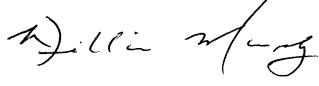





**TO:** Higher Education Committee

**FROM:** William P. Murphy 

**SUBJECT:** Proposed Amendment of Section 3.59 of the Rules of the Board of Regents Relating to Provisions for Mergers, Consolidation, and Membership with Highly Qualified Out-of-State Institutions of Higher Education

**DATE:** January 5, 2024

**AUTHORIZATION(S):** 

## SUMMARY

### Issue for Discussion

Should the Board of Regents adopt the proposed amendment of section 3.59 of the Rules of the Board of Regents relating to provisions for mergers, consolidation, and membership with highly qualified out-of-state institutions of higher education?

### Reason for Consideration

Review of policy.

### Proposed Handling

The proposed amendment is presented to the Higher Education Committee for discussion at the January 2024 Regents meeting. A copy of the proposed rule (Attachment A) is attached.

### Procedural History

A Notice of Proposed Rule Making will be published in the State Register on January 24, 2024, for a 60-day public comment period. Supporting materials are available upon request to the Secretary of the Board of Regents.

### Background Information

Many Institutions of Higher Education (IHEs) across New York State are experiencing enrollment, financial, and operational challenges, and are increasingly exploring partnership opportunities with other institutions to offer more attractive programs, share services, achieve efficiencies, and possibly operate in more than one location.

In response, the Department has issued guidance (Attachment B) to inform the field of the procedures and possibilities for merger, consolidation, or membership between IHEs in New York as well as potential not-for-profit partners. The Department is also proposing a regulatory change to eliminate unnecessary hurdles for mergers, consolidation, and membership between in-state independent/not-for-profit institutions of higher education and highly qualified out-of-state independent/not-for-profit institutions of higher education. The proposed amendment proposes a more streamlined approach to such mergers, consolidation, and membership between such institutions.

### **Proposed Amendment:**

The Department proposes to amend section 3.59 of the Rules of the Board of Regents, defining a “highly qualified out-of-state institution” as an independent, not-for-profit institution of higher education that: (1) is authorized to offer degree programs in a United States state or territory other than New York State, for at least 25 years; (2) is currently certified to participate in Title IV aid programs, without provisional status or sanction, for the last 5 years; and (3) has been accredited for at least 10 years by an institutional accrediting agency recognized by the United States Department of Education, and no adverse actions have been taken during such time period.

Where a New York IHE seeks to merge or consolidate with a highly qualified out-of-state institution, both institutions shall enter into a written agreement and submit an application to the Department pursuant to Education Law §223. Alternatively, if sole membership with a highly qualified out-of-state institution is desired, an application pursuant to Education Law §219 must be made.

The highly qualified out-of-state institution must apply for a charter as an education corporation in New York and for degree-conferring authority. It must demonstrate that it meets the requirements for a provisional or absolute charter, with the Board of Regents to decide whether the institution ultimately receives a provisional or absolute charter. Such institution must demonstrate that it meets all the requirements of section 3.59 of the Rules of the Board of Regents to obtain authorization to offer degree programs in New York State, provided that: (1) the Board of Regents shall determine whether such institution and resulting chartered corporation would hold provisional or permanent authorization to offer degree programs, and (2) the institution and the resulting charter corporation need not have a New York State-based governing board that is independent from the highly qualified out-of-state institution as required by 3.59(b)(2).

Finally, prior to recruiting or enrolling students in any curricula not currently registered to the New York IHE, the institution and resulting chartered corporation must apply for new program registration and a master plan amendment, if applicable.

### **Related Regents Items**

March 2018: [Proposed Amendment of §3.58 and Addition of a New §3.59 to the Rules of Board of Regents to Establish Procedures and Fees for Institutional Authorization to Offer Degree Programs](#)

(<https://www.regents.nysed.gov/sites/regents/files/318brca2.pdf>)

## **Recommendation**

Not applicable.

## **Timetable for Implementation**

It is anticipated that the proposed amendment will be presented for permanent adoption at the May 2024 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 May 2024 meeting, the proposed amendment will become effective on May 22, 2024.

AMENDMENT OF THE RULES OF THE BOARD OF REGENTS

Pursuant to sections 207, 210, 215, 216, 218, and 224 of the Education Law.

Section 3.59 of the Rules of the Board of Regents is amended by adding a new subdivision (f) to read as follows:

(f) Provisions for highly qualified out-of-state institutions of higher education.

(1) For purposes of this subdivision, the term “highly qualified out-of-state institution” shall mean an independent, not-for-profit institution of higher education that:

(i) is authorized to offer degree programs in a United States state or territory other than New York State, for at least 25 years;

(ii) is currently certified to participate in Title IV aid programs, without provisional status or sanction, for the last 5 years; and

(iii) has been accredited for at least 10 years by an institutional accrediting agency recognized by the United States Department of Education, and no adverse actions have been taken during such time period.

(2) Where an institution authorized to offer degree programs in New York State pursuant to this section seeks to merge or consolidate with a highly qualified out-of-state institution, a written agreement and plan shall be entered into setting forth such intent and an application shall be submitted pursuant to Education Law §223 or, if sole-membership with a highly qualified out-of-state institution is desired, an application pursuant to Education Law §219 shall be made.

(3) The highly qualified out-of-state institution shall submit an application for a charter as an educational corporation in New York and for degree granting authority demonstrating that it meets the requirements for a provisional charter pursuant to Education Law § 217 and section 3.22 of this Part, or for an absolute charter pursuant

to Education Law §216 and section 3.21 of this Part. Provided, however, that the Board of Regents shall determine whether such institution receives a provisional or absolute charter. Where the Board of Regents approves such application:

(i) such institution and the resulting chartered corporation shall demonstrate that they meet all the requirements in this section to obtain authorization to offer degree programs in New York State provided, however, that:

(a) the Board of Regents shall determine whether such institution and the resulting chartered corporation would hold provisional authorization to offer degree programs pursuant to subdivision (c) of this section, or a permanent authorization to offer degree programs pursuant to subdivision (d) of this section; and

(b) such institution and resulting chartered corporation need not meet the requirement of paragraph (2) of subdivision (b) of this section; and

(ii) prior to recruiting or enrolling students in any curricula not currently registered to the institution already authorized to offer degree programs in New York State, the institution and the resulting chartered corporation shall apply for new program registration and a master plan amendment, if applicable.

## Guidance for Independent Institutions of Higher Education on Mergers, Consolidations, and Membership

### Introduction

Many Institutions of Higher Education (IHEs) across New York State are experiencing enrollment, financial and operational challenges, and are increasingly exploring partnership opportunities with other institutions to offer more attractive programs, share services, achieve efficiencies, and possibly have a presence in more than one location.

As part of the statewide planning process for Higher Education, the New York State Education Department (NYSED) and Board of Regents anticipate further elucidation of these interests and the issuance of additional guidance or regulatory changes regarding the issues of relationships with other colleges and universities within the State and other means by which operations, structures, and programs may be transformed in response to the evolving higher education landscape and student demographics. We anticipate that this might include reforms in the areas of multi-institution programs and the processes for establishing branch campuses and extension centers.

Recent college closures, however, signal an immediate need for clear guidance and initial proposed regulatory reform to inform the field of the procedures and possibilities for merger, consolidation, or membership between two not-for-profit institutions. Below are Questions and Answers in this regard which we trust will be helpful and we look forward to continued discussions.

### Q&A

Q: Can a not-for-profit IHE's degree conferring authority be sold or transferred to another?

A: Generally, no. Historically, this would involve (a) closure and dissolution of one institution, (b) transfer of substantially all assets to another institution (subject to Attorney General (OAG) and Supreme Court approval), and (c) program registration applications to register programs to the surviving institution.

Q: What about proprietary (for-profit) colleges?

A: Regents Rule 3.58 sets forth the procedures and considerations for transfer of degree conferring authority by proprietary colleges. This guidance will therefore concern not-for-profit institutions.

Q: Closure and dissolution are unattractive options. Are there other means by which two institutions authorized to confer degrees in New York may formally partner with each other?

A: Yes, merger, consolidation or membership with another institution of higher education in New York is possible. Where institutions authorized to offer degree programs in New York State seek to merge or consolidate with each other, a written agreement and plan may be entered into setting forth such intent and an application may be submitted to the Board of Regents pursuant to Education Law §223.

Alternatively, if sole-membership with another institution is desired, an application pursuant to Education Law §219 may be made.

Q: We are interested in a merger or consolidation, but guidance from the USDE ([available here](#)) requires that the institution that has been “acquired” continue its existence as an independent institution and must continue to operate under its existing OPE ID until federal approval of the merger into one institution is obtained. How does this work in New York?

A: Assuming all other requirements are met, the Board of Regents may approve the merger or consolidation contingent upon (and effective upon the date of) federal approval and, in the interim, amend the charters to allow a temporary sole membership arrangement between the two institutions.

Q: In the scenario noted above regarding a merger awaiting federal approval, what about the requirement in Regents Rule 3.59(b)(2) that there be one New York State-based governing board that has final responsibility for and control over the New York institution, independent from any parent?

A: With the ultimate merger or consolidation of the two entities already approved by the Regents and subject only to USDE approval, control by one member over the other does not offend the requirements of the cited section.

Q: Are there other regulatory approvals required for a merger or consolidation of two IHEs?

A: Approval by the United States Department of Education and the institutions’ accrediting agencies may be required.

Q: What if we want to maintain separate corporate entities but allow for sole membership by another institution.

A: Again, this is permissible, but there is a limit on the control and powers that may be reserved to the sole member and additional approvals may be needed. In light of the independent board requirement in 3.59(b)(2), only a minority of the trustees may be appointed or removed by the sole member and ultimate control of the academic programs and budget must remain with the original entity. Please also note that creation of a sole member and some transfer of control may be a transaction requiring review and approval of the NYS Office of the Attorney General (OAG) or Supreme Court under Education Law §216-a and NPCL §§510-511.

Q: May a NY IHE merge/consolidate with a NY Not-For Profit Corporation (NPC)?

A: Yes, but the education corporation (IHE) would generally have to be the surviving corporation. See *also* 3.59(a)(1) (“In rare circumstances, Regents authorization to operate as an independent/not-for-profit institution may be provided through the Consent of the Commissioner to an amendment to the corporate purposes of an existing corporation, which holds a certificate of incorporation or has been formed under the not-for-profit corporation laws of New York State.”).

Q: May a NY IHE allow a NY NPC to be its sole-member.

A: Yes, but subject to the same limitations expressed above regarding only a minority of the trustees being appointed or removed by the sole member; ultimate control of the

academic programs and budget remaining with the education corporation, and the possible need for review and approval by OAG.

Q: What about partnering with an IHE from another state?

A: Under proposed amendment to Rule 3.59 (link to be provided) discussed at the January 2024 Regents meeting, if adopted, a NY IHE may apply to merge or consolidate with a highly qualified independent and not-for-profit institution of higher education from another state. This proposed amendment would not allow for a merger or consolidation with an out-of-state public institution.

Q: What about partnering with a foreign (out of country) IHE?

A: NYSED is considering issues attendant to allowing such formal partnerships. Additional guidance may be forthcoming.

Q: Who can we talk with about these issues?

A: While NYSED cannot offer legal advice or strategic planning, NYSED's Office of Counsel ([legal@nysed.gov](mailto:legal@nysed.gov)) and Office of College and University Evaluation ([ocueinfo@nysed.gov](mailto:ocueinfo@nysed.gov)) are available to provide technical assistance. Inquiries related to institutions offering programs related to [professional licensure](#) should be directed to NYSED's Professional Education Program Review ([opprogs@nysed.gov](mailto:opprogs@nysed.gov)).

Updated January 4, 2024