



TO: The Honorable Members of the Board of Regents
FROM: Angelique Johnson-Dingle *Angelique Johnson-Dingle*
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 Enrolled in Grades 3-8 for the 2023-2024 School Year

DATE: August 31, 2023

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 enrolled in grades 3-8 for the 2023-2024 school year?

Reason for Consideration

Review of policy.

Proposed Handling

The proposed amendment is presented to the Full Board for adoption as an emergency rule at the September 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 2, 2023, for a 60-day public comment period.

Because the July emergency will expire on October 15, 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 November 2023 Regents meeting. A Notice of Emergency Adoption will be published in the State Register on November 1, 2023. Supporting materials for the proposed amendment are available upon request from the Secretary to the Board of Regents.

Background Information

Ordinarily, pursuant to section 100.2(ee) of the Commissioner's regulations, schools are required to conduct a two-step identification process to identify those students in need of academic intervention services (AIS).¹ However, the spring 2023 Grades 3-8 English Language Arts (ELA) and Mathematics Tests were the first state assessments to measure the New York State (NYS) Next Generation Learning Standards. Because these are new tests measuring new learning standards, additional analyses and NYS educator input are necessary to establish the achievement standards (also known as "cut scores") for performance on each of the tests. These steps are taking place over the summer and results on the ELA and Math Tests are expected to be available in fall 2023.

To ensure that schools are able to make programming decisions and determine which students will receive AIS prior to the first day of school, the Department proposes to provide flexibility in the identification process for AIS during the 2023-2024 school year and any other year where the results of the grades 3-8 assessments are not provided to schools prior to the beginning of the 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 where the results of the grades 3-8 assessments are not provided to schools prior to the beginning of the 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.

Related Regents Items

July 2023: [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 Enrolled in Grades 3-8 for the 2023-2024 School Year](https://www.regents.nysed.gov/sites/regents/files/723p12a1.pdf)
(<https://www.regents.nysed.gov/sites/regents/files/723p12a1.pdf>)

¹ The two-step identification process is as follows: first, all students performing at or below a certain scale score, established through a standard setting process conducted by the Department, on one or more of the State elementary assessments in English language arts or mathematics shall be considered for AIS. Students scoring at or above the scale score established by a standard setting panel and approved by the Commissioner are not required to receive AIS unless the school district determines that such services are needed. Second, districts must then use a district-developed procedure, to be applied uniformly at each grade level, for determining which identified students shall receive AIS after it considered a student's score on multiple measures of student performance.

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 October 16, 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 provide flexibility for the two-step identification process for academic intervention services (AIS) for students enrolled in grades 3-8 for the 2023-2024 school year, and any other school year where the results of the grades 3-8 assessments are not provided to schools prior to the beginning of the school year, 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 September 2023 Regents meeting, the emergency rule will become effective October 16, 2023. It is anticipated that the proposed amendment will be presented to the Board of Regents for permanent adoption at the November 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 November 2023 meeting, the proposed amendment will become effective as a permanent rule on November 29, 2023.

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 years due to the cancelation of State assessments for the 2019-20 school year] school years in which the results of the grades 3-8 assessments are not provided to schools prior to the beginning of such school year. [Schools] In such school years, 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] during a school year where the two-step identification process is not required pursuant to subclause (i) of this clause, schools [shall] which opt not to conduct the two-step identification process prescribed in clauses (a) and (b) of this subparagraph 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].

STATEMENT OF FACTS AND CIRCUMSTANCES WHICH NECESSITATE
EMERGENCY ACTION

Ordinarily, pursuant to section 100.2(ee) of the Commissioner's regulations, schools are required to conduct a two-step identification process to identify those students in need of academic intervention services (AIS). However, the spring 2023 Grades 3-8 English Language Arts (ELA) and Mathematics Tests were the first state assessments to measure the New York State (NYS) Next Generation Learning Standards. Because these are new tests measuring new learning standards, additional analyses and NYS educator input are necessary to establish the achievement standards (also known as "cut scores") for performance on each of the tests. These steps are taking place over the summer and results on the ELA and Math Tests are expected to be available in fall 2023.

To ensure that schools are able to make programming decisions and determine which students will receive AIS prior to the first day of school, the Department proposes to provide flexibility in the identification process for AIS during the 2023-2024 school year and any other year where the results of the grades 3-8 assessments are not provided to schools prior to the beginning of the 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 where the results of the grades 3-8 assessments are not provided to schools prior to the beginning of the 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.

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 July 18, 2023. 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 60-day public comment period provided for in the State Administrative Procedure Act (SAPA) sections 201(1) and (5) would be the November 2023 Regents meeting. Furthermore, pursuant to SAPA 203(1), the earliest effective date of the proposed rule, if adopted at the November meeting, would be November 29, 2023, the date the Notice of Adoption would be published in the State Register.

However, the emergency rule will expire on October 15, 2023. Therefore, a second emergency action is necessary at the September 2023 meeting, effective October 16, 2023, for the preservation of the general welfare to immediately provide flexibility for the two-step identification process for academic intervention services (AIS) for students enrolled in grades 3-8 for the 2023-2024 school year, and any other school year where the results of the grades 3-8 assessments are not provided to schools prior to the beginning of the school year and to ensure that the emergency action taken at the July 2023 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 November 2023 Regents meeting, which is the first scheduled meeting after expiration of the 60-day public comment period mandated by SAPA for state agency rule making.

