




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

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

**FROM:** Aaron M. Baldwin 

**SUBJECT:** Proposed Amendments to Sections 52.21, 79-8.5, 100.5, and 154-2.3 of the Regulations of the Commissioner of Education Relating to Addressing the COVID-19 Crisis and the Reopening of Schools

**DATE:** September 3, 2020

**AUTHORIZATION(S):**



**SUMMARY**



### **Issue for Decision**

Should the Board of Regents adopt the proposed amendments to Sections 52.21, 79-8.5, 100.5, and 154-2.3 of the Regulations of the Commissioner of Education relating to addressing the COVID-19 crisis and the reopening of schools?

### **Reason for Consideration**

Review of Policy.

### **Proposed Handling**

The proposed amendment will be presented to the Full Board for adoption as an emergency rule at its September 2020 meeting. Supporting materials are available upon request to the Secretary to the Board of Regents. A copy of the proposed rule is included as Attachment A, and a Statement of Facts and Circumstances which necessitate emergency action is included as Attachment B.

### **Procedural History**

Not applicable.

### **Background Information**

#### **Generally**

On January 30, 2020, the World Health Organization designated the novel coronavirus, COVID-19, outbreak as a Public Health Emergency of International Concern.

On March 7, 2020, the Governor of New York State declared a State disaster emergency for the entire State of New York pursuant to Executive Order 202. Subsequently, the Governor issued additional Executive Orders in response to the COVID-19 crisis, including orders directing the closure of schools for the remainder of the 2019-2020 school year and 2020 summer school except for extended school year (ESY) services. In response, the Department adopted emergency regulations at the April, May, June, and July 2020 Board of Regents meetings to address numerous issues resulting from the interruptions caused by the COVID-19 crisis. The Governor of New York announced that schools across the State are permitted to open in the fall and required all school districts to submit reopening plans to the Department and the Department of Health. Therefore, to address additional issues resulting from the interruptions caused by the COVID-19 crisis, and to plan for the reopening of schools, the Department is proposing further emergency regulatory amendments as follows:

- Professions
  - Section 79-8.5 of the Commissioner's regulations is amended to permit the Department, in its discretion, to renew limited permits for medical physics for additional two-year periods beyond the current limit of no more than six years total, for good cause shown, as determined by the Department (Attachment A #1).
- Higher Education
  - Section 52.21 of the Commissioner's regulations is amended to provide additional time for institutions of higher education to complete the process for accreditation of their educator preparation programs from the time they notify the Department that they are seeking accreditation from a professional education accrediting association acceptable to the Department that is seeking recognition from the Council for Higher Education Accreditation or the United States Department of Education. Such institutions would now have six years, instead of five, to complete the accreditation process (Attachment A #'s 2 and 3).
- Bilingual Education
  - Seal of Biliteracy:
    - Section 100.5(h)(4)(a) of the Commissioner's regulations is amended to provide that students who were unable to take applicable Regents exams due to COVID-19 related cancellation will satisfy criteria for the New York State Seal of Biliteracy (NYSSB) that would have been met by the required June 2020 or August 2020 Regents exam(s), provided that such students have been exempted from the applicable Regents examinations in accordance with section 100.5(a)(5)(iv) of the Commissioner's regulations.
    - Additionally, such section is amended to provide that English Language Learners (ELLs) will satisfy criteria for the NYSSB that would have been met by a 2020 NYS English as a Second Language Achievement Test (NYSESLAT) score through a combination of having achieved an English language proficiency level of Transitioning or Expanding on the 2019

NYSESLAT or NYS Identification Test for ELLs (NYSITELL) and who earned credit in a course of study for English as a New Language or Bilingual Education in the 2019-2020 school year. This change provides parity for students who would otherwise be disadvantaged to earn the NYSSB due to the cancellation of the 2020 NYSESLAT.

- Finally, such section is amended to update the NYSSB's NYSESLAT score requirement. Prior to the 2015-2016 school year, the method of determining a student's English language proficiency level was based on separate proficiency levels for each of the four language modalities (speaking, listening, reading, and writing). Beginning with the 2016 administration of the NYSESLAT, the method for determining a student's English language proficiency level was changed to be based on a single scale score reflecting English language proficiency overall. The proposed new language will reflect this updated score reporting by allowing students to apply a NYSESLAT scale score of 290 towards the NYSSB. The Department has determined this score to be equivalent to the previous requirement of achieving the commanding proficiency level in two separate modalities (Attachment A #4).
- English Language Learner (ELL) identification:
  - Section 154-2.3(a) of the Commissioner's regulations is amended to provide that for the 2020-2021 school year, any parent of a student who attends a school which is operating fully remotely or have opted to have their child receive instruction fully remotely in accordance with the district's reopening plan, and whose child has been provisionally identified as an English Language Learner (ELL) via remote identification, may submit a waiver of the administration of the English language proficiency identification assessment(Attachment A #5).

### **Related Regents Items**

[Proposed Amendments to Sections 52.3, 52.21, 57-4.5, 70.4, 74.6, 75.2, 75.5, 76.2, 79-9.3, 79-10.3, 79-11.3, 79-12.3, 80-1.13, 80-1.5, 80-3.15, 80-4.3, 83.5, 87.2, 87.5, 100.2, 100.4, 100.5, 100.6, 100.10, 100.21, 119.1, 119.5, 125.1, 151-1.4, 154-2.3, 175.5, 200.4, 200.5, 200.7, 200.20 and 275.8 and addition of Section 279.5 to the Regulations of the Commissioner of Education Relating to Addressing the COVID-19 Crisis](https://www.regents.nysed.gov/common/regents/files/420bra6.pdf)  
(<https://www.regents.nysed.gov/common/regents/files/420bra6.pdf>)

[Proposed Amendments to Sections 52.21, 60.6, 61.19, 80-1.2, 80-3.7, 100.1, 100.2, 100.4, 100.5, 100.6, 100.7, 100.19 and 151-1.3 and addition of Section 80-5.27 to the Regulations of the Commissioner of Education Relating to Addressing the COVID-19 Crisis](https://www.regents.nysed.gov/common/regents/files/520bra9-REVISED.pdf)  
(<https://www.regents.nysed.gov/common/regents/files/520bra9-REVISED.pdf>)

[Proposed Amendments to Sections 52.3, 52.21, 57-4.5, 70.4, 74.6, 75.2, 75.5, 76.2, 79-9.3, 79-10.3, 79-11.3, 79-12.3, 80-1.13, 80-1.5, 80-3.15, 80-4.3, 83.5, 87.2, 87.5, 100.2, 100.4, 100.5, 100.6, 100.10, 100.21, 119.1, 119.5, 125.1, 151-1.4, 154-2.3, 175.5, 200.4, 200.5,](https://www.regents.nysed.gov/common/regents/files/420bra6.pdf)

[200.7, 200.20 and 275.8 and addition of Section 279.5 to the Regulations of the Commissioner of Education Relating to Addressing the COVID-19 Crisis](https://www.regents.nysed.gov/common/regents/files/520bra10.pdf)  
(<https://www.regents.nysed.gov/common/regents/files/520bra10.pdf>)

[Proposed Amendments to Sections 60.10, 80-1.2, 80-4.3, 80-4.4, 80-5.6, 100.2, 100.5, 100.7, 100.10, 110.4, 119.4, 121.5, 135.4, 145-2.15 of the Regulations of the Commissioner of Education Relating to Addressing the COVID-19 Crisis](https://www.regents.nysed.gov/common/regents/files/620bra10.pdf)  
(<https://www.regents.nysed.gov/common/regents/files/620bra10.pdf>)

[Proposed Amendments to Sections 52.3, 52.21, 57-4.5, 70.4, 74.6, 75.2, 75.5, 76.2, 79-9.3, 79-10.3, 79-11.3, 79-12.3, 80-1.13, 80-1.5, 80-3.15, 80-4.3, 83.5, 87.2, 87.5, 100.2, 100.4, 100.5, 100.6, 100.10, 100.21, 119.1, 119.5, 125.1, 151-1.4, 154-2.3, 175.5, 200.4, 200.5, 200.7, 200.20 and 275.8 and addition of Section 279.5 to the Regulations of the Commissioner of Education Relating to Addressing the COVID-19 Crisis](https://www.regents.nysed.gov/common/regents/files/620bra11.pdf)  
(<https://www.regents.nysed.gov/common/regents/files/620bra11.pdf>)

[Proposed Amendments to Sections 52.21, 60.6, 61.19, 80-1.2, 80-3.7, 100.1, 100.2, 100.4, 100.5, 100.6, 100.7, 100.19 and 151-1.3 and addition of Section 80-5.27 to the Regulations of the Commissioner of Education Relating to Addressing the COVID-19 Crisis](https://www.regents.nysed.gov/common/regents/files/620bra12.pdf)  
(<https://www.regents.nysed.gov/common/regents/files/620bra12.pdf>)

[Proposed Amendments to Sections 52.3, 52.21, 57-4.5, 70.4, 74.6, 75.2, 75.5, 76.2, 79-9.3, 79-10.3, 79-11.3, 79-12.3, 80-1.13, 80-1.5, 80-3.15, 80-4.3, 83.5, 87.2, 87.5, 100.2, 100.4, 100.5, 100.6, 100.10, 100.21, 119.1, 119.5, 125.1, 151-1.4, 154-2.3, 175.5, 200.4, 200.5, 200.7, 200.20 and 275.8 and addition of Section 279.5 to the Regulations of the Commissioner of Education Relating to Addressing the COVID-19 Crisis](https://www.regents.nysed.gov/common/regents/files/720bra7.pdf)  
(<https://www.regents.nysed.gov/common/regents/files/720bra7.pdf>)

[Proposed Amendments to Sections 52.21, 60.6, 61.19, 80-1.2, 80-3.7, 100.1, 100.2, 100.4, 100.5, 100.6, 100.7, 100.19 and 151-1.3 and addition of Section 80-5.27 to the Regulations of the Commissioner of Education Relating to Addressing the COVID-19 Crisis](https://www.regents.nysed.gov/common/regents/files/720bra5.pdf)  
(<https://www.regents.nysed.gov/common/regents/files/720bra5.pdf>)

[Proposed Amendments to Sections 60.10, 80-1.2, 80-4.3, 80-4.4, 80-5.6, 100.2, 100.5, 100.7, 100.10, 110.4, 119.4, 121.5, 135.4, and 145-2.15 of the Regulations of the Commissioner of Education Relating to Addressing the COVID-19 Crisis](https://www.regents.nysed.gov/common/regents/files/720brca13.pdf)  
(<https://www.regents.nysed.gov/common/regents/files/720brca13.pdf>)

[Proposed Amendments to Sections 80-5.3, 80-5.4, 100.1, 100.2, 100.5, 100.6, 100.10, 117.3, 136.3, 145-2.1, 151-1.3, 154-2.2, 154-2.3, and 200.4 of the Regulations of the Commissioner of Education Relating to Addressing the COVID-19 Crisis and the Reopening of Schools](https://www.regents.nysed.gov/common/regents/files/720bra8revised.pdf)  
(<https://www.regents.nysed.gov/common/regents/files/720bra8revised.pdf>)

## **Recommendation**

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

VOTED: That Sections 52.21, 79-8.5, 100.5, and 154-2.3 be amended, as submitted, as an emergency measure, effective September 15, 2020, upon a finding by the Board of Regents that such action is necessary for the preservation of public health and the general welfare in order to immediately provide flexibility to certain regulatory requirements in response to the COVID-19 crisis and to plan for the reopening of schools.

### **Timetable for Implementation**

If adopted as an emergency measure at the September 2020 Regents meeting, the proposed amendment will become effective as an emergency rule on September 15, 2020. It is anticipated that the proposed amendment will be presented for permanent adoption at the December 2020 Regents meeting, after publication of the proposed amendment in the State Register and expiration of the 60-day public comment period required under the State Administrative Procedure Act. If adopted at the December 2020 meeting, the proposed rule will become effective on December 30, 2020. Because the emergency adoption will expire before the December 2020 Regents meeting, it is anticipated that an additional emergency action will be presented for adoption at the November Regents meeting.

**Attachment A**

AMENDMENT TO THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to sections 101, 207, 208, 210, 215, 305, 315, 2117, 2854, 3001, 3004, 3009, 3204, 3713, and 8706 of the Education Law.

1. Subdivision (c) of section 79-8.5 of the Regulations of the Commissioner of Education is amended to read as follows:

(c) A limited permit shall be valid for two years and may be renewed by the department for additional two-year periods for up to a total of no more than six years. Due to the State of Emergency declared by the Governor pursuant to an Executive Order for the COVID-19 crisis, the Department, in its discretion, may renew such limited permit for additional two-year periods beyond six years for good cause shown, as determined by the Department

2. Subclause (2) of clause (c) of subparagraph (iv) of paragraph (2) of subdivision (b) of section 52.21 of the Regulations of the Commissioner of Education is amended, to read as follows:

(2) Programs shall be continuously accredited by either:

(i) ...; or

(ii) a professional education accrediting association acceptable to the Department that is seeking recognition from the Council for Higher Education Accreditation or the United States Department of Education. To pursue this option and have its programs be considered continuously accredited under this subclause, the institution shall provide the Department with satisfactory evidence, on a form prescribed by the Commissioner, that it intends to apply for accreditation with a professional education accrediting association that

is seeking recognition from the Council for Higher Education Accreditation or the United States Department of Education, prior to the expiration date of its current accreditation period. The institution will then have [five] six years from the date of such notification to successfully complete the accreditation process. If at any time during the accreditation process, the association determines that the institution's program or programs cannot be accredited by such association and/or that the institution has not diligently pursued an application for accreditation, then the institution's program or programs shall not be considered continuously accredited for purposes of this subclause.

3. Clause (b) of subparagraph (iii) of paragraph (6) of subdivision (c) of section 52.21 of the Regulations of the Commissioner of Education is amended, to read as follows:

(b) Programs shall be accredited by either:

(1) ...; or

(2) a professional education accrediting association acceptable to the Department that is seeking recognition from the Council for Higher Education Accreditation or the United States Department of Education. To pursue this option and have its programs be considered continuously accredited under this clause, the institution shall provide the Department with satisfactory evidence, on a form prescribed by the Commissioner, that it intends to apply for accreditation with a professional education accrediting association that is seeking recognition from the Council for Higher Education Accreditation or the United States Department of Education, prior to the expiration date of its current accreditation period. The institution will then have [five] six years from the date of such notification to successfully complete the accreditation process. If at any time during the accreditation process, the association determines that the institution's program or programs cannot be accredited by such association and/or that the institution has not diligently pursued an

application for accreditation, then the institution's program or programs shall not be considered continuously accredited for purposes of this clause.

4. Subparagraph (a) of paragraph (4) of subdivision (h) of section 100.5 of the Regulations of the Commissioner of Education is amended to read as follows:

(a) Area 1: Criteria for Demonstrating Proficiency in English.

(1) Students shall earn one point per item for achieving the following items:

(i) Score 75 or higher on the NYS Comprehensive English Regents Examination, or score 80 or higher on the NYS Regents Examination in English Language Arts

[(Common Core)] (however, students in schools with an alternate pathway for graduation approved by the Commissioner will be held to those schools' criteria), or students who have been exempted from the applicable Regents Examination in English Language Arts in the June 2020 or August 2020 Regents examination administration pursuant to subparagraph (vi) of paragraph (5) of subdivision (a) of this section, or English Language Learners (ELLs) score 75 or above on two Regents exams other than English, without translation, or ELLs have been exempted from two of the applicable Regents examinations in the June 2020 or August 2020 Regents examination administration as pursuant to subparagraph (vi) of paragraph (5) of subdivision (a) of this section,;

(ii) ELLs [score at the Commanding level in two modalities] earn an overall score of 290 on the New York State English as a Second Language Achievement Test (NYSESLAT) or who were identified in 2019 at the Transitioning or Expanding English Language Proficiency Level by the statewide English language proficiency identification assessment or the annual English language proficiency assessment and who earned



credit in a course of study for English as a New Language or Bilingual Education in the 2019-2020 school year.

5. Subdivision (a) of section 154-2.3 of the Regulations of the Commissioner of Education is amended by adding a new paragraph (10) to read as follows:

(10) (i) Notwithstanding any other provision of this section to the contrary due to the COVID-19 crisis, for the 2020-2021 school year, any parent of a student who attends a school which is operating fully remotely pursuant to the district's reopening plan, or have opted to have their child receive instruction entirely remotely pursuant to the district's reopening plan, and whose child has been provisionally identified as an ELL pursuant to paragraphs (1) and (2) of this subdivision, or paragraph (3) of this subdivision for students who have a disability, may submit a written statement to the district waiving the administration of the statewide English language proficiency identification assessment pursuant to paragraph (4) of this subdivision. The district shall maintain a record of such written waiver for at least three years.

(ii) A parent shall submit the waiver described in subparagraph (i) of this paragraph within ten (10) days after enrollment for the 2020-2021 school year, provided, however, that parents whose child was either newly enrolled during the COVID-19 closures in the 2019-2020 school year, Summer 2020 or the first twenty (20) days of the 2020-2021 school year shall submit such waiver within thirty (30) school days after the commencement of the 2020-2021 school year.

(iii) If a waiver is submitted pursuant to subparagraph (i) of this paragraph, the child shall remain provisionally identified as an ELL for the 2020-2021 school year, unless the school such child attends changes to in-person or hybrid instruction during such school

year, or the parent has opted to no longer have their child receive instruction entirely remotely. Within ten days of either instance such child shall be administered the English language proficiency identification assessment pursuant to paragraph (4) of this subdivision.

(iv) School districts shall maintain a record of all waivers submitted pursuant to this paragraph for a period for at least three years.

## **Attachment B**

### STATEMENT OF FACTS AND CIRCUMSTANCE WHICH NECESSITATE EMERGENCY ACTION

On January 30, 2020, the World Health Organization designated the novel coronavirus, COVID-19, outbreak as a Public Health Emergency of International Concern. On March 7, 2020 the Governor of New York State declared a State disaster emergency for the entire State of New York pursuant to Executive Order 202. Subsequently, the Governor issued additional Executive Orders in response to the COVID-19 crisis including orders directing the closure of schools for the remainder of the school year and summer school and directing nonessential work personnel to work from home. In response, the Department adopted emergency regulations at the April, May, June, and July 2020 Board of Regents Meetings to address numerous issues resulting from the interruptions caused by the COVID-19 crisis and to prepare for the reopening of schools. To address additional issues resulting from the interruptions caused by the COVID-19 crisis and to prepare for the reopening of schools, it is necessary for the Department to adopt further regulatory amendments. The proposed amendments provide flexibility related to the following:

- Medical physics limited permits;
- Accreditation of their educator preparation programs;
- English Language Learner identification; and
- The Seal of Biliteracy.

Because the Board of Regents meets at scheduled intervals, the earliest the proposed amendment could be presented for regular (nonemergency) adoption, after publication in the State Register and expiration of the 60-day public comment period

required in the State Administrative Procedure Act (SAPA) sections 201(1) and (5), is the December 2020 Regents meeting. However, because the COVID-19 crisis is presently affecting the State of New York, emergency action is necessary for the preservation of public health and the general welfare in order to immediately provide flexibility for certain regulatory requirements in response to the COVID-19 crisis and to prepare for the reopening of schools.

It is anticipated that the proposed rule will be presented for adoption as a permanent rule at the December 2020 Regents meeting, which is the first scheduled meeting after the 60-day public comment period prescribed in SAPA for State agency rule makings. However, since the emergency regulation will expire before the December meeting, it is anticipated that an additional emergency action will be presented for adoption at the November 2020 Regents meeting.