



TO: The Honorable the Members of the Board of Regents

FROM: Kimberly Young-Wilkins *Kimberly Young Wilkins*

SUBJECT: Proposed Amendment of Section 100.21 of the Regulations of the Commissioner of Education Relating to Providing Flexibility for Accountability Requirements in Response to the COVID-19 Crisis

DATE: November 4, 2021

AUTHORIZATION(S): *Don M. B.* *Betty M.*

SUMMARY

Issue for Decision (Consent)

Should the Board of Regents adopt the proposed amendment to section 100.21 of the Regulations of the Commissioner of Education relating to providing flexibility for accountability requirements in response to the COVID-19 crisis?

Reason(s) for Consideration

Review of State policy.

Proposed Handling

The proposed amendment is submitted to the Full Board for adoption as an emergency rule at the November 2021 Board of Regents meeting. A copy of the proposed amendment is included (Attachment A), and a Statement of Facts and Circumstances which necessitate emergency action is included (Attachment B).

Procedural History

The proposed amendment was presented to the P-12 Education Committee for recommendation to the Full Board for adoption as an emergency rule at the September 2021 meeting of the Board of Regents. A Notice of Emergency Adoption and Proposed Rule Making was published in the State Register on September 29, 2021 for a 60-day public comment period. Supporting materials are available upon request to the Secretary to the Board of Regents.

Because the September emergency action will expire on December 12, 2021 a second emergency action is necessary to ensure the emergency rule remains continuously in effect until it can be permanently adopted at the January 2022 Regents meeting. A Notice of Emergency Adoption will be published in the State Register on December 29, 2021. Supporting materials are available upon request to the Secretary of the Board of Regents.

Background Information

In April 2020, the United States Department of Education (USDE) approved the Department's application for a one-year waiver from provisions of the Elementary and Secondary Education Act (ESEA), as recently amended by the Every Student Succeeds Act (ESSA) pertaining to State assessments and school district accountability determinations due to the unique circumstances that have arisen because of the COVID-19 crisis.

In response, the Board of Regents permanently adopted amendments to section 100.21 of the Commissioner's regulations at its February 2021 meeting providing that: the Commissioner shall not conduct a review of school and district performance using 2019-2020 school year result; the accountability status of public schools and districts for the 2020-2021 school year shall be the same as for the 2019-2020 school year; and the 2018-2019 school year results shall be used in any instance for which 2019-2020 school year results would have been used as part of the process of making 2021-2022 school year accountability determinations.

Additionally, the amendments provide that the Commissioner may, upon a finding of good cause, modify for the 2019-2020 through 2021-2022 school years any timelines pertaining to notifications, plans, reports, or implementation of activities required by such section.

Because of the on-going impact of the COVID-19 crisis, the Department again applied for a one-year waiver from provisions of ESSA pertaining to school and district accountability determinations due to the ongoing impact of the COVID-19 crisis. The USDE approved the Department's application in June 2021 and granted the Department a waiver of the following requirements of ESSA:

- Accountability and school identification requirements in sections 1111(c)(4) and 1111(d)(2)(C)-(D): the requirements that a State measure progress toward Long-Term Goals and Measures of Interim Progress (MIP); meaningfully differentiate, on an annual basis, all public schools, including adjusting the Academic Achievement indicator based on a participation rate below 95 percent; and identify schools for Comprehensive, Targeted, and additional Targeted Support and Improvement based on data from the 2020-2021 school year;
- Report card provisions related to accountability in section 1111(h) based on data from the 2020-2021 school year; these include:

- Section 1111(h)(1)(C)(i)(I)-(IV) and (VI): Accountability system description, other than the list of Comprehensive, Targeted, and additional Targeted Support and Improvement Schools;
- Section 1111(h)(1)(C)(iii)(I): Other Academic indicator results for schools that are not high schools;
- Section 1111(h)(1)(C)(v): School Quality or Student Success indicator results;
- Section 1111(h)(1)(C)(vi): Progress toward meeting Long-Term Goals and MIPs; and
- Section 1111(h)(2)(C) with respect, at the LEA and school levels, to all waiver requirements in section 1111(h)(1)(C).

Proposed Revisions

Therefore, the Department is proposing to amend sections 100.21(a) and (b)(3)(i) of the Commissioner's regulations to provide that the Commissioner shall not identify schools for Comprehensive, Targeted, and additional Targeted Support and Improvement for the 2021-2022 school year based on data from the 2020-2021 school year. As such, the accountability status of public schools and districts for the 2021-2022 school year shall be the same as for the 2020-2021 school year. Additionally, the proposed amendment to section 100.21(a) of the Commissioner's regulation extends the time period where the Commissioner may, upon a finding of good cause, modify any timelines pertaining to notifications, plans, reports, or implementation of activities required by such section through the 2022-2023 school year.

The Department also proposes to amend section 100.21(b)(2)(xi) of the Commissioner's regulations to: (1) delay until the 2023-2024 school year the Commissioner assigning a Level from 1 to 4 to any accountability group for which a school or district is accountable on the out-of-school suspension indicator based on 2022-2023 school year results and the requirement that districts implement the provisions of section 100.21(i)(4) for any schools that have an accountability group that performs at Level 1 on the out-of-school suspension indicator; and (2) delay until the 2025-2026 school year the incorporation of the out-of-school suspension indicator into the methodology used to determine the accountability status of schools and districts under this section.

Finally, the Department proposes to amend sections 100.21(i)(5)(ii), (i)(5)(iii), (i)(5)(iv), (i)(5)(v), and (i)(5)(vi) of the Commissioner's regulations to: (1) delay until the 2023-2024 school year the requirement that certain districts conduct a participation rate audit and develop an updated participation rate improvement plan for any school that completes a school participation rate self-assessment and improvement plan in the previous school year and that fails to improve its participation rates for the subgroup(s) and subject(s), as determined by the Commissioner, for which the plan was required; (2) delay until the 2024-2025 school year the requirement that certain districts partner with a Board of Cooperative Educational Services (BOCES) or other technical assistance center to conduct a participation rate audit and develop an updated participation rate plan for any school for which a district audit and district participation rate improvement plan is completed in the previous school year and that fails to improve

its participation rates for the subgroup(s) and subject(s), as determined by the Commissioner; and (3) delay until the 2025-2026 school year the requirements that the Department conduct an audit of the participation rate and require schools to address recommendations contained in the participation rate audit for any school for which an audit and participation rate improvement plan was completed in the previous school year and that fails to improve its participation rates for the subgroup(s) and subject(s), as determined by the Commissioner, for which the plan was required.

Later this school year, the Department will recommend for Board of Regents consideration additional regulatory amendments to address issues pertaining to 2022-2023 and subsequent school year accountability determinations.

Related Regent's Items

February 2021: [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 279.15 to the Regulations of the Commissioner of Education Relating to Addressing the COVID-19 Crisis](https://www.regents.nysed.gov/common/regents/files/221brca6.pdf)

(<https://www.regents.nysed.gov/common/regents/files/221brca6.pdf>)

September 2021: [Proposed Amendment of Section 100.21 of the Regulations of the Commissioner of Education Relating to Providing Flexibility for Accountability Requirements in Response to the COVID-19 Crisis](https://www.regents.nysed.gov/common/regents/files/921p12a3.pdf)

(<https://www.regents.nysed.gov/common/regents/files/921p12a3.pdf>)

Recommendation

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

VOTED: That section 100.21 of the Regulations of the Commissioner of Education be amended, as submitted, as an emergency measure, effective December 13, 2021, upon a finding by the Board of Regents that such action is necessary for the preservation of public health and general welfare in order to provide flexibility for certain regulatory requirements relating to accountability in response to the impact of the COVID-19 crisis and to ensure that the emergency action taken at the September meeting remains continuously in effect.

Timetable for Implementation

If adopted as an emergency measure at the November 2021 Regents meeting, the proposed amendment will become effective as an emergency rule on December 13, 2021. It is anticipated that the proposed amendment will be presented for permanent adoption at the January 2022 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 (SAPA). If adopted at the

January 2022 meeting, the proposed rule will become effective as a permanent rule on January 26, 2022.

AMENDMENT TO THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to sections 101, 112, 207, 210, 215, 305, 309, and 3713 of the Education Law and the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act of 2015, 20 U.S.C. sections 6301 et seq. (Public Law 114-95, 129 STAT. 1802).

1. Paragraph of subdivision (a) of section 100.21 of the Regulations of the Commissioner of Education is amended to read as follows:

(3) Notwithstanding any other provisions of this section, the Commissioner shall not conduct a review of school and district performance for the 2021-2022 school year using 2019-2020 or 2020-2021 school year results, the accountability status of public schools and districts for the 2020-2021 school year shall be the same as for the 2019-2020 school year and the accountability status of public schools and districts for the 2021-2022 school year shall be the same as for the 2020-2021 school year.

(4) Notwithstanding any other provision of this section, the Commissioner may, upon a finding of good cause, modify for the 2019-2020 through [2021-2022] 2022-2023 school years any timelines pertaining to notifications, plans, reports, or implementation of activities required by this section.

2. Subparagraphs (i) and (ii) of paragraph (3) of subdivision (b) of section 100.21 of the Regulations of the Commissioner of Education are amended to read as follows:

(i) Comprehensive support and improvement (CSI) schools (elementary and middle schools). The State shall designate elementary/middle schools as CSI schools using the following criteria:

(a) beginning with the 2018-2019 school year, using 2017-2018 school year results, and the [2022-2023] 2023-2024 school year using [2021-2022] 2022-2023 school year results, the State shall identify a minimum five percent of the lowest performing schools as CSI schools and shall identify CSI schools based upon the results from the all students group once every three years thereafter, based on the accountability measures described in subdivision (f) of this section. Provided that, if the accountability measures used to identify CSI schools in subdivision (f) of this section result in the identification of fewer than five percent of Title I public elementary/middle schools in the State, the commissioner shall identify the lowest performing five percent of Title I public elementary/middle schools using the rank ordered list for the combined composite performance and growth index; and

(b) ...

(ii) CSI (high schools). The State shall designate high schools as CSI schools using the following criteria:

(a) beginning with the 2018-2019 school year, using 2017-2018 school year results, and the [2022-2023] 2023-2024 school year using [2021-2022] 2022-2023 school year results, the State will identify a minimum five percent of the lowest-performing schools as CSI schools based upon the results from the all students group once every three years based on the accountability measures described in subdivision (f) of this section. Provided that, if the methodology pursuant to subparagraph (f)(1)(i) of this section for elementary/middle schools and subparagraph (f)(2)(i) of this section for high schools results in the identification of fewer than five percent of Title I public high schools in the State, the commissioner shall identify the lowest performing five percent

of Title I public high schools using the rank ordered list for the combined composite performance and graduation rate index; and

(b)...

(c)...

3. Subparagraphs (xi) of paragraph (2) of subdivision (b) of section 100.21 of the Regulations of the Commissioner of Education are amended to read as follows:

(xi) The out-of-school suspension rate shall mean the number of students who were suspended from school (not including in-school suspensions) for one full day or longer anytime during the school year divided by the number of students enrolled on BEDS day of that school year commencing with data collected for the [2018-2019] 2022-2023 school year. A student is counted only once, regardless of whether the student was suspended one or more times during the school year. For the [2020-2021] 2023-2024 school year results, the Commissioner shall report for each accountability group for which a school or district is accountable a Level from 1-4 based on the out-of-school suspension rate. For the [2020-2021] 2023-2024 school year results, districts must implement the provisions of 100.21(i)(4) for any schools that have an accountability group that performs at Level 1 on the out-of-school suspension indicator. Beginning with the [2023-2024] 2024-2025 school year results, the out-of-school suspension indicator shall be incorporated into the methodology used to determine the accountability status of schools and districts under this section.

4. Subparagraphs (ii), (iii), (iv), (v), and (vi) of paragraph (5) of subdivision (i) of section 100.21 of the Regulations of the Commissioner of Education are amended to read as follows:

(ii) Beginning with [2017-2018] 2021-2022 and [2018-2019] 2022-2023 school year results, any public elementary/middle or high school that has a weighted average achievement level or high school composite performance level of 1 or 2 and that fails to meet the required 95 percent participation rate for the same subgroup(s), in the same subject (*i.e.*, ELA or math) for two consecutive years, and that fails to improve participation rate as compared to the previous year for the same subgroup(s) and subject(s), as determined by the [Commissioner] commissioner, must conduct a participation rate self-assessment and develop a participation rate improvement plan, in such form and according to such timeline as determined by the [Commissioner] commissioner. Such school participation rate self-assessment and improvement plan shall be developed in collaboration with a committee composed of the school principal or his/her designee(s); school staff, including teachers and student support staff selected by the representative collective bargaining organization(s), and parents (not employed by the district or a collective bargaining organization representing teachers or administrators in the district) selected by school-related parent organizations; except that a school district may designate that a school-based management team established pursuant to section 100.11 of this Part or a community engagement team established pursuant to 100.19 of this Part may serve as the committee required by this paragraph. Such school plan must address participation of students from all subgroups for which the school has failed to meet the required 95 percent participation rate and failed to improve the participation rate as compared to the previous year. Such school plan must be adopted by the district Board of Education (in New York City, the chancellor or chancellor's designee), after consultation with the committee, no later than 60 days following notification to the district that such a plan is required. The Board of Education

(in New York City, the chancellor or chancellor's designee) shall take appropriate action to notify the general public upon adoption of the school plan; such action shall include, but not be limited to, publishing on the district website, if one exists, or direct notification, within 30 days of adoption, in English and translated, when appropriate, into the recipient's native language or mode of communication.

(iii) Beginning with [2018-2019] 2022-2023 and [2020-2021] 2023-2024 school year results, for any school that completed a school participation rate self-assessment and improvement plan in the previous school year and that fails to improve its participation rates for the subgroup(s) and subject(s), as determined by the commissioner, for which the plan was required, the district shall conduct a participation rate audit and develop an updated participation rate improvement plan. Such district participation improvement plan shall be developed in collaboration with a committee composed of the superintendent or his/her designee(s); the school principal or his/her designee(s); school staff, including teachers and student support staff selected by the representative collective bargaining organization(s); and parents (not employed by the district or a collective bargaining organization representing teachers or administrators in the district) selected by district-related and/or school-related parent organizations. Such district plan must be adopted by the district board of education, no later than 60 days following notification to the district that such a plan is required. The board of education (in New York City, the chancellor or chancellor's designee) shall take appropriate action to notify the general public upon adoption of the school plan; such action shall include, but not be limited to, publishing on the district website, if one exists, or direct notification to the parents, within 30 days of adoption, in English and translated, when appropriate, into the recipient's native language or mode of communication.

(iv) Beginning with [2020-2021] 2023-2024 and [2021-2022] 2024-2025 school year results, for any school for which a district audit and district participation rate improvement plan was completed in the previous school year and that fails to improve its participation rates for the subgroup(s) and subject(s), as determined by the commissioner, for which the plan was required, the district must partner with a Board of Cooperative Educational Services (BOCES) or other technical assistance center to conduct a participation rate audit and develop an updated participation rate plan. Such participation rate improvement plan shall be developed in collaboration with a committee composed of BOCES staff, the superintendent or his/her designee(s); the school principal or his/her designee(s); school staff, including teachers and student support staff, no more than 50 percent of whom shall be selected by the representative collective bargaining organization(s); and parents (not employed by the district or a collective bargaining organization representing teachers or administrators in the district) selected by district-related and/or school-related parent organizations. Such plan must be adopted by the district board of education no later than 60 days following notification to the district that such a plan is required. The board of education (in New York City, the chancellor or chancellor's designee) shall take appropriate action to notify the general public upon adoption of the school plan; such action shall include, but not be limited to, publishing on the district website, if one exists, or direct notification to the parents, within 30 days of adoption, in English and translated, when appropriate, into the recipient's native language or mode of communication.

(v) Beginning with [2021-2022] 2024-2025 and [2022-2023] 2025-2026 school year results, for any school for which an audit and participation rate improvement plan was completed pursuant to subparagraph (iv) of this paragraph in the previous school

year and that fails to improve its participation rates for the subgroup(s) and subject(s), as determined by the commissioner, for which the plan was required, the department shall conduct an audit of the participation rate and the school may be required by the commissioner to address recommendations contained in the participation rate audit.

(vi) Beginning with [2017-2018] 2021-2022 and [2018-2019] 2022-2023 school year results, for any public elementary/middle or high school that is required to develop a participation rate improvement plan and is among the lowest 10 percent of schools within the State for participation rate as determined by the commissioner, the district must submit such plan for approval by the commissioner no later than 60 days following notification to the district that such plan is required.

STATEMENT OF FACTS AND CIRCUMSTANCE WHICH NECESSITATE
EMERGENCY ACTION

In February 2021, the Department submitted a waiver request to the United States Department of Education (USDE) on behalf of all Local Education Agencies (LEAs) in New York State seeking flexibility from federal accountability requirements in the 2020-2021 school year. Specifically, the waiver request addressed the unique circumstances caused by the ongoing COVID-19 pandemic. USDE granted the Department a waiver of the following requirements of the Elementary and Secondary Education Act (ESEA), as recently amended by the Every Student Succeeds Act (ESSA):

- Accountability and school identification requirements in Sections 1111(c)(4) and 1111(d)(2)(C)-(D): the requirements that a State measure progress toward Long-Term Goals and Measures of Interim Progress (MIP); meaningfully differentiate, on an annual basis, all public schools, including adjusting the Academic Achievement indicator based on a participation rate below 95 percent; and identify schools for Comprehensive, Targeted, and additional Targeted Support and Improvement based on data from the 2020-2021 school year.
- Report card provisions related to accountability in section 1111(h) based on data from the 2020-2021 school year. These include:
 - Section 1111(h)(1)(C)(i)(I)-(IV) and (VI): Accountability system description, other than the list of Comprehensive, Targeted, and additional Targeted Support and Improvement Schools.

- Section 1111(h)(1)(C)(iii)(I): Other Academic indicator results for schools that are not high schools.
- Section 1111(h)(1)(C)(v): School Quality or Student Success indicator results.
- Section 1111(h)(1)(C)(vi): Progress toward meeting Long-Term Goals and MIPs.
- Section 1111(h)(2)(C) with respect, at the LEA and school levels, to all waiver requirements in section 1111(h)(1)(C).

As a result, it is necessary for the Department to adopt emergency regulations to be consistent with the waiver granted by USDE. The proposed amendment provides continued flexibility related to school and district accountability, out-of-school suspension rates, and school and district participation rate improvement plans.

The proposed amendment was presented to the P-12 Education Committee for recommendation to the Full Board for adoption as an emergency rule at the September 2021 meeting of the Board of Regents, effective September 14, 2021. Since 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 SAPA sections 201(1) and (5), is the January 2022 Regents meeting. Furthermore, pursuant to SAPA 203(1), the earlier effective date of the proposed rule, if adopted at the (insert month) meeting, would be (insert date), the date the Notice of Adoption would be published in the State Register.

However, the emergency rule will expire on December 12, 2021. Therefore, a second emergency action is necessary for the preservation of public health and the

general welfare to provide flexibility for certain regulatory requirements relating to accountability in response to the COVID-19 crisis and to ensure 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 rule will be presented for adoption as a permanent rule at the January 2022 Regents meeting, which is the first scheduled meeting after the 60-day public comment period prescribed in SAPA for State agency rule makings.