



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

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

**FROM:** Sarah S. Benson *Sarah S. Benson*

**SUBJECT:** Proposed Amendment of Section 64.7 of the Regulations of the Commissioner of Education Relating to the Execution by Registered Professional Nurses of Non-Patient Specific Orders to Administer COVID-19 Tests and Influenza Tests

**DATE:** November 3, 2022

**AUTHORIZATION(S):** *Don McG* *Bell*

### SUMMARY

#### **Issue for Decision (Consent)**

Should the Board of Regents adopt the proposed amendment of section 64.7 of the Regulations of the Commissioner of Education relating to the execution by registered professional nurses of non-patient specific orders to administer COVID-19 tests and influenza tests?

#### **Reason for Consideration**

Required by State statute (Education Law section 6909, as amended by Part C of Chapter 57 of the Laws of 2022).

#### **Proposed Handling**

The proposed amendment will be presented to the Full Board for adoption as an emergency rule at the November 2022 meeting of the Board of Regents. A copy of the proposed rule (Attachment A) and a statement of facts and circumstances justifying emergency action (Attachment B) are attached.

## **Procedural History**

The proposed amendment was presented to the Professional Practice Committee for discussion and recommendation to the Full Board for adoption as an emergency rule at the September 2022 meeting of the Board of Regents. A Notice of Emergency Adoption and Proposed Rule Making was published in the State Register on September 28, 2022, for a 60-day comment period.

Because the September 2022 emergency action will expire on December 11, 2022, a second emergency action is necessary to ensure the emergency rule remains continuously in effect until it can be permanently adopted at the January 2023 Regents meeting. A Notice of Emergency Adoption will be published in the State Register on December 28, 2022. Supporting materials for the proposed rule are available upon request from the Secretary to the Board of Regents.

## **Background Information**

The 2022 enacted New York State Budget (Part C of Chapter 57 of the Laws of 2022 or “Chapter 57”), effective April 1, 2022, included amendments to the Education Law which authorize registered professional nurses to execute non-patient specific orders to administer tests to determine the presence of COVID-19, or its antibodies, or the influenza virus, pursuant to regulations promulgated by the Commissioner of Education. Such amendments aim to expand access to needed COVID-19 and influenza testing in New York State as both viruses remain public health challenges and combatting them remains a top public health priority.

Therefore, to implement Chapter 57, the Department proposes to add a new subdivision (h) to section 64.7 of the Commissioner’s regulations to permit registered professional nurses (RNs) to administer COVID-19 or influenza tests pursuant to a non-patient specific order issued by a licensed physician or a certified nurse practitioner. The proposed amendment requires that the COVID-19 tests be fully approved or authorized for emergency use by the federal Food and Drug Administration (FDA) to detect COVID-19 or COVID-19 and influenza. Further, the proposed amendment requires that influenza tests be fully approved by the FDA. These requirements ensure that RNs administer accurate and reliable tests.

## **Related Regents Items**

September 2022: [Proposed Amendment of Section 64.7 of the Regulations of the Commissioner of Education Relating to the Execution by Registered Professional Nurses of Non-Patient Specific Orders to Administer COVID-19 Tests and Influenza Tests](https://www.regents.nysed.gov/common/regents/files/922ppca2.pdf) (https://www.regents.nysed.gov/common/regents/files/922ppca2.pdf)

## **Recommendation**

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

VOTED: That section 64.7 of the Regulations of the Commissioner of Education be amended, as submitted, effective December 12, 2022, as an emergency action upon a finding by the Board of Regents that such action is necessary for the preservation of the public health and general welfare to immediately implement Part C of Chapter 57 of the Laws of 2022, which became effective April 1, 2022, and to ensure the emergency action taken at the September 2022 meeting remains continuously in effect.

## **Timetable for Implementation**

If adopted as an emergency rule at the November 2022 Regents meeting, the emergency rule will become effective on December 12, 2022. It is anticipated that the proposed rule will be presented to the Board of Regents for permanent adoption at the January 2023 Regents meeting, after publication in the State Register and expiration of the 60-day public comment period required under the State Administrative Procedure Act. If adopted at the January 2023 meeting, the proposed rule will become effective as a permanent rule on January 25, 2023.

**Attachment A**

AMENDMENT TO THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to sections 207, 6504, 6507, 6527, 6902, and 6909 of the Education Law and Part C of Chapter 57 of the Laws of 2022.

1. The section heading of section 64.7 of the Regulations of the Commissioner of Education is amended to read as follows:

64.7 Administration of immunizations, emergency treatment of anaphylaxis, tuberculosis tests, human immunodeficiency virus (HIV) tests, opioid-related overdose treatments, hepatitis C tests, and screening for syphilis, gonorrhea, COVID-19, influenza, and/or chlamydia infections pursuant to non-patient specific orders and protocols.

2. Section 64.7 of the regulations of the Commissioner of Education is amended by adding a new subdivision (h) to read as follows:

(h) COVID-19 tests and influenza tests.

(1) As used in this subdivision:

(i) COVID-19 test means one or more laboratory or point of care tests that have been fully approved or have received emergency use authorization by the Federal Food and Drug Administration to detect COVID-19 or its antibodies or to detect COVID-19 and influenza virus; and

(ii) influenza test means one or more laboratory or point of care tests approved by the Federal Food and Drug Administration to detect influenza virus.

(2) A registered professional nurse may administer a COVID-19 test or an influenza test pursuant to a written non-patient specific order and protocol prescribed or

ordered by a licensed physician or a certified nurse practitioner, provided that the requirements of this subdivision are met.

(3) Order and protocol.

(i) The non-patient specific order shall include, at a minimum, the following:

(a) the name, license number, and signature of the licensed physician or certified nurse practitioner who orders or prescribes the non-patient specific order and protocol;

(b) the name of the specific COVID-19 or influenza test to be administered;

(c) a protocol for administering the ordered COVID-19 or influenza test or a specific reference to a separate written protocol for administering the ordered test, which shall meet the requirements of subparagraph (ii) of this paragraph;

(d) the period of time that the order is effective, including the beginning and ending dates;

(e) a description of the group(s) of persons to be tested; and

(f) the name and license number of the registered professional nurse(s) authorized to execute the non-patient specific order and protocol to administer the ordered COVID-19 or influenza test, or the name of the entity that employs or contracts with registered professional nurse(s) to execute the non-patient specific order and protocol, provided that the registered professional nurse(s) execute the non-patient specific order and protocol only in the course of such employment or pursuant to such contract and the entity is legally authorized to employ or contract with registered professional nurses to provide nursing services.

(ii) The written protocol, incorporated into the order prescribed in subparagraph

(i) of this paragraph, shall, at a minimum, require the registered professional nurse(s) to ensure that:

(a) each potential recipient is assessed, pursuant to criteria in the protocol, for conditions that would qualify or preclude him or her from receiving the ordered test;

(b) informed consent for administering the ordered test or disclosing the test results to a third party (if applicable) has been obtained pursuant to the criteria in the protocol from the recipient, or when the recipient lacks capacity to consent, a person authorized pursuant to law to consent to health care for the recipient;

(c) positive diagnostic test results shall be disclosed to the test recipient, or the recipient's authorized representative, by the registered professional nurse as specifically authorized by the protocol or pursuant to a patient-specific order from a licensed physician, licensed physician assistant, or certified nurse practitioner; and

(d) the administration of the ordered test(s) is documented in the recipient's medical record in accordance with criteria in the protocol. Such documentation shall be maintained in accordance with section 29.2(a)(3) of this Title.

**8 NYCRR § 64.5**

STATEMENT OF FACTS AND CIRCUMSTANCES WHICH NECESSITATE  
EMERGENCY ACTION

The 2022 enacted New York State Budget (Part C of Chapter 57 of the Laws of 2022 or “Chapter 57”), effective April 1, 2022, included amendments to the Education Law which authorize registered professional nurses to execute non-patient specific orders to administer tests to determine the presence of COVID-19, or its antibodies, or the influenza virus, pursuant to regulations promulgated by the Commissioner of Education. Such amendments aim to expand access to needed COVID-19 and influenza testing in New York State as both viruses remain public health challenges and combatting them remains a top public health priority.

Therefore, to implement Chapter 57, the Department proposes to add a new subdivision (h) to section 64.7 of the Commissioner’s regulations to permit registered professional nurses (RNs) to administer COVID-19 or influenza tests pursuant to a non-patient specific order issued by a licensed physician or a certified nurse practitioner. The proposed amendment requires that the COVID-19 tests be fully approved or authorized for emergency use by the Federal Food and Drug Administration (FDA) to detect COVID-19 or COVID-19 and influenza. Further, the proposed amendment requires that influenza tests be fully approved by the FDA. These requirements ensure that RNs administer accurate reliable tests.

The proposed amendment was presented to the Professional Practice Committee for recommendation to the Full Board for adoption as an emergency rule at

the September 2022 meeting of the Board of Regents, effective September 13, 2022. Since the Board of Regents meets at fixed intervals, the earliest the proposed amendment can be presented for regular (non-emergency) adoption, after expiration of the required 60-day public comment period provided for in State Administrative Procedure Act (SAPA) section 202(1) and (5), would be the January 2023 Regents meeting. Furthermore, pursuant to SAPA section 203(1), the earliest effective date of the proposed amendment, if adopted at the January 2023 meeting, would be January 25, 2023, the date a Notice of Adoption would be published in the State Register.

However, the emergency rule will expire December 11, 2022. Therefore, a second emergency action is necessary at the November 2022 Regents meeting for preservation of the public health and general welfare to immediately implement Part C of Chapter 57 of the Laws of 2022, which became effective April 1, 2022 and to ensure that the emergency action taken at the September meeting remains continuously in effect until the rule can be permanently adopted.

It is anticipated that the proposed amendment will be presented for permanent adoption at the January 2023 Regents meeting, which is the first scheduled meeting after the expiration of the 60-day public comment period mandated by SAPA for state agency rulemaking.