



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

**FROM:** John L. D'Agati *John L. D'Agati*

**SUBJECT:** Proposed Amendments to Section 80-5.4 of the Regulations of the Commissioner of Education Relating to the Employment of Substitute Teachers Who Do Not Hold a Valid Teaching Certificate

**DATE:** January 15, 2019

**AUTHORIZATION(S):** *Sharon L. Lake* *Mary Ellen Elin*

### **SUMMARY**

#### **Issue for Decision**

Should the Board of Regents adopt proposed amendments to §80-5.4 of the Regulations of the Commissioner of Education relating to the employment of substitute teachers who do not hold a valid teaching certificate?

#### **Reason(s) for Consideration**

Review of Policy.

#### **Proposed Handling**

On January 14, 2019, the Higher Education Committee voted to adopt, as an emergency measure Higher Education Item (A)1-Revised and requested that further amendments be made to 80-5.4 of the Regulations of the Commissioner of Education to require all substitute teachers to have at least an associate's degree, except for substitute teachers without a valid teaching certificate, but who are completing collegiate study toward certification at the rate of not less than six semester hours per year. At this meeting, the Higher Education Committee directed Department staff to bring the revised item to the Full Board for adoption as an emergency rule (Attachment A is a copy of the proposed amendment that was before the Higher Education Committee on January 14, 2019).

The revised item is submitted to the Full Board for adoption at the January 2019 Board of Regents meeting (Attachment B is a copy of the revised proposed amendment). A Statement of Facts and Circumstances Justifying the Emergency Action is included as Attachment C.

### **Procedural History**

A Notice of Proposed Rule Making will be published in the State Register on January 30, 2019. Supporting materials for the proposed amendment are available upon request from the Secretary to the Board of Regents.

### **Background Information**

Section 80-5.4 of the Commissioner's Regulations lists the following three categories from which school districts can employ substitute teachers.

- Individuals with a valid teaching certificate can work for an unlimited number of days in any capacity. If they are employed more than on an itinerant basis, they must be employed in their certification area.
- Individuals without a valid certificate, but who are working towards certification (taking college coursework) at a rate of not less than 6 semester hours per year, can work for an unlimited number of days in any capacity. If they are employed more than on an itinerant basis, they must be employed in the area in which they are seeking certification.
- Individuals who do not hold a valid teaching certificate and are not working towards certification are limited to working no more than 40 days in a school district or BOCES in a school year.

Substitute teachers who do not hold a valid teaching certificate and are not working towards certification are not eligible to continue working in a school district after they are employed for 40 days, regardless of how effective they may be with students. As a result, school districts that cannot find a certified teacher or an individual who is working towards certification to serve as a substitute teacher must hire a new individual to fill this position. In some instances, districts will find individuals who, while not certified, are identified by the building's teachers or administrators as effective in the classroom. However, since this individual is limited to 40 days, the district is forced to find another substitute who may be less qualified than the substitute teacher who reached the 40-day limit.

At their July 2016 meeting, the Board of Regents adopted provisions for substitute teachers who do not hold a valid teaching certificate and are not working towards certification to be employed beyond the 40-day limit. The provisions allowed school districts and BOCES to hire a substitute teacher beyond the 40-day limit, for up to 90 days total in a school year, in extreme circumstances where there is an urgent need for a substitute teacher and the district or BOCES has undertaken a good faith recruitment search for a properly certified candidate. In rare circumstances, a district or BOCES could hire a substitute teacher beyond 90 days when there are still no available certified

teachers for a position after a good faith recruitment search and a particular substitute teacher is needed to work with a specific class or group of students until the end of the school year.

These provisions addressed the issue of several school districts having difficulty finding certified teachers to serve as substitute teachers and wanting to continue the employment of substitute teachers who were not certified and were not working towards certification but demonstrated competency in the classroom and in covering the curriculum. By continuing to employ these substitute teachers, districts and BOCES would not need to find a replacement substitute teacher who may not have the same expertise and familiarity with the classroom and curriculum as the former substitute teacher demonstrated.

During the July 2016 meeting in which these provisions were adopted, members of the Board raised the concern that the provisions allow uncertified teachers who are not pursuing certification to remain in substitute teacher positions for an extended period of time and requested that the Department create a “sunset provision” at its September 2016 meeting. As a result, the provisions allowing substitute teachers who do not hold a valid teaching certificate and are not working towards certification to work more than 40 days were only applicable through June 30, 2018.

Due to an ongoing teacher shortage in regions of the State, the Department proposed a regulatory amendment at the May 2018 Board of Regents meeting to extend the sunset provision from June 30, 2018 to June 30, 2020. However, during the meeting the Board raised the issue that there are no minimum qualifications for uncertified substitute teachers and expressed a desire to table the proposal and asked that the Department reconsider its recommendations.

To learn about school districts’ and BOCES’ current hiring practices for substitute teachers, the Department sent a survey to all school districts and BOCES in August 2018 regarding their minimum educational requirements for substitute teachers. Sixty-four percent of the 314 school districts that responded to the survey and 33% of the 18 BOCES that responded to the survey indicated that they currently require an associate’s degree or bachelor’s degree for substitute teaching positions. Thirty-four percent of the 314 school districts that responded to the survey and 61% of the 18 BOCES that responded to the survey indicated that they currently require a high school diploma or equivalent for substitute teaching positions.

### **Proposed Amendment**

To address the Board’s concerns, the Department is proposing to require uncertified substitute teachers to hold at least an associate’s degree or its equivalent to ensure that they have a minimum educational background.

The Department is also proposing a provision to address extreme circumstances where there is an urgent need for a substitute teacher and the district or BOCES has undertaken a good faith recruitment search for a properly certified candidate, and determined that there are no available certified teachers to perform the duties of such

position, a substitute teacher, without a valid or expired teaching certificate and who is not working towards certification, may be employed by the school district or board of cooperative educational services beyond the 40-day limit, for up to an additional 50 days (90 days total in a school year), if the district superintendent (for districts that are a component district of a board of cooperative educational services and boards of cooperative educational services) or the superintendent (for school districts that are not a component district of a board of cooperative educational services) attests that the district or board of cooperative educational services, as applicable, has conducted a good faith recruitment search and there are no available certified teachers that can perform the duties of such position.

In rare circumstances, a district or BOCES may hire a substitute teacher beyond 90 days when there are still no available certified teachers for a position after a good faith recruitment search and a particular substitute teacher is needed to work with a specific class or group of students until the end of the school year. In order for an uncertified substitute teacher to work beyond the 40-day limit, they must complete professional learning activity(ies) as determined to be appropriate by the district superintendent or, in cases where the district is not a component of the BOCES, the superintendent. The professional learning activity(ies) shall be documented by the district or BOCES and may be delivered in multiple modes, including online learning. The provision for uncertified substitute teachers without a valid or expired teaching certificate and who are not working towards certification to teach beyond the 40-day limit would be applicable through June 30, 2020.

In addition, the Department is proposing to allow substitute teachers who hold an expired Provisional or Initial certificate in the classroom teaching service to teach in any capacity for any number of days unless the substitute teacher is employed on more than an itinerant basis, in which case the substitute teacher must be employed in an area for which they were previously certified. These individuals would also need to be provided with appropriate professional learning activity(ies) that must be documented by the district or BOCES and may be delivered in multiple modes, including online learning. This proposed regulatory amendment expands the pool of qualified substitute teachers and enables individuals who hold an expired Initial teaching certificate to gain the teaching experience necessary to earn the Professional certificate. Currently, teachers who hold an expired Initial teaching certificate can only serve as a substitute for up to 40 days in a school district or BOCES in a school year.

The current regulation identifies substitute teachers with a valid teaching certificate or certificate of qualification as a category of substitute teachers. The Department is proposing to delete the reference to “certificates of qualification” because these credentials are no longer issued and there are no longer any teachers who hold a valid certificate of qualification.

### **Related Regents Items**

[April 2016](https://www.regents.nysed.gov/common/regents/files/416hed1.pdf) (https://www.regents.nysed.gov/common/regents/files/416hed1.pdf)

[July 2016](https://www.regents.nysed.gov/common/regents/files/716hea1.pdf) (https://www.regents.nysed.gov/common/regents/files/716hea1.pdf)

[September 2016](http://www.regents.nysed.gov/common/regents/files/916hed1.pdf) (http://www.regents.nysed.gov/common/regents/files/916hed1.pdf)

[May 2018](http://www.regents.nysed.gov/common/regents/files/518hea1.pdf) (http://www.regents.nysed.gov/common/regents/files/518hea1.pdf)

### **Recommendation**

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

VOTED: That §80-5.4 of the Regulations of the Commissioner of Education be adopted as an emergency action effective February 4, 2019 to ensure that school districts and BOCES continue to be provided with the flexibility needed to address their hiring needs and employ substitute teachers who demonstrate competency in the classroom for more than 40 days.

### **Timetable for Implementation**

If adopted as an emergency rule at the January 2019 Regents meeting, the proposed amendment will be effective February 4, 2019. Following the 60-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 May 2019 meeting. If adopted at the May 2019 meeting, the proposed amendment will become effective on May 22, 2019.

**Substitute Teachers  
Current Requirements**

<b>Certification Status</b>	<b>Authorized Teach Time</b>	<b>Educational Qualifications</b>
Individual with a Certificate <sup>1</sup>	<ul style="list-style-type: none"> <li>• Unlimited number of days</li> <li>• More than itinerant work in certification area</li> </ul>	Has bachelor's degree
No Certificate <sup>1</sup>	<ul style="list-style-type: none"> <li>• Taking 6 or more credits towards certification</li> <li>• Unlimited number of days in itinerant placement</li> <li>• More than itinerant work employment must be in certification area being pursued</li> </ul>	No bachelor's degree, but pursuing
No Certificate	<ul style="list-style-type: none"> <li>• Limited to 40 days</li> </ul>	No requirement

**Substitute Teachers  
Proposed Requirements**

<b>Certification Status</b>	<b>Authorized Teach Time</b>	<b>Educational Qualifications</b>
Individual with a Certificate <sup>1</sup>	<ul style="list-style-type: none"> <li>• Unlimited number of days</li> <li>• More than itinerant work in certification area</li> </ul>	Has bachelor's degree
No Certificate <sup>1</sup>	<ul style="list-style-type: none"> <li>• Taking 6 or more credits towards certification</li> <li>• Unlimited number of days in itinerant placement</li> <li>• More than itinerant work employment must be in certification area being pursued</li> </ul>	No bachelor's degree, but pursuing
No Certificate	<ul style="list-style-type: none"> <li>• Can teach up to 40 days</li> </ul>	Associate's Degree
No Certificate	<ul style="list-style-type: none"> <li>• Can teach 41-90 days with approval of the District Superintendent/Superintendent and a good faith recruitment search</li> <li>• Can teach more than 90 days with a specific class or group of students with approval of the District Superintendent/Superintendent and a good faith recruitment search</li> </ul>	Associate degree and must receive appropriate professional learning and support which may include online opportunities

<sup>1</sup> Current requirement that stays in effect

Expired Certificate	<ul style="list-style-type: none"><li>• Unlimited number of days</li><li>• More than itinerant work in the certificate area held</li></ul>	Bachelor's degree and must receive appropriate professional learning and support which may include online opportunities
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## Attachment A

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

Pursuant to Education Law sections 101, 207, 210, 305, 3001, 3004, and 3009.

1. A new subdivision (c) shall be added to section 80-5.4 of the Regulations of the Commissioner of Education as follows and former subdivisions (c) through (d) of section 80-5.4 of the Regulations of the Commissioner of Education shall be renumbered (d) through (e).

(c) Education. All substitute teachers shall hold at a minimum an associate's degree or higher, or its equivalent. If no eligible substitute teacher with an associate's degree or higher, or its equivalent, is available after a good faith recruitment effort has been conducted, the school district may request from the district superintendent (for districts that are a component district of a board of cooperative educational services and boards of cooperative educational services) or the superintendent (for school districts that are not a component district of a board of cooperative educational services) a waiver allowing them to employ an individual with a high school diploma, or its equivalent, under this section.

2. Renumbered subdivision (d) of section 80-5.4 of the Regulations of the Commissioner of Education shall be amended to read as follows:

(d) Length of employment. There shall be three categories of substitutes as follows:

(1) Substitutes with valid teaching certificates [or certificates of qualification]. Service may be rendered in any capacity, for any number of days. If employed on more than an itinerant basis, such persons will be employed in an area for which they are certified.

(2) Substitutes with expired Initial or Provisional teaching certificates. Service may be rendered in any capacity, for any number of days. If employed on more than an itinerant basis, such persons shall be employed in an area for which they were certified and must be provided with appropriate professional learning activity(ies) that must be documented by the district or BOCES, which may be delivered in multiple modes, including online learning.

(3) Substitutes without a valid or expired teaching certificate, but who are completing collegiate study toward certification at the rate of not less than six semester hours per year. Service may be rendered in any capacity, for any number of days, in any number of school districts. If employed on more than an itinerant basis, such persons will be employed in the area for which they are seeking certification.

[(3)] (4) Substitutes without a valid or expired teaching certificate and are not working towards certification.

(i) . . .

(ii) In extreme circumstances where there is an urgent need for a substitute teacher and the district has undertaken a good faith recruitment search for a properly certified candidate, and determined that there are no available certified teachers to perform the duties of such position, a substitute teacher, without a valid or expired teaching certificate and who is not working towards certification, may be employed by the school district or board of cooperative educational services beyond the 40-day limit, for up to an additional 50 days (90 days total in a school year), if the district superintendent (for districts that are a component district of a board of cooperative educational services and boards of cooperative educational services) or the superintendent (for school districts that are not a component district of a board of

cooperative educational services) [certifies] attests that the district or board of cooperative educational services, as applicable, has conducted a good faith recruitment search and there are no available certified teachers that can perform the duties of such position. In rare circumstances, a district or BOCES may hire a substitute teacher beyond the 90 days, if a district superintendent or superintendent attests that a good faith recruitment search has been conducted and there are still no available certified teachers who can perform the duties of such position and that a particular substitute teacher is needed to work with a specific class or group of students until the end of the school year; provided however that only a substitute teacher with an associate's degree or higher, or its equivalent, may be employed beyond 90 days. A substitute teacher that is employed by a school district or board of cooperative educational services on a long-term basis shall complete appropriate professional learning activity(ies) as determined by the district superintendent (for districts that are a component district of a board of cooperative educational services and boards of cooperative educational services) or the superintendent (for school districts that are not a component district of a board of cooperative educational services). The professional learning activity(ies) shall be documented by the school district or board of cooperative educational services, as applicable, and may be delivered in multiple modes, including online learning. Any substitute teacher with a high school diploma that is employed on a long-term basis under a waiver issued under this section shall only be employed in a classroom on a daily basis (i.e., such substitute teacher shall not be employed in one classroom for an extended period of time) and shall complete appropriate professional learning activity(ies) as determined by the district superintendent (for districts that are a component district of a board of cooperative educational services and boards of

cooperative educational services) or the superintendent (for school districts that are not a component district of a board of cooperative educational services) that may be delivered in multiple modes, including online learning. The provisions of this subparagraph shall be applicable until June 30, [2018] 2020.

3. Subdivision (d) of section 80-5.4 of the Regulations of the Commissioner of Education shall be amended to read as follows:

[(d)] (e) Reporting. The chief school officer of each school district and the district superintendent of each board of cooperative educational services shall submit an annual report concerning the employment of all uncertified substitute teachers to the commissioner on forms prescribed by the commissioner, which shall include the number of substitute teachers authorized to be employed beyond the 40-day limit until June 30, [2018] 2020 for the limited circumstances described in subparagraph (c)(3)(ii) of this section, with the required certification(s) from the district superintendent or superintendent, as applicable, for each substitute teacher employed beyond the 40-day limit, [certifying] attesting that a good faith recruitment search was conducted and that there were no available certified teachers that could perform the duties of such position. The annual report shall also include the number of waivers sought and the number granted by the school district or board of cooperative educational services, for substitute teachers that did not hold at least an associate's degree and who were employed by the school district or board of cooperative educational services and the total number of substitute teachers authorized to be employed from 41-90 days pursuant to subdivision (c) of this section; and the number of substitute teachers authorized to be employed beyond the 90 day[s] limit until June 30, [2018] 2020 for the [limited] rare circumstances described in subparagraph (c)(3)(ii) of this section, with the required [certification(s)]

attestation(s) from the district superintendent or superintendents, as applicable, for each substitute teacher employed beyond the 90-day limit, certifying that a good faith recruitment search was conducted and that there were no available certified teachers that could perform the duties of such position and that a particular substitute teacher is needed to work with a specific class or group of students until the end of the school year.

AMENDMENT TO THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to Education Law sections 101, 207, 210, 305, 3001, 3004, and 3009.

1. A new subdivision (c) shall be added to section 80-5.4 of the Regulations of the Commissioner of Education as follows and former subdivisions (c) through (d) of section 80-5.4 of the Regulations of the Commissioner of Education shall be renumbered (d) through (e).

(c) Education. Except as otherwise provided in paragraph (3) of subdivision (d) of this section, all substitute teachers shall hold at a minimum an associate's degree or higher, or its equivalent.

2. Renumbered subdivision (d) of section 80-5.4 of the Regulations of the Commissioner of Education shall be amended to read as follows:

(d) Length of employment. There shall be three categories of substitutes as follows:

(1) Substitutes with valid teaching certificates [or certificates of qualification]. Service may be rendered in any capacity, for any number of days. If employed on more than an itinerant basis, such persons will be employed in an area for which they are certified.

(2) Substitutes with expired Initial or Provisional teaching certificates. Service may be rendered in any capacity, for any number of days. If employed on more than an itinerant basis, such persons shall be employed in an area for which they were certified and must be provided with appropriate professional learning activity(ies) that must be documented by the district or BOCES, which may be delivered in multiple modes, including online learning.

(3) Substitutes without a valid or expired teaching certificate, but who are completing collegiate study toward certification at the rate of not less than six semester hours per year. Service may be rendered in any capacity, for any number of days, in any number of school districts. If employed on more than an itinerant basis, such persons will be employed in the area for which they are seeking certification.

[(3)] (4) Substitutes without a valid or expired teaching certificate and are not working towards certification.

(i) . . .

(ii) In extreme circumstances where there is an urgent need for a substitute teacher and the district has undertaken a good faith recruitment search for a properly certified candidate, and determined that there are no available certified teachers to perform the duties of such position, a substitute teacher, without a valid or expired teaching certificate and who is not working towards certification, may be employed by the school district or board of cooperative educational services beyond the 40-day limit, for up to an additional 50 days (90 days total in a school year), if the district superintendent (for districts that are a component district of a board of cooperative educational services and boards of cooperative educational services) or the superintendent (for school districts that are not a component district of a board of cooperative educational services) [certifies] attests that the district or board of cooperative educational services, as applicable, has conducted a good faith recruitment search and there are no available certified teachers that can perform the duties of such position. In rare circumstances, a district or BOCES may hire a substitute teacher beyond the 90 days, if a district superintendent or superintendent attests that a good faith recruitment search has been conducted and there are still no available certified

teachers who can perform the duties of such position and that a particular substitute teacher is needed to work with a specific class or group of students until the end of the school year. A substitute teacher that is employed by a school district or board of cooperative educational services on a long-term basis shall complete appropriate professional learning activity(ies) as determined by the district superintendent (for districts that are a component district of a board of cooperative educational services and boards of cooperative educational services) or the superintendent (for school districts that are not a component district of a board of cooperative educational services). The professional learning activity(ies) shall be documented by the school district or board of cooperative educational services, as applicable, and may be delivered in multiple modes, including online learning. The provisions of this subparagraph shall be applicable until June 30, [2018] 2020.

3. Subdivision (d) of section 80-5.4 of the Regulations of the Commissioner of Education shall be amended to read as follows:

[(d)] (e) Reporting. The chief school officer of each school district and the district superintendent of each board of cooperative educational services shall submit an annual report concerning the employment of all uncertified substitute teachers to the commissioner on forms prescribed by the commissioner, which shall include the number of substitute teachers authorized to be employed beyond the 40-day limit until June 30, [2018] 2020 for the limited circumstances described in subparagraph (c)(3)(ii) of this section, with the required certification(s) from the district superintendent or superintendent, as applicable, for each substitute teacher employed beyond the 40-day limit, [certifying] attesting that a good faith recruitment search was conducted and that there were no available certified teachers that could perform the duties of such position.

The annual report shall also include the number of substitute teachers authorized to be employed beyond the 90 day[s] limit until June 30, [2018] 2020 for the [limited] rare circumstances described in subparagraph (c)(3)(ii) of this section, with the required [certification(s)] attestation(s) from the district superintendent or superintendents, as applicable, for each substitute teacher employed beyond the 90-day limit, certifying that a good faith recruitment search was conducted and that there were no available certified teachers that could perform the duties of such position and that a particular substitute teacher is needed to work with a specific class or group of students until the end of the school year.

## Attachment C

### STATEMENT OF FACTS AND CIRCUMSTANCES JUSTIFYING THE EMERGENCY ACTION

At their July 2016 meeting, the Board of Regents adopted the provisions for substitute teachers who do not hold a valid teaching certificate and are not working towards certification to be employed beyond the 40-day limit. These provisions addressed the issue of several school districts having difficulty finding certified teachers to serve as substitute teachers and wanting to continue the employment of substitute teachers who were not certified and were not working towards certification. By continuing to employ these substitute teachers, districts and BOCES would not need to find a replacement substitute teacher who may not have the same expertise and familiarity with the classroom and curriculum as the former substitute teacher demonstrated.

During the July 2016 meeting in which these provisions were adopted, members of the Board raised the concern that the provisions allow uncertified teachers who are not pursuing certification to remain in substitute teacher positions for an extended period of time and requested that the Department create a “sunset provision” at its September 2016 meeting. As a result, the provisions allowing substitute teachers who do not hold a valid teaching certificate and are not working towards certification to work more than 40 days were only applicable through June 30, 2018.

Districts continue to have difficulty finding certified teachers to serve as substitute teachers. Therefore, the Department is proposing to extend the sunset provision to June 30, 2020. Extending the deadline would continue to provide districts with the flexibility to address their hiring needs and employ substitute teachers who demonstrate competency

in the classroom for more than 40 days under the circumstances described in the proposed amendment.

Because the Board of Regents meets at scheduled intervals, the earliest the proposed amendment could be presented for regular (non-emergency) adoption, after publication in the State Register and expiration of the 60-day public comment period provided for in the State Administrative Procedure Act (SAPA) Sections 202(1) and (5), is the May 2019 Regents meeting. Furthermore, pursuant to SAPA Section 203(1), the earliest effective date of the proposed amendment, if adopted at the May Regents meeting, is May 22, 2019, the date a Notice of Adoption would be published in the State Register. However, because the provision allowing substitute teachers in the classroom expired on June 30, 2018, emergency action is necessary now for the preservation of the general welfare in order to ensure that districts have flexibility to address their hiring needs and allow them to employ substitute teachers in the classroom for more than 40 days under the circumstances described in the proposed amendment.