





TO: The Honorable Members of the Board of Regents

FROM: Mark Schaming 

SUBJECT: Proposed Repeal of Section 90.4, Addition of a New Section 90.4, and Amendment of Section 90.12 of the Regulations of the Commissioner of Education Relating to Central Library Services Aid and State Aid for Library Construction

DATE: December 29, 2022

AUTHORIZATION(S): 

SUMMARY

Issue for Decision (Consent)

Should the Board of Regents adopt the proposed repeal of section 90.4, addition of a new section 90.4, and amendment of section 90.12 of the Regulations of the Commissioner of Education relating to central library services aid and state aid for library construction?

Reason(s) for Consideration

Required by State statute.

Proposed Handling

The proposed amendment is submitted to the Full Board for adoption as an emergency rule at its January 2023 meeting. A copy of the proposed amendment (Attachment A) and a statement of facts and circumstances justifying emergency action (Attachment B) are included.

Procedural History

The proposed amendment was presented to the Cultural Education Committee for discussion and recommendation to the Full Board for adoption as an emergency rule at the November 2022 meeting of the Board of Regents. A Notice of Emergency Adoption and Proposed Rule Making was published in the State Register on November 30, 2022, for a 60-day public comment period.

Because the November emergency action will expire on February 12, 2023, a second emergency action is necessary to ensure the emergency rule remains continuously in effect until it can be permanently adopted at the March 2023 Regents meeting. A Notice of Emergency Adoption will be published in the State Register on March 1, 2023. Supporting materials are available upon request from the Secretary to the Board of Regents.

Background Information

Commissioner's Regulation §90.12

Education Law §273-a (State aid for library construction) was recently amended by the Legislature in three significant respects:

- The time allowed for construction project completion was increased from three years to four years in 2021 (Chapter 563 of the Laws of 2021; "Chapter 563"), and then to six years in 2022 (Chapter 333 of the Laws of 2022).
- Chapter 627 of the Laws of 2021 set limits on the amount of money that a library system may commit to building projects. Specifically, no more than fifty percent of the total funds appropriated to a library system may be used to support total costs for projects receiving state aid in excess of seventy-five percent, up to ninety percent, of the total approved costs. This built upon earlier legislation (Chapter 381 of the Laws of 2019), which authorized State funding of up to ninety percent of total project costs for public and association library buildings that are located in economically distressed communities.
- Chapter 389 of the Laws of 2019 authorized public library systems to submit coordinated project applications for a project involving more than one library building.

The Department now proposes amendments to section 90.12 of the Commissioner's regulations to implement these legislative amendments. The Department also proposes technical amendments to align the language of section 90.12, last updated in 2017, with Education Law §273-a. Specifically, the proposed amendment:

- Defines the terms "library service area", "economically disadvantaged", "economically distressed", and "coordinated application";
- Amends the definition of library construction to clarify that it includes renovation or rehabilitation of a building to be leased for library purposes for a minimum of 10 years, after the expected completion of the project;
- Amends application procedures to:
 - specify that the library system board must give particular attention to the service needs of any communities that are geographically isolated as well as economically distressed;

- explain how a library system board may demonstrate “economically disadvantaged” status;
 - clarify that the library system board must determine the amount of State aid that will be allocated for each single building project application;
 - state that library systems may allocate up to 50 percent of their library systems’ total State aid for single building projects serving economically distressed communities; and
 - indicate that coordinated applications must be submitted in accordance with Education Law §273-a(3);
- Specifies that the library share of the cost of the project must be available or have been otherwise committed to the project;
- Clarifies that the degree to which each project will result in the provision of library services in communities that are “economically distressed” shall be considered in the approval process;
- Indicates that, with respect to costs:
 - project management project costs, salaries, benefits, or other in-house personnel costs are not eligible for approval;
 - purchase and installation or construction of permanent components of a library building and construction of an outbuilding are added to approved costs; and
 - certain costs are not eligible for State aid funds, but may be included in a project application and paid from the library’s share of the total project cost.

Commissioner’s Regulation §90.4

Chapter 563 also amended Education Law §273 to simplify and modernize State aid formulas for various library aid programs. At its September 2022 meeting, the Board of Regents adopted amendments to the Commissioner’s regulations to implement a portion of Chapter 563. After obtaining input from key stakeholders, the Department now proposes amendments to section 90.4 of the Commissioner’s regulations relating to standards for central libraries, to fully implement Chapter 563.

Chapter 563 combined the former Central Library Services Aid (CLDA) and Central Book Aid (CBA) programs administered by the public library systems into a new, more flexible Central Library Services Aid Program. As a result, the outdated wording of section 90.4 of the Commissioner’s regulations (i.e., “Standards for Central Libraries”) will be repealed and replaced with new language that aligns with Education Law §273(1)(b), as amended by Chapter 563. The proposed amendment:

- Defines terms used in such section;
- Requires each public library system to submit proposals to show how the system will manage a central library services program as part of their plan of service;

- Sets forth central library service program purposes;
- Prescribes eligibility criteria for State aid for central library services, and for designation as the central or co-central library; and
- Provides that the Commissioner shall determine the format and timetable for the submission and application of reports and may request any reports deemed necessary to carry out the purposes of the program.

Related Regents Items

November 2022: [Proposed Repeal of Section 90.4, Addition of a New Section 90.4, and Amendment of Section 90.12 of the Regulations of the Commissioner of Education Relating to Central Library Services Aid and State Aid for Library Construction](https://www.regents.nysed.gov/common/regents/files/1122cea1.pdf)
(<https://www.regents.nysed.gov/common/regents/files/1122cea1.pdf>)

September 2022: [Proposed Amendment of Sections 90.3, 90.14, 90.18 and Repeal of Section 90.19 of the Regulations of the Commissioner of Education Relating to State Aid for Public Library Systems, School Library Systems and Reference and Research Library Resource Councils](https://www.regents.nysed.gov/common/regents/files/922brca1.pdf)
(<https://www.regents.nysed.gov/common/regents/files/922brca1.pdf>)

Recommendation

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

VOTED: That section 90.4 of the Regulations of the Commissioner of Education be repealed, a new section 90.4 of the Regulations of the Commissioner of Education be added, and section 90.12 of the Regulations of the Commissioner of Education be amended, as submitted, effective February 13, 2023, as an emergency rule upon a finding by the Board of Regents that such action is necessary for the preservation of the general welfare to immediately align the Commissioner’s regulations with 389 of the Laws of 2019, Chapter 563 of the Laws of 2021, and Chapter 333 of the Laws of 2022, and to ensure that the emergency action taken at the November 2022 meeting remains continuously in effect.

Timetable for Implementation

If adopted as an emergency rule at the January 2023 Regents meeting, the emergency rule will become effective February 13, 2023. Following the 60-day public comment period required under the State Administrative Procedure Act, it is anticipated that the proposed amendment will be presented to the Board of Regents for adoption at its March 2023 meeting. If adopted at the March meeting, the proposed amendment will become effective as a permanent rule on March 29, 2023.

AMENDMENT TO THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to sections 207, 215, 253, 254, 255, 272, 273, 273-a, 282-285 of the Education Law and -Chapter 389 of 2019, Chapters 563 and 627 of the Laws of 2021 and Chapter 333 of the Laws of 2022.

1. Section 90.12 of the Regulations of the Commissioner of Education is amended to read as follows:

90.12 State Aid for Library Construction

(a) Definitions.

As used in this section and in Education Law[, section] §273-a:

(1)

(2)

(3) Library service area means the chartered service area of a public, free association or Indian library as stated on charter documents approved by the Board of Regents and on file at the department. For the purposes of this section, the phrase “and environs” or its equivalent as contained in any charter document will not be recognized by the commissioner as a valid part of a library service area. For the purposes of this section, areas served by the library under contract will not be recognized by the commissioner as a valid part of a library service area.

(4) Library construction means:

(i) ...

(ii) ...

(iii) renovation or rehabilitation of a building to be leased for library purposes for a minimum of ten (10) years, including renovation or rehabilitation of a building for library purposes pursuant to a lease-purchase agreement.

[4][5] *Acquisition* means the purchase of a site for library purposes and/or an existing building suitable for conversion to library purposes.

[5][6] *Renovation* means the overall improvement or conversion of an existing building, exclusive of routine maintenance, resulting in increased operational efficiency and economy

[6][7] *Rehabilitation* means the restoration of an existing library building, exclusive of routine maintenance, with particular emphasis on energy conservation, accommodation for computer equipment, or access by [physically handicapped] persons with disabilities.

[7][8] *Broadband library services* means providing a high speed internet connection for library users, including but not limited to internal and external connections, at a minimum speed prescribed by the commissioner using such means as wireless, fiber, cable, white space and similar products

(9) Economically disadvantaged means that the library building that will be the subject of a project application is located in a community that meets a set of criteria as determined by the library system in accordance with Education Law §273-a (2)(e) and that the project is therefore eligible for aid of up to seventy-five percent (75%) of the total project costs.

(10) Economically distressed means that the average poverty rate for the library service area meets or exceeds the New York State average poverty rate in accordance with the provisions of Education Law §273-a (2)(f) and where the library also

demonstrates the need for State aid of up to and including ninety percent (90%) of the total project costs.

(11) Coordinated application means an application submitted by a public library system on behalf of two or more libraries for one specific type of project, such as broadband, infrastructure, generators or energy efficient lighting. The State aid allocation for such coordinated projects shall not exceed fifty percent (50%) of the total project costs.

(b) Application procedures.

(1)

(2) ...

(3) When the applicant is a library system [board], the application shall describe how the State-aided project will improve system services to member libraries and users.

(4) The library system board shall rank the applications from its system area in order of its recommendations, giving particular attention to the service needs of any communities which are geographically isolated, [or] economically disadvantaged, economically distressed or located beyond the reasonable service capabilities of other libraries which are members of such library system.

(5) The library system board, upon request by the commissioner, shall provide the eligibility criteria for applications designated as projects serving economically disadvantaged communities pursuant to Education Law section 273-a(2)(e) for each recommended application. Such documentation may demonstrate eligibility through poverty rates, concentrations of English language learners, low high school graduation rates, limited fiscal capacity or other relevant factors as approved by the commissioner.

(6) The library system board shall determine the amount of State aid that will be allocated for each single building project application. The library system may allocate up to and including fifty percent (50%) of the library system's total State aid appropriation under Education Law §273-a for single building projects serving economically distressed communities as defined in paragraph (10) of subdivision (a) of this section. In accordance with the provisions of Education Law §273-a(4), State aid funding for all economically distressed projects must be allocated entirely from the fifty percent (50%) portion of the library system's total appropriation.

(7) Coordinated applications must be submitted by the library system in accordance with the provision of Education Law §273-a (3). The public library system shall be responsible for managing all coordinated projects. Each coordinated project application shall be approved by the board of trustees of each participating library as well as the board of trustees of the library system. Each library building included in a coordinated application is eligible for State funding up to and including fifty percent (50%) of total coordinated project costs for that building. No one building may be the subject of more than one coordinated project application per year.

(c) Content of applications. Each application shall assure that:

(1) ...

(2) the [nonstate] library share of the cost of the project [is or will] must be available or have been otherwise committed to the project;

(3) ...

(4) ...

(5) the project has not been completed prior to the date of application to the library system;

(6) ...

(7)

(d) Criteria for approval of an application. Approval of construction project applications will be based in part upon the degree to which each project will result in:

(1) ...

(2) ...

(3) improved access to and use of building services by all library users, including [physically handicapped] persons with physical disabilities;

(4) the provision of library services in communities which are geographically isolated, [or] economically disadvantaged or economically distressed; and

(5)

(e) Costs. Pursuant to Education Law, section 273-a:

(1) Costs eligible for approval shall include:

(i) ...

(ii) ...

(iii) ...

(iv) ...

(v) ...

(vi) ...

(vii) ...

(viii) ...

(ix) ...

(x) ...

(xi) ...

(xii) ...

(xiii) project management of the construction, renovation, rehabilitation or broadband library services infrastructure project, exclusive of salaries, benefits, or other in-house personnel costs;

(xiv) architectural and engineering plans for locally approved new or ongoing projects; [and]

(xv) purchase and installation or construction of permanent components of a library building, including devices or systems to increase energy efficiency and energy conservation for library purposes, exclusive of any add-on warranties or recurring service or maintenance costs;

(xvi) in accordance with i, ii and iii above, construction of an outbuilding, when that building is built onsite or when a permanent foundation or base is added beneath the outbuilding that was constructed off-site;

(xvii) such other costs as may be approved by the commissioner.

(2) [Costs ineligible for approval shall include, but shall not be limited to] The following costs are not eligible for State aid funds, but may be included in a project application and paid from the library's share of the total project costs:

(i) ongoing service fees for telecommunications and broadband services, including but not limited to, help-desk services, training costs, or any other cost incurred after installation;

(ii) software licensing;

(iii) flooring and/or carpeting when not part of a larger construction project in that same room of the library;

(iv) lease payments of any kind;

(v) interest or debt retirement; and

(vi) furniture when not part of a much larger construction project in the same room or rooms of the library and in the same project number.

(3) The following costs are not eligible for State aid for Library construction, regardless of whether such project costs will be paid with State aid funds, or the library's share of the total project costs:

(i) speculative architectural and engineering plans and feasibility studies;

(ii) building consultant studies;

(iii) interest or carrying charges on bonds financing the project;

(iv) purchase of books and other library materials;

(v) repairs incidental to larger construction activities;

(vi) landscaping that is not a project component of subparagraph (i), (ii), (iii) or (iv) of paragraph (1) of this subdivision; and

(vii) routine repair and maintenance.

(f) Schedule of payment of State aid for library construction:

(1)

(2) Forty percent (40%) of such aid shall be payable in the State fiscal year following the year in which State funding was first provided in the State's enacted budget.

(3) The ten percent (10%) final payment will be made after submission and approval of satisfactory evidence that the project has been completed in accordance with the terms of the approved application. The commissioner will determine if the evidence submitted is satisfactory and approvable.

(g) Reports. The following reports shall be made to the commissioner on the forms and by the dates prescribed by the commissioner:

(1)

(2)

(3) Upon request by the commissioner, a library system board shall submit a report detailing the status of each project for which an application was submitted by a member library and not recommended for approval, or was [approved] submitted but for which no State aid was provided.

(4)

2. Section 90.4 of the Regulations of the Commissioner of Education is REPEALED and a new section 90.4 is added to read as follows:

90.4 Central library services aid.

(a) Definitions. As used in this section and Education Law §273(1)(b):

(1) Central library means the library so designated in the public library system's approved plan of service.

(2) Co-central libraries means the two libraries so designated in the public library system's approved plan of service.

(3) Approved plan of service means the public library system's plan of service submitted to the State Library pursuant to Education Law §272(1).

(4) Professional position means a position that requires a public librarian professional certificate pursuant to section 90.7 of this Part.

(5) Library materials and information resources means adult, juvenile, fiction, non-fiction, foreign language or reference materials in any format.

(b) Inclusion in plan of service. Pursuant to Education Law §273(1)(b) each public library system shall submit as part of their plan of service, in a form and by a date prescribed by the commissioner, proposals to show how the system will manage a central library services program. The elements and format of such a plan of service related to the central library services aid program shall be determined by the commissioner.

(c) Central library service program purposes:

(1) To acquire and make widely available library materials and information resources in multiple formats that will meet the needs of the residents of the public library system service area.

(2) To provide reference and information services to all residents of the system's service area.

(d) Eligibility criteria.

(1) In order to be eligible for State aid for central library services pursuant to Education Law §273(1)(b) a public library system shall:

(i) Operate under an approved plan of service pursuant to the provisions of Education Law §272(1);

(ii) Submit an approvable prior year library system annual report and current year budget;

(iii) Submit an approvable annual application for such formula aid;

(iv) Provide program assurances and information as requested by the commissioner;

(v) Provide that the central library or each of the two co-central libraries are open at least 55 hours per week including non-duplicative branch hours;

(vi) Show evidence of member library input; and

(vii) Assure that library materials acquired with central library services aid are:

(a) Owned by the public library system; and

(b) Located in the central library as designated in the approved plan of service of the system. If two co-central libraries are designated in such plan, the system shall determine the proportion of library materials assigned to each.

(2) In order to be eligible for designation as the central or co-central library, a library shall:

(i) Be designated as the central or co-central library in the approved plan of service of the public library system;

(ii) Provide an annual average of not less than 55 hours per week of service to the public, including non-duplicative branch hours, and not less than the number of hours each week required under section 90.2 of this Part;

(iii) Provide in the central library or in each of the co-central libraries at least two-full time professional positions financed from other than Federal or State funds, excluding budgeted positions vacant for more than 24 months;

(iv) Submit an approvable prior year library annual report;

(v) Participate in the development and implementation of the public library system's plans for central library services;

(vi) Pursuant to Education Law §272(1)(i), abide by maintenance of effort for central libraries and public library systems;

(vii) Abide by the public library system's approved free direct access plan; and

(viii) Provide a statement by the board of trustees of the central library or each of the co-central libraries to the public library system;

(a) Accepting designation as the central library or co-central libraries;

(b) Confirming the adequacy of the proposed central library services plan to meet system wide needs; and

(c) Confirming the commitment of the central library or co-central libraries to the implementation of such plan.

(e) Applications and reports.

(1) The commissioner shall determine the format and timetable for the submission of applications and reports.

(2) The commissioner may request any other reports that the commissioner shall deem necessary to carry out the purposes of this program.

STATEMENT OF FACTS AND CIRCUMSTANCES WHICH NECESSITATE
EMERGENCY ACTON

Education Law §273-a (State aid for library construction) was recently amended by the Legislature in three significant respects:

- (1) The time allowed for construction project completion was increased from three years to four years in 2021 (Chapter 563 of the Laws of 2021; “Chapter 563”), and then to six years in 2022 (Chapter 333 of the Laws of 2022).
- (2) Chapter 627 of the Laws of 2021 set limits on the amount of money that a library system may commit to building projects. Specifically, no more than fifty percent of the total funds appropriated to a library system may be used to support total costs for projects receiving state aid in excess of seventy-five percent, up to ninety percent, of the total approved costs. This built upon earlier legislation (Chapter 381 of the Laws of 2019), which authorized State funding of up to ninety percent of total project costs for public and association library buildings that are located in economically distressed communities.
- (3) Chapter 389 of the Laws of 2019 authorized public library systems to submit coordinated project applications for a project involving more than one library building.

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Chapter 563 combined the former Central Library Services Aid (CLDA) and Central Book Aid (CBA) programs administered by the public library systems into a new, more flexible Central Library Services Aid Program. As a result, the outdated wording of section 90.4 of the Commissioner's regulations (i.e., "Standards for Central Libraries") will be repealed and replaced with new language that aligns with Education Law §273(1)(b), as amended by Chapter 563.

The proposed amendment was presented to the Cultural Education Committee for recommendation to the Full Board for adoption as an emergency rule at the November 2022 meeting of the Board of Regents, effective November 14, 2022. 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 March 2023 Regents meeting. Furthermore, pursuant to SAPA 203(1), the earliest effective date of the proposed rule, if adopted at the March meeting, would be March 29, 2023, the date the Notice of Adoption would be published in the State Register.

However, the emergency rule will expire on February 12, 2023. Therefore, a second emergency action is necessary at the January 2023 meeting, effective February

13, 2022, for the preservation of the general welfare in order to immediately align the Commissioner's regulations with 389 of the Laws of 2019, Chapter 563 of the Laws of 2021, and Chapter 333 of the Laws of 2022 and to ensure that the emergency action taken at the November 2022 meeting remains continuously in effect until the rule can be permanently adopted.

It is anticipated that the proposed rule will be presented to the Board of Regents for adoption as a permanent rule at the March 2023 meeting, which is the first scheduled meeting after expiration of the 60-day public comment period mandated by SAPA for state agency rule making.