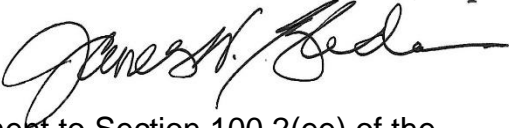






TO: The Honorable the Members of the Board of Regents

FROM: James N. Baldwin 

SUBJECT: Proposed Amendment to Section 100.2(ee) of the Regulations of the Commissioner of Education Relating to Providing Flexibility for the Two-Step Identification Process for Academic Intervention Services (AIS) for Students Who Will Be Enrolled in Grades 3-8 for the 2021-2022 School Year in Response to the COVID-19 Crisis

DATE: September 2, 2021

AUTHORIZATION(S):  

SUMMARY

Issue for Decision (Consent)

Should the Board of Regents adopt the proposed amendment to section 100.2(ee) of the Regulations of the Commissioner of Education relating to providing flexibility for the two-step identification process for academic intervention services (AIS) for students who will be enrolled in grades 3-8 for the 2021-2022 school year in response to the COVID-19 crisis?

Reason(s) for Consideration

Review of policy.

Proposed Handling

The proposed amendment is submitted to the Full Board for adoption as a permanent rule at its September 2021 meeting. A copy of the proposed rule is included as Attachment A.

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 June 2021 meeting of the Board of Regents. A Notice of Emergency Adoption and Proposed Rule Making was published in the State Register on June 23, 2021 for a 60-day public comment period. Because the June emergency action was set to expire on September 5, 2021, a second emergency action was necessary at the July 2021 Board meeting to

ensure the emergency rule remained continuously in effect until it could be permanently adopted and take effect as a permanent rule.

Following publication in the State Register, the Department received comments on the proposed amendment. An Assessment of Public Comment is included as Attachment B. No changes to the proposed amendment are recommended at this time. Supporting materials are available upon request from the Secretary to the Board of Regents.

Background Information

Ordinarily, schools are required to conduct a two-step identification process to identify those students in need of academic intervention services (AIS). At its December 2020 meeting, the Board of Regents adopted regulations providing that schools were not required to conduct this process during the 2020-2021 school year for grade 3-8 students due to the cancellation of State assessments (due, in turn, to COVID-19).

The Department now proposes to extend similar flexibility to the 2021-2022 school year due to the limited administration of State assessments during the 2020-2021 school year. Specifically, the Department proposes to amend section 100.2(ee) of the Commissioner's regulations to provide that schools may, but are not required to, conduct the two-step identification process for grade 3-8 students during the 2021-2022 school year. Those schools that do not utilize the two-step identification process may make an identification based solely on district-developed procedures applicable to all grade 3-8 students during the 2021-2022 school year.

Related Regents Items

December 2020: [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, 156.3, and 200.4 of the Regulations of the Commissioner of Education Relating to Addressing the COVID19 Crisis and the Reopening of Schools](https://www.regents.nysed.gov/common/regents/files/1220brca7.pdf)
(<https://www.regents.nysed.gov/common/regents/files/1220brca7.pdf>)

June 2021: [Proposed Amendment to Section 100.2\(ee\) of the Regulations of the Commissioner of Education Relating to Providing Flexibility for the Two-Step Identification Process for Academic Intervention Services \(AIS\) for Students Who Will Be Enrolled in Grades 3-8 for the 2021-2022 School Year in Response to the COVID-19 Crisis](https://www.regents.nysed.gov/common/regents/files/621p12a4.pdf)
(<https://www.regents.nysed.gov/common/regents/files/621p12a4.pdf>)

July 2021: [Proposed Amendment to Section 100.2\(ee\) of the Regulations of the Commissioner of Education Relating to Providing Flexibility for the Two-Step Identification Process for Academic Intervention Services \(AIS\) for Students Who Will Be Enrolled in Grades 3-8 for the 2021-2022 School Year in Response to the COVID-19 Crisis](https://www.regents.nysed.gov/common/regents/files/721brca6.pdf)
(<https://www.regents.nysed.gov/common/regents/files/721brca6.pdf>)

Recommendation

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

VOTED: That section 100.2(ee) of the Regulations of the Commissioner of Education be amended, as submitted, effective September 29, 2021.

Timetable for Implementation

If adopted at the September 2021 meeting, the proposed amendment will become effective on September 29, 2021.

Attachment A

AMENDMENT TO THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to sections 101, 207, 305, 308, 309, and 3204 of the Education Law.

1. Clause (f) of subparagraph (ii) of paragraph (2) of subdivision (ee) of section 100.2 of the Regulations of the Commissioner of Education is amended to read as follows:

(f) Notwithstanding any other provision of this subparagraph[, schools]:

(i) Schools shall not be required to conduct the two-step identification process prescribed in clauses (a) and (b) of this subparagraph for the 2020-21 school year due to the cancelation of State assessments for the 2019-20 school year [due to]. Schools may, but are not required to, conduct the two-step identification process prescribed in clauses (a) and (b) of this subparagraph for the 2021-22 school year due to the limited administration of State assessments in the 2020-21 school year as a result of the State of emergency declared by the Governor for the COVID-19 crisis.

(ii) For all students who will be enrolled in grades 3 through 8 for the 2020-21 school year, schools shall make such identification based solely on the district-developed procedures prescribed in clauses (b), (d) and (e) of this subparagraph. For schools that opt not to conduct the two-step identification process prescribed in clauses (a) and (b) of this subparagraph for the 2021-22 school year, schools may make such identification based solely on the district-developed procedures prescribed in clauses (b), (d), and (e) of this subparagraph for all students who will be enrolled in grades 3 through 8 for the 2021-22 school year.

ASSESSMENT OF PUBLIC COMMENT

Since publication of the Notice of Emergency Adoption and Proposed Rule Making in the State Register on June 23, 2021, the State Education Department (Department) received the following comment on the proposed amendments:

1. COMMENT: Commenter agrees that “using the state test scores would not be a valid measure of how students are doing, considering the inconsistencies in delivery that existed due to COVID.” However, the commenter expresses concern that allowing “free ranging placement” will lead to teaching to “an atmosphere that supports teaching to your top students and expecting AIS to support the skill building for the rest of the students. In essence, this is building curriculum on a pre-designed deficit model instead of one using UDL and differentiation to teach all students. Excessive use of AIS does not incentivize improvement in quality of instruction. The learning loss students have experienced due to COVID presents a challenge and I do believe support is necessary but can do more with an emphasis on high quality instruction.” The commenter further asks “[w]hat monitoring will be in place to note if districts are over utilizing AIS instead of improving instruction to meet the needs of all students?” The commenter also asserts that “[t]oo much AIS eats up slots in a student’s schedule that could be allowing equitable access to opportunities. With equity on everyone in the education world’s mind think about which students would be the first to lose those opportunities. So, the 2 step (process) with the state tests might not work but the alternative must be thought out, tracked, documented, and monitored.”

DEPARTMENT RESPONSE: While the department agrees that the two-step process for identifying students who are eligible for AIS services is ideal under typical circumstances, this regulation change is temporary, instituted for the upcoming 2021-2022 school year only, in response to the extraordinary conditions created by the COVID-19 crisis and its impact on the ability to administer 3-8 State assessments in Spring of 2021. It is important to note that the two-step process is only applicable to grades 3-8 and the State assessments given to those grades. Students in grades K-2 and 9-12 continue to be identified to receive AIS services through several criteria, the majority of which are district-developed or adopted procedures that do not include State assessment scores. For the majority of grade levels, districts have historically had the ability to identify students based largely on their district specific procedures (see 8 CRR-NY 100.2(ee)(1) and (3)). Districts are not currently required to submit their AIS plans to the Department for monitoring, review, or evaluation (except certain districts which may be required to, based on performance criteria established by the Commissioner (see 8 NYCRR 100.2(ee)(4)(iv)). However, every two years, districts are required to review and revise their description of academic intervention services based on student performance results (8 NYCRR 100.2(ee)(4)(ii)).