regents to establish procedures and fees for the review of applications to establish new independent/not-for-profit institutions. In addition, since proprietary/for-profit institutions are held to the same quality standards as independent institutions, the Department proposes amendments to §3.58 so that the same procedures and fees apply equally to both not-for-profit and proprietary/for-profit institutions.

The proposed fees will provide resources to support evaluation of prospective institutions in a manner that does not diminish resources otherwise available to support New York State's existing degree-granting institutions. The establishment of procedures for review will provide clarity and transparency in the steps and standards that must be met to be recommended for authorization by the Board of Regents. The annual administrative fee for institutions that are approved by the Board of Regents will support additional oversight by the Department during the period that the institution has provisional authorization. The proposed fee structure is as follows:

Application Phase	Proposed Fee
Initial written application (one program)	\$7,000
Additional programs submitted with initial written application	\$2,500
In-person capacity interview (as needed)	\$1,500
Site-review (as needed)	\$5,000
Annual administrative fee for provisional period (if approved)	\$5,000

This fee structure is reasonable in relation to the type and nature of the work required of the Department to review these proposed programs and is comparable to fees currently charged by other states. Currently, 44 other states charge fees for applications to establish a new institution. The fee structures in other states vary greatly. Some states charge flat fees, others charge per program proposed, and several states require additional costs such as securing surety bonds, and other report review fees. The chart below provides select examples of fees other states charge to establish a new degree-granting institution.

Select Examples of State Approval Fees for Institutions of Higher Education (IHEs) to Establish a Physical Presence	
Hawaii	Initial application fee is \$10,000. Renewal application fees are \$10,000 every two years.
Kansas	Initial application fee is \$4,000 base fee plus \$1,500-\$5,000 per program, for initial review. Additional costs include \$20,000 surety bond for records retention upon closure. Renewal fee is 3% of gross tuition received or derived from Kansas students, but not less than \$1,800 and not more than \$10,000.
Maryland	Initial review is \$7,500 for up to two academic programs and \$850 for each additional program. There is also a \$7,500 fee per site for each site at which an institution is delivering face-to-face instruction.
Massachusetts	Initial application fee is \$10,000 plus \$2,000 for each degree requested at the same time if more than one. Annual fee each year for the first five years for institutions new to Massachusetts: \$4,000. Periodic inspection or review (if a separate review from Board's participation in New England Association of Schools and Colleges review is required): \$4,000.
Ohio	Initial review is \$5,000 per program, plus \$1,000 per additional program submitted at the time of application. Progress report fee is \$1,000 and renewal costs may range from \$1,000-\$7,500 based on a changing scope.
Oregon	Initial application fee is \$7,000, due biennially, plus a surety bond in Oregon.
Tennessee	Initial application fee is \$3,000, plus \$500 for each proposed program. Institutions wishing to offer degrees must pay between \$1,000 and \$4,000 for the highest degree program level being offered (associates to doctorate). The annual reauthorization fee of .75% of the annual gross tuition collected for Tennessee students (Minimum \$500, Maximum \$25,000).
Virginia	Initial application is \$6,000. New institutions must provide a surety instrument or letter of credit with their application. The amount of the surety is determined based on funds that would be needed to refund unearned tuition for non-title IV students in the event of closure. The

annual re-certification fee is based on gross tuition and ranges from \$250 to \$5,000 per branch operating in Virginia.

Source: State Higher Education Executive Officers Association (SHEEO), State Authorization Surveys. Accessed on November 30, 2016, at http://sheeo.org/sheeo_surveys

As one comparative example, the chart below compares the proposed New York fees to those currently in place in Massachusetts, which may be considered comparable to New York in terms of the level of rigor and review:

Example of Institution Seeking Two Programs with a Five-Year Term			
Massachusetts		Proposed New York	
Initial Review:	\$12,000	Written application	\$7,000
		Additional Program	\$2,500
		Capacity Interview	\$1,500
		Site Review	\$5,000
Term Fee 4k/year @ 5 years:	\$20,000	Term Fee 5k/year @ 5 years:	\$25,000
5-Year total*:	\$32,000	5-Year Total*:	\$41,000
* excludes periodic inspections @ \$4,000 each		*includes the cost of site review	

Related Regents Items

N/A

Timetable for Implementation

Following the 45-day public comment period required under the State Administrative Procedure Act, it is anticipated that the proposed amendment will be presented to the Board of Regents for adoption at its February 2018 meeting. If adopted at the February 2018 meeting, the proposed amendment will become effective on February 28, 2018.

AMENDMENT TO THE RULES OF THE BOARD OF REGENTS

Pursuant to sections 207, 210, 215, 216, 218, and 224 of the Education Law, State Finance Law section 97-LLLL, and Chapter 82 of the Laws of 1995.

1. A new section 3.59 shall be added to the Rules of the Board of Regents, as follows:

Authorization of an independent/not-for-profit higher education institution to offer programs leading to postsecondary degrees.

(a) Definitions. For purposes of this section only:

(1) *Institution* means an independent/not-for-profit institution of higher education whose corporate purpose includes the provisional or permanent authorization to offer postsecondary curricula registered pursuant to Part 52 of this Title, leading toward any one or number of the undergraduate and/or graduate degrees set forth in Section 3.50 of this Title. Authorization to operate as an independent/not-for-profit institution must be provided through the issuance of a charter by the Board of Regents pursuant to Sections 3.21 or 3.22 of this Title, as applicable. In rare circumstances, Regents authorization to operate as an independent/not-for-profit institution may be provided through the Consent of the Commissioner to an amendment to the corporate purposes of an existing corporation, which holds a certificate of incorporation or has been formed under the not-for-profit corporation laws of New York State.

(2) *Provisional authorization* means authorization to offer postsecondary curricula registered pursuant to Part 52 of this Title, leading toward any undergraduate and/or graduate degree(s) set forth in Section 3.50 of this Title. An institution granted provisional authorization shall have all the powers, privileges, and obligations that it

would have under permanent authorization, except it shall not have the power to confer degrees.

(3) *Permanent authorization* means institutional authorization to offer curricula registered pursuant to Part 52 of this Title, with all the powers, privileges, obligations of an institution that is granted an absolute charter pursuant to Section 3.21 of this Title, including the authority to confer specific degrees set forth in Section 3.50 of this Title.

(4) *Satisfactory, sufficient, effective, and reasonable likelihood* means satisfactory, sufficient, effective, and reasonable likelihood respectively in the judgment of the Commissioner.

(b) *General requirements.* Commencing on April 1, 2018 and during periods in which the Department is accepting new applications for institutions seeking to offer degree programs in New York State, an applicant must apply and obtain provisional authorization to operate an institution in New York State from the Board of Regents for a period of up to five years, in accordance with the requirements of subdivision (c) of this section, prior to obtaining permanent authorization. Applicants seeking provisional or permanent authorization under this section must provide the Department with satisfactory evidence of the following:

(1) need for each degree program that the institution seeks to offer in New York based upon demand by students and/or employers and/or need of society for such programs, in accordance with section 137 of chapter 82 of the laws of 1995;

(2) a New York State-based governing board that has final responsibility for and control over the New York institution, independent from any parent institution, and such board has experience operating an educational institution or other business or

enterprise in an effective manner which demonstrates their capacity to operate an institution under this section;

(3) capacity to operate as an institution in compliance with the Education Law, the program registration standards set forth in Part 52 of this Title and other federal and state statutes, regulations, and policies related to the operation of an institution;

(4) financial resources to ensure satisfactory conduct of proposed degree programs, achievement of its institutional mission, and proposed educational goals;

(5) performance outcomes that demonstrate that the institution and/or programs it operates are effective, where applicable; and

(6) that the institution, including but not limited to individuals governing and administering the institution have a record free from evidence suggesting fraudulent and/or deceptive practices, including but not limited to misleading or misrepresentation in advertising.

(c) Provisional authorization to offer degree program(s).

(1) Initial Review. A written application based on the criteria set forth in subdivision (b) of this section, and including the fees set forth in subdivision (e) of this section, shall be submitted to the Department in a timeframe and manner prescribed by the Commissioner. Properly submitted applications shall be reviewed by the Department to determine whether the application demonstrates sufficient initial evidence of meeting the requirements set forth in subdivision (b) of this section.

(i) For those written applications that demonstrate sufficient initial evidence of meeting the requirements set forth in subdivision (b) of this section the Department shall notify the applicant in writing, and the applicant shall be subject to the secondary review procedures set forth in subdivision (c)(2).

(ii) For written applications that do not demonstrate sufficient initial evidence of meeting the requirements set in subdivision (b) of this section, the application shall be closed without further action. The Department shall provide the applicant with the reasons for its decision in writing. The applicant may appeal the Department's decision to the Commissioner, within 10 days of the date of the Department's decision, and may submit additional information in support of its position in a timeframe determined by the Commissioner. Applicants whose applications are closed may submit a new application pursuant to subdivision (c)(1) of this section no earlier than one year after the Department's final determination to close the application.

(2) Secondary Review. For applications that meet the provisions of subdivision (c)(1)(i):

(i) The Department shall review any available information concerning the applicant, including but not limited to information related to financial resources, academic quality and performance outcomes and consumer protections.

(ii) The Department may cause the applicant to undergo an in-person capacity interview and a site review, if additional information is needed to determine if the applicant has satisfactorily met the requirements in subdivision (b) of this section, and may require the applicant to provide additional reports and/or information based on the findings from such review.

(iii) The Department shall conduct a canvass in accordance with Section 137 of Chapter 82 of the laws of 1995.

(3) Determination. For applicants that have completed the procedures set forth in subdivision (c)(2) of this section, the Deputy Commissioner shall consider the information obtained during the Department's review of the application during the initial

and secondary review, including in-person interviews and any site visits, and make a determination as to whether to recommend to the Commissioner and Board of Regents that the applicant be granted provisional authorization.

(i) If the Deputy Commissioner determines the applicant meets the requirements set forth in subdivision (b) of this section, the Deputy Commissioner shall make a recommendation to the Commissioner and Board of Regents to grant provisional authorization. At a regularly scheduled public meeting, the Board of Regents shall consider the Deputy Commissioner's recommendation and make the determination on whether to grant the applicant provisional authorization.

(ii) If the Deputy Commissioner determines the applicant does not meet the requirements set forth in subdivision (b) of this section, the application shall be closed without further action. The Deputy Commissioner shall provide the applicant with the reasons for the decision in writing. The institution may appeal the Deputy Commissioner's decision to the Commissioner, within 10 days of the date of the Deputy Commissioner's decision, and may submit additional information in support of its position in a timeframe determined by the Commissioner. If an application is closed, a new application may be submitted no earlier than one year after the final determination to close the application.

(4) Progress toward permanent authorization. An institution that receives provisional authorization shall maintain satisfactory evidence that it meets the requirements set forth in subdivision (b) of this section.

(i) At the Department's request, the institution shall provide the Department with information and reports concerning its performance and demonstration of progress

toward meeting the requirements for permanent authorization as set forth in subdivision (d) of this section.

(ii) At least 12 months prior to the end of the provisional authorization period, the institution shall apply to the Department for permanent authorization, in accordance with the requirements of subdivision (d) of this section. An institution that fails to apply for permanent authorization within 12 months prior to the end of its provisional authorization period shall not be eligible for permanent authorization and its provisional authorization shall expire at the end of its provisional period, except in rare circumstances as determined by the Commissioner.

(d) Permanent Authorization.

(1) An institution with provisional authorization shall submit to the Department, in a form and timeframe prescribed by the Commissioner, a written application for permanent authorization and satisfactory evidence that it met the requirements set forth in subdivision (b) of this section throughout its provisional period.

(2) The Department may cause the institution to undergo a site review and provide additional reports in support of its application for permanent authorization.

(3) The Deputy Commissioner shall review the information submitted by the institution and any information obtained during the Department's site reviews, and other information obtained during the Department's review of the institution during its provisional period. The Deputy Commissioner shall consider whether the institution provided sufficient evidence that it met the requirements set forth in subdivision (b) of this section during its provisional authorization. The Deputy Commissioner shall make a recommendation to the Commissioner and Board of Regents to either grant the

institution permanent authorization, extend its provisional authorization, or deny permanent authorization.

(4) At a regularly scheduled public meeting, the Board of Regents shall consider the findings and recommendations of the Deputy Commissioner and take one of the following actions:

(i) grant permanent authorization;

(ii) extend provisional authority for an additional period to be determined by the Board of Regents, for the purposes of additional review in consideration of permanent authorization;

(iii) deny permanent authorization and extend the provisional authorization period with limited authority for the purposes of teach-out and closure; or

(iv) deny permanent authorization and direct immediate closure.

(e) Fees. In addition to the fees set forth in section 3.23 of this Title, applicants who apply for provisional or permanent authority under this section, shall be subject to the following fees:

(1) Application for provisional authorization. A nonrefundable and nontransferable fee of \$7,000 shall be submitted with an application for provisional authorization under this section, plus \$2,500 for each additional degree program if more than one such program is requested. Failure to submit this fee with the application will constitute an incomplete application and submitted materials will not be reviewed.

(2) In-person capacity interview. A nonrefundable and nontransferable fee of \$1,500 shall be submitted upon notice from the Department pursuant to subdivision (c)(1)(i) of this section that such an interview is needed. Failure to submit this fee within

90 days of the Department's notification will result in the application being closed without further action.

(3) Site-review. A nonrefundable and nontransferable fee of \$5,000 shall be submitted upon notification from the Department that a site-review is needed pursuant to subdivisions (c)(2)(ii) or (d)(2) of this section. Failure to submit this fee within 90 days of the Department's notification will result in the application being closed without further action.

(4) Annual administrative fee. An institution granted provisional authorization shall be subject to an annual non-refundable fee of \$5,000 commencing in the first annual period that the institution obtains provisional authorization, and for each annual period through the term of its provisional authorization. The fee for each annual period shall be due no later than 60 days prior to the start of each annual period for such institution, as determined by the Department.

2. Subdivision (b) of section 3.58 of the Rules of the Board of Regents, shall be amended, as follows:

(b) General Requirements.

(1) A for-profit institution may be granted degree-conferring authority by the Board of Regents in accordance with the procedures of this section. Such an institution that has no degree-conferring authority must first obtain provisional authority to confer degrees for a period of up to five years, in accordance with the requirements of subdivision (c) of this section. At least 12 months prior to the end of the provisional authority period, such institution must apply to the department for permanent authority to confer degrees, in accordance with the requirements of subdivision (d) of this section. The Board of Regents shall determine whether to grant such permanent authority, or

extend the provisional authority to confer degrees for an additional period of up to five years, or deny continuing degree-conferring authority past the term of the previously granted provisional authority.

(2) During the period of provisional authority, the institution shall take steps to meet the requirements for permanent authority to confer degrees, as prescribed in subdivision (d) of this section. At the department's request, the institution shall provide the department with information and reports concerning its progress in meeting the requirements for permanent authority to confer degrees.

(3) Applicants seeking provisional or permanent authorization under this section shall maintain satisfactory demonstration of the following:

(i) need for each degree program that the institution seeks to offer in New York based upon demand by students and/or employers and/or need of society for such programs, in accordance with section 137 of chapter 82 of the laws of 1995;

(ii) institutional capacity to operate as an institution in compliance with the Education Law, the program registration standards set forth in Part 52 of this Title and other federal and state statutes, regulations, and policies related to the operation of an institution;

(iii) financial resources to ensure satisfactory conduct of proposed degree programs, achievement of its institutional mission, and proposed educational goals;

(iv) performance outcomes that demonstrate that the institution and/or programs it operates are effective, where applicable; and

(v) that the individuals having ownership or control of the institution have a record free from evidence suggesting fraudulent and/or deceptive practices, including but not limited to misleading or misrepresentation in advertising.

3. Subdivision (c) of section 3.58 of the Rules of the Board of Regents shall be repealed and a new subdivision (c) shall be added as follows:

(c) Provisional authorization to confer degrees.

(1) Initial Review. A written application based on the criteria set forth in subdivision (b) of this section, and including the fees set forth in (i) of this section, shall be submitted to the Department in a timeframe and manner prescribed by the Commissioner. Properly submitted applications shall be reviewed by the Department to determine whether the application demonstrates sufficient initial evidence of meeting the requirements set forth in subdivision (b) of this section.

(i) For those written applications that demonstrate sufficient initial evidence of meeting the requirements set forth in subdivision (b) of this section the Department shall notify the applicant in writing, and the applicant shall be subject to the secondary review procedures set forth in subdivision (c)(2).

(ii) For written applications that do not demonstrate sufficient initial evidence of meeting the requirements set in subdivision (b) of this section, the application will be closed without further action. The Department shall provide the applicant with the reasons for its decision in writing. The applicant may appeal the Department's decision to the Commissioner, within 10 days of the date of the Department's decision, and may submit additional information in support of its position in a timeframe determined by the Commissioner. Applicants whose applications have been closed may submit a new written application under the terms of subdivision (c)(1) no sooner than one year after the final determination to close the application.

(2) Secondary Review. For applications that meet the provisions of subdivision (c)(1)(i):

(i) The Department shall review any available information concerning the applicant, including but not limited to information related to availability of financial resources, academic quality and performance, and consumer protections.

(ii) The Department may cause the applicant to undergo an in-person capacity interview and a site review, and may require the applicant to provide additional reports and/or information based on the findings from such review.

(iii) The Department shall conduct a canvass of existing degree-granting institutions in accordance with Section 137 of Chapter 82 of the laws of 1995.

(3) Determination. For applicants that have completed the procedures set forth in subdivision (c)(2), the Deputy Commissioner shall consider the information obtained during the Department's review of the application during the initial and secondary review, including in-person interviews and any site reviews, and make a determination as to whether to recommend to the Commissioner and Board of Regents that provisional authorization be granted.

(i) If the Deputy Commissioner determines the applicant meets the requirements set forth in subdivision (b) of this section, and that the findings from review do not raise a substantial question about the likelihood of success, effectiveness, or consumer protections, she/he shall make a recommendation to the Commissioner and Board of Regents to grant provisional authorization. At a regularly scheduled public meeting, the Board of Regents shall consider the Deputy Commissioner's recommendation and make the determination on whether to grant the applicant provisional authorization.

(ii) If the Deputy Commissioner determines the applicant does not meet the requirements set forth in subdivision (b) of this section, or that findings from review raise a substantial question about the likelihood of success, effectiveness, consumer protections, she/he will not make a recommendation to the Board of Regents and the application shall be closed without further action. The Deputy Commissioner shall provide the applicant with the reasons for the decision in writing. The applicant may appeal the Deputy Commissioner's decision to the Commissioner, within 10 days of the date of the Deputy Commissioner's decision, and may submit additional information in support of its position in a timeframe determined by the Commissioner. If an application is closed, a new written application may be submitted under the terms of subdivision (c)(1) no sooner than one year after the final determination to close the application.

(4) Progress toward permanent authorization. A provisionally authorized institution shall maintain a satisfactory demonstration of the requirements identified in subdivision (b) of this section.

(i) At the Department's request, the institution shall provide the Department with information and reports concerning its performance and demonstration of progress toward meeting the requirements for permanent authorization.

(ii) At least 12 months prior to the end of the provisional authorization period, the institution must apply to the Department for permanent authorization, in accordance with the requirements of subdivision (d) of this section. An institution that fails to apply for permanent authorization by the end of its provisional period shall not be eligible for permanent authorization and its provisional authorization shall expire at the end of its provisional period.

4. Subdivision (d) of section 3.58 shall be repealed and a new subdivision (d) shall be added, to read as follows:

(d) Permanent authorization to confer degrees.

(1) An institution with provisional authorization shall submit to the Department, in a form and timeframe prescribed by the Commissioner, a written application for permanent authorization that provides satisfactory evidence of maintaining the requirements set forth in subdivision (b) of this section throughout its provisional period.

(2) The Department may cause the institution to undergo a site review and provide additional reports in support of its application for permanent authorization.

(3) The Deputy Commissioner shall review the information submitted by the institution and information obtained during the Department's site reviews, and other information obtained during the Department's review of the institution during its provisional period. The Deputy Commissioner shall consider whether the institution provides sufficient evidence that it met the requirements set forth in subdivision (b) of this section during the period of provisional authorization. On the basis of these considerations, the Deputy Commissioner shall make a recommendation to the Commissioner and Board of Regents to either grant permanent authorization, or extend provisional authorization, or deny permanent authorization.

(4) At a regularly scheduled public meeting, the Board of Regents shall consider the findings and recommendations of the Deputy Commissioner and take one of the following actions:

(i) grant permanent authorization;

(ii) extend provisional authority for an additional period for the purposes of additional review in consideration of permanent authorization;

(iii) deny permanent authorization and extend the provisional authorization period with limited authority for the purposes of teach-out and closure; or

(iv) deny permanent authorization and direct immediate closure;

5. A new subdivision (i) shall be added to section 3.58 of the Rules of the Board of Regents to read as follows:

(i) Fees. In addition to the fees set forth in section 3.23 of this Title, applicants who apply for provisional or permanent authority under this section, shall be subject to the following fees:

(1) Application for provisional authorization. A nonrefundable and nontransferable fee of \$7,000 shall be submitted with an application for provisional authorization under this section, plus \$2,500 for each additional degree program if more than one such program is requested. Failure to submit this fee with the application will constitute an incomplete application and submitted materials will not be reviewed.

(2) In-person capacity interview. A nonrefundable and nontransferable fee of \$1,500 shall be submitted upon notice from the Department pursuant to subdivision (c)(1)(i) of this section that such an interview is needed. Failure to submit this fee within 90 days of the Department's notification will result in the application being closed without further action.

(3) Site-review. A nonrefundable and nontransferable fee of \$5,000 shall be submitted upon notification from the Department that a site-review is needed pursuant to subdivisions (c)(2)(ii) or (d)(2) of this section. Failure to submit this fee within 90 days of the Department's notification will result in the application being closed without further action.

(4) Annual administrative fee. An institution granted provisional authorization shall be subject to an annual non-refundable fee of \$5,000 commencing in the first annual period that the institution obtains provisional authorization, and for each annual period through the term of its provisional authorization. The fee for each annual period shall be due no later than 60 days prior to the start of each annual period for such institution, as determined by the Department.