



TO: The Honorable Members of the Board of Regents

FROM: Angelique Johnson Dingle *Angelique Johnson Dingle*

SUBJECT: Proposed Amendment to Sections 114.3 and 114.4 of the Regulations of the Commissioner of Education Relating to School Food Service Programs and Bidding Exemptions for Purchasing New York State Food and Milk

DATE: October 5, 2023

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

SUMMARY

Issue for Decision (Consent)

Should the Board of Regents adopt the proposed amendment of Sections 114.3 and 114.4 of the Regulations of the Commissioner of Education relating to School Food Service Programs and bidding exemptions for purchasing New York State food and milk?

Reason for Consideration

Required by State statute (Part OO of Chapter 58 of the laws of 2023).

Proposed Handling

The proposed amendment is presented to the Full Board for adoption as an emergency rule at the October 2023 Regents meeting. 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 P-12 Education Committee for discussion and recommendation to the Full Board for adoption as an emergency rule at the July 2023 meeting of the Board of Regents. A Notice of Emergency Adoption and Proposed Rule Making was published in the State Register on August 30, 2023, for a 60-day public comment period.

Because the July emergency action will expire on November 12, 2023, a second emergency action is necessary to ensure that the emergency rule remains

continuously in effect until it can be permanently adopted at the December 2023 Regents meeting. A Notice of Emergency Adoption will be published in the State Register on November 29, 2023. Supporting materials for the proposed amendment are available upon request from the Secretary to the Board of Regents.

Background Information

On May 3, 2023, Part OO of Chapter 58 of the laws of 2023 (“Chapter 58”) was signed into law which, effective April 1, 2023, amended General Municipal Law (GML) §103 to facilitate the purchase of New York State food products and milk produced in New York State by school districts or boards of cooperative educational services. The proposed amendments to sections 114.3 and 114.4 were developed in consultation with the Commissioner of Agriculture and Markets (as required by GML §103(9), (9-a)) to accommodate and promote the provisions of the farm-to-school program established pursuant to Education Law §305(31) and Agriculture and Markets Law §16(5-b).

The proposed amendment to section 114.3 increases the amount of unprocessed or minimally processed food products grown, produced, or harvested in New York State that school districts or boards of cooperative educational services (BOCES) can purchase without formal bidding requirements from \$100,000 to \$150,000. Additionally, the proposed amendment expands the types of vendors these purchases can be made from to include any vendor that sells such food products. The law previously limited purchases to food products purchased directly from vendors who are New York State producers or growers, or small associations of producers or growers who are owners and operators of farms that combined to sell products to a school district.

The proposed amendment to section 114.3 also increases the dollar threshold for when a school district or BOCES must receive permission from the Commissioner of Education to purchase eligible products from an association of owners of farms when no other producers or growers have offered to sell to such district or BOCES. This amount was increased from \$100,000 to \$150,000.

Additionally, the proposed amendment to section 114.3 provides new definitions for the terminology used in GML §103(9) amendments. The proposal defines “grown in New York State” and “produced in New York State” consistent with the definition of “processed products” in Agriculture and Markets Law §451(3). The proposal also removes definitions for the phrase “association of producers or growers” and the term “directly” which are no longer used in GML §103(9).

Consistent with Chapter 58’s amendments to GML §103(10), the proposed amendment to section 114.4 removes the limitation on the direct purchases of milk from licensed milk producers that employ less than 40 people and clarifies that the milk subject to the bidding exemption must be produced in New York State. Additionally, as with section 114.3, it provides a definition of “produced in New York State” consistent with the definition of “processed products” provided in Agriculture and Markets Law §451(3).

Non-substantial Revisions

Following publication of the Notice of Emergency Adoption and Proposed Rule Making, the Department has made non-substantial revisions to the amendments made to section 114.3 of the proposed rule as follows:

- The definitions for the terms “producer” and “grower” in section 114.3 of the Commissioner’s regulations were reinserted, as those terms are still used in GML §103(9) and section 114.3;
- Subdivisions (d) through (f) of section 114.3 of the Commissioner’s regulations regarding prices paid for items purchased pursuant to such section, public notice requirements, and equal opportunity for producers and growers, were amended to include references to BOCES and to remove additional references to associations of producers and growers.

Related Regents Items

July 2023: [Proposed Amendment to Sections 114.3 and 114.4 of the Regulations of the Commissioner of Education Relating to School Food Service Programs and Bidding Exemptions for Purchasing New York State Food and Milk](https://www.regents.nysed.gov/sites/regents/files/723p12a2.pdf)
(<https://www.regents.nysed.gov/sites/regents/files/723p12a2.pdf>)

Recommendation

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

VOTED: That sections 114.3 and 114.4 of the Regulations of the Commissioner of Education be amended, as submitted, effective November 13, 2023, as an emergency action upon a finding by the Board of Regents that such action is necessary for the preservation of the general welfare to immediately conform the Commissioner’s regulations to Part OO of Chapter 58 of the laws of 2023, and to ensure that the emergency action taken at the July 2023 meeting remains continuously in effect.

Timetable for Implementation

If adopted as an emergency rule at the October 2023 Regents meeting, the emergency rule will become effective November 13, 2023. It is anticipated that the proposed amendment will be presented to the Board of Regents for permanent adoption at the December 2023 Regents meeting, after publication in the State Register and the expiration of the 60-day public comment period required under the State Administrative Procedures Act. If adopted at the December 2023 meeting, the proposed amendment will become effective as a permanent rule on December 27, 2023.

Attachment A

AMENDMENT TO THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to sections 101, 207, and 305 of the Education Law, and section 103 of the General Municipal Law, and Part OO of Chapter 58 of the laws of 2023.

1. Section 114.3 of the Regulations of the Commissioner of Education is amended to read as follows:

114.3 Bidding exemption for [direct] purchasing New York State food.

(a) For use in its school food service program, a board of education on behalf of its school district, or a board of cooperative educational services, may separately purchase eggs, livestock, fish, species of fresh fruits and vegetables, juices, grains, and dairy products, excluding milk, [directly from producers or growers, or from associations of producers or growers] grown, produced or harvested, in New York State exempt from the bidding provisions of subdivisions 1 through 8 of section 103 of the General Municipal Law. All such purchases shall be subject to the provisions of this section.

(b) Definitions.

For the purposes of this section:

(1) *Producer* shall mean the owner of the hens from whom eggs are gathered, the person who owns and raises the livestock, the person who harvests the fish, the person who processes the dairy products, excluding milk, from animals he or she owns and the person who processes juice from fruit he or she owns.

(2) *Grower* shall mean the planter, cultivator, and harvester of the crops to be sold.

(3) Grown in New York State shall mean food products planted, cultivated, and harvested in the state, including eggs gathered from hens located in the state, livestock raised in the state, and fish harvested in the state.

(4) Produced in New York State shall mean any food or dairy product (excluding milk) meeting the definition of “processed products” in Agriculture and Markets Law §451(3).

[(3)] (5) *Quality* shall be determined by the same market standards of the New York State Department of Agriculture and Markets as apply to products sold at the wholesale markets throughout New York State.

[(4) *Directly* shall mean without an intermediary between the producer and/or grower and the board of education.

(5) *Association of producers or growers* shall mean an association or other unincorporated organized group comprised of 10 or fewer producers or growers who own and operate their farms and who have combined to sell products to a board of education in accordance with this section.]

(c) Vendor limitation. [Exempt purchases by a school district from any single producer and/or grower, and/or association of growers or producers are limited to an annual maximum of \$50,000.] An exempt order must be for one hundred fifty thousand dollars or less. A school district or board of cooperative educational services may apply to the commissioner of education for permission to purchase orders of more than one hundred fifty thousand dollars from an association of owners of such farms when no other producers or growers have offered to sell to such school.

(d) *Prices paid*. It shall be the responsibility of the board of education or BOCES to ensure that the prices paid for items purchased pursuant to this exemption do not

exceed the wholesale prices in effect on the date of purchase. Such wholesale prices shall be ascertained by the school district or BOCES, prior to the finalization of the actual purchase agreement, either by telephone solicitation from local wholesalers or by referring to the most current issue of the *Fruit and Vegetable Market News* published by the Division of Market Services, New York State Department of Agriculture and Markets. Records of such price determination shall be kept on file for audit for at least six years.

(e) *Public notice.* The board of education or BOCES shall give public notice of its intent to purchase eggs, fruits, vegetables, livestock, fish, juices, grains and dairy products, excluding milk, without competitive bidding. Such notice shall be given in a manner which will provide all producers and growers [and associations of producers and growers] who desire to sell to a school district or BOCES, pursuant to subdivision 9 of section 103 of the General Municipal Law and this section, an equal opportunity to do so. As a minimum, all producers and/or growers, whose products are grown or produced upon land taxed by the school district, or in the case of a BOCES, all producers and/or growers, whose products are grown or produced upon land taxed by a component school district, shall receive such notice of intent to purchase issued by such school district, or BOCES. Records of such compliance with this subdivision shall be kept on file for audit for at least six years.

(f) *Equal opportunity for producers and growers.* When more than one eligible producer and/or grower proposes to sell at the same price similar products of equivalent quality, and the total value of these products to be purchased exceeds \$1,000, the board of education or BOCES shall divide its purchase equally among all such producers and/or growers. [For purposes of this subdivision, each association of producers or growers shall be considered a single eligible producer or grower.]

2. Section 114.4 of the Regulations of the Commissioner of Education is amended to read as follows:

114.4 Bidding exemption for the direct purchasing of milk.

(a) For use in its school food service program(s), a board of education may, on behalf of its school district, separately purchase fluid milk produced in New York State, directly from a licensed milk processor or processors exempt from the bidding provisions of subdivisions 1 through 8 of section 103 of the General Municipal Law, subject to the maximum allowable expenditure set forth in subdivision 10 of such section. All such purchases shall be subject to the provisions of this section.

(b) ~~[Definition]~~Definitions. For the purpose of this section[, licensed]:

(1) Licensed milk processor shall mean a processor of milk who is licensed by the New York State Department of Agriculture and Markets at the time the milk is supplied to the school district [and who employs less than 40 people at that time].

(2) Produced in New York State shall mean milk meeting the definition of “processed products” in Agriculture and Markets Law §451(3), with the exception that it must be from a licensed milk processor.

(c) ...

(d) ...

(e) ...

(f) ...

STATEMENT OF FACTS AND CIRCUMSTANCES WHICH NECESSITATE
EMERGENCY ACTION

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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 July 2023 meeting of the Board of Regents, effective August 15, 2023. Since the Board of Regents meets at fixed intervals, the earliest the proposed rule can be presented for adoption, after expiration of the required 60-day public comment period provided for in the State Administrative Procedure Act (SAPA) sections 202(1) and (5), would be the December 2023 Regents meeting. Furthermore, pursuant to SAPA section 203(1), the earliest effective date of the proposed amendment, if adopted at the December 2023 meeting, would be December 27, 2023, the date a Notice of Adoption would be published in the State Register.

However, the emergency rule will expire on November 12, 2023. Therefore, a second emergency action is necessary at the October 2023 meeting, effective November 13, 2023, for the preservation of the public health and the general welfare in order to timely implement its provisions, which will facilitate the purchase of New York State food products and milk produced in New York State by school districts or board of cooperative educational services, and to ensure that the emergency action taken at the July 2023 meeting remains continuously in effect.

It is anticipated that the proposed amendment will be presented for permanent adoption at the December 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.