



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

**FROM:** James N. Baldwin 

**SUBJECT:** Proposed Amendment of Section 125.1 of the Regulations of the Commissioner of Education Relating to the Annual Visitation of Voluntarily Registered Nursery Schools and Kindergartens

**DATE:** February 3, 2022

**AUTHORIZATION(S):** 

### SUMMARY

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

Should the Board of Regents adopt the proposed amendment of section 125.1 of the Regulations of the Commissioner of Education relating to the annual visitation of voluntarily registered nursery schools and kindergartens?

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

Review of Policy.

#### **Proposed Handling**

The proposed amendment is presented to the Full Board for adoption as an emergency rule at its February 2022 meeting. A copy of the proposed rule is included as (Attachment A) and a statement of facts and circumstances justifying emergency action is included as (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 November 2021 meeting of the Board of Regents. A Notice of Emergency Adoption and Proposed Rule Making was published in the State Register on December 1, 2021 for a 60-day public comment period.

At the January 2022 Regents meeting, a revised proposed rule was presented to the P-12 Education Committee for recommendation to the Full Board for adoption as an

emergency rule. A Notice of Emergency Adoption and Revised Rule Making was published in the State Register on January 26, 2022 for a 45-day public comment period.

Because the January 2022 emergency action will expire on March 11, 2022, an additional emergency action is necessary to ensure the rule remains continuously in effect until it can be permanently adopted at the April 2022 Regents meeting. A Notice of Emergency Adoption will be published in the State Register on March 30, 2022. Supporting materials are available upon request to the Secretary of the Board of Regents.

### **Background Information**

At its February 2021 meeting, the Board of Regents permanently adopted amendments to section 125.1 of the Commissioner's regulations providing that Department staff must conduct mandatory visitations to voluntarily registered nursery schools and kindergartens "as soon as practicable" if prevented from doing so in the 2019-2020 or 2020-2021 school year(s) due to the COVID-19 crisis. Ordinarily, these inspections are required annually (8 NYCRR 125.1[c]). The Department extended the registration of nursery schools and kindergartens whose registration was up for renewal that did not have on-site visits in the 2019-2020 and/or 2020-2021 school years due to COVID-19.

### **Initial Proposed Amendment and Proposed Revisions**

At its November 2021 meeting, the Board of Regents adopted emergency amendments to section 125.1(d) of the Commissioner's regulations extending the above flexibility to the 2021-2022 school year due to the ongoing challenges of the COVID-19 crisis. However, the proposed amendment inadvertently omitted corresponding amendments to section 125.1(e) of the Commissioner's regulations regarding extension of such schools' registration.

Therefore, at its January 2022 meeting, the Board of Regents took emergency action to adopt revisions to the proposed rule to include an amendment to section 125.1(e) of the Commissioner's regulations, extending the registration of nursery schools and kindergartens whose registration was up for renewal that did not have on-site visits in the 2019-2020, 2020-2021, or 2021-2022 school years due to COVID-19. Additionally, the revised proposed rule provides that such registration shall be up for renewal in the 2022-2023 school year.

### **Related Regents 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, 801.13, 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, 1542.3, 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>)

November 2021: [Proposed Amendment of Section 125.1\(d\) of the Regulations of the Commissioner of Education Relating to the Annual Visitation of Voluntarily Registered Nursery Schools and Kindergartens](https://www.regents.nysed.gov/common/regents/files/1121p12a2.pdf)  
(<https://www.regents.nysed.gov/common/regents/files/1121p12a2.pdf>)

January 2022: [Proposed Amendment of Section 125.1 of the Regulations of the Commissioner of Education Relating to the Annual Visitation of Voluntarily Registered Nursery Schools and Kindergartens](https://www.regents.nysed.gov/common/regents/files/122p12a1.pdf)  
<https://www.regents.nysed.gov/common/regents/files/122p12a1.pdf>

### **Recommendation**

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

VOTED: That section 125.1 of the Regulations of the Commissioner of Education be amended, as submitted, effective March 12, 2022 as an emergency action upon a finding by the Board of Regents that such action is necessary for the preservation of the general welfare and public health to continue to provide flexibility for the annual visitation of voluntarily registered nursery schools and kindergartens during the 2021-2022 school year due to the COVID-19 crisis and to ensure that the emergency action taken at the January 2022 meeting remains continuously in effect.

### **Timetable for Implementation**

If adopted as an emergency rule at the February 2022 Regents meeting, the emergency rule will become effective March 12, 2022. It is anticipated that the proposed amendment will be presented for permanent adoption at the April 2022 Regents meeting, after publication of the proposed amendment in the State Register and expiration of the 45-day public comment period required under the State Administrative Procedure Act for revised rule makings. If adopted at the April meeting, the proposed amendment will become effective as a permanent rule on April 27, 2022.

**Attachment A**

AMENDMENT TO THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to sections 101, 207, 210, 3602, and 3602-e of the Education Law.

1. Subdivisions (d) and (e) of section 125.1 of the Regulations of the Commissioner of Education is amended to read as follows:

(d) Where Department staff are unable to conduct an annual visit in accordance with subdivision (c) of this section in the 2019-2020, [or] 2020-2021, or 2021-2022 school [year] year(s) due to the COVID-19 crisis, Department staff shall conduct such visit as soon as practicable.

(e) Notwithstanding subdivision (b) of this section, any voluntarily registered school whose registration expires in the 2019-2020, [or] 2020-2021, or 2021-2022 school year, and does not receive a required on-site visit from Department staff due to the COVID-19 crisis pursuant to subdivision (d) of this section, shall have such registration extended, subject to revocation for cause, and such registration shall be up for renewal in the [2021-2022] 2022-2023 school year.

STATEMENT OF FACTS AND CIRCUMSTANCES WHICH NECESSITATE  
EMERGENCY ACTION

At its February 2021 meeting, the Board of Regents permanently adopted amendments to section 125.1 of the Commissioner's regulations providing that Department staff must conduct mandatory visitations to voluntarily registered nursery schools and kindergartens "as soon as practicable" if prevented from doing so in the 2019-2020 or 2020-2021 school year(s) due to the COVID-19 crisis. Ordinarily, these inspections are required annually (8 NYCRR 125.1[c]). The Department extended the registration of nursery schools and kindergartens whose registration was up for renewal that did not have on-site visits in the 2019-2020 and/or 2020-2021 school years due to COVID-19.

At its November 2021 meeting, the Board of Regents adopted emergency amendments, effective November 16, 2021, to section 125.1(d) of the Commissioner's regulations extending the above flexibility to the 2021-2022 school year due to the ongoing challenges of the COVID-19 crisis. However, the proposed amendment inadvertently omitted corresponding amendments to section 125.1(e) of the Commissioner's regulations regarding extension of such schools' registration.

Therefore, at its January 2021 meeting, the Board of Regents took emergency action, effective January 11, 2022, to adopt revisions to the proposed rule to include an amendment to section 125.1(e) of the Commissioner's regulations, extending the registration of nursery schools and kindergartens whose registration was up for renewal that did not have on-site visits in the 2019-2020, 2020-2021, or 2021-2022 school years due to COVID-19. Additionally, the revised proposed rule provides that such registration shall be up for renewal in the 2022-2023 school year. A Notice of Emergency Adoption

and Revised Rule Making was published in the State Register on January 26, 2022 for a 45-day public comment period.

Since the Board of Regents meets at fixed intervals, the earliest the proposed amendment could be adopted by regular (nonemergency) action after expiration of the 45-day public comment period required in the State Administrative Procedure Act (SAPA) section 201(4-a) for revised rule makings would be the April 2022 Regents meeting. Furthermore, pursuant to SAPA 203(1), the earlier effective date of the proposed rule, if adopted at the April meeting, would be April 27, 2021, the date the Notice of Adoption would be published in the State Register.

Therefore, emergency action is necessary at the January 2022 meeting for the preservation of the general welfare and public health in order to continue to provide flexibility for the annual visitation of voluntarily registered nursery schools and kindergartens during the 2021-2022 school year due to the COVID-19 crisis and to ensure the emergency action taken at the January 2022 Regents meeting remains continuously in effect.

It is anticipated that the proposed rule will be presented to the Board of Regents for adoption as a permanent rule at the April 2022 meeting, which is the first scheduled meeting after expiration of the 45-day public comment period mandated by SAPA for state agency revised rule making.