



**TO:** Higher Education Committee

**FROM:** William P. Murphy *William P. Murphy*

**SUBJECT:** Proposed Amendment of Sections 80-5.3 and 80-5.4 of the Regulations of the Commissioner of Education Relating to Extending Flexibilities for Incidental and Substitute Teaching

**DATE:** May 5, 2022

**AUTHORIZATION(S):** *John A. ... Betty ...*

**SUMMARY**

**Issue for Decision**

Should the Board of Regents adopt the proposed amendment of sections 80-5.3 and 80-5.4 of the Regulations of the Commissioner of Education relating to extending flexibilities for incidental and substitute teaching?

**Reason(s) for Consideration**

Review of policy.

**Proposed Handling**

The proposed amendment is submitted to the Higher Education Committee for discussion and to the Full Board for adoption as an emergency rule at its May 2022 meeting. A copy of the proposed amendment is included (Attachment A), and a Statement of Facts and Circumstances which necessitate emergency action is included (Attachment B).

**Procedural History**

A Notice of Emergency Adoption and Proposed Rule Making will be published in the State Register on June 1, 2022, for a 60-day public comment period. Supporting materials are available upon request from the Secretary to the Board of Regents.

## **Background Information**

In response to the COVID-19 pandemic and a statewide teacher shortage, the Board of Regents expanded opportunities for incidental and substitute teaching as described below. The Department now proposes to extend these flexibilities into the 2022-2023 school year.

### **Incidental Teaching**

At its December 2020 meeting, the Board of Regents permanently adopted regulatory amendments to increase the amount of incidental teaching permitted in schools from up to five classroom hours a week to up to 10 classroom hours a week during the 2020-2021 school year in response to the COVID-19 pandemic.

At its October 2021 meeting, the Board of Regents permanently adopted regulatory amendments to extend this flexibility to the 2021-2022 school year. Through incidental teaching, certified teachers can teach a subject not covered by their certificate when no certified or qualified teachers are available after extensive and documented recruitment.

### **Substitute Teaching**

The Board of Regents permanently adopted regulatory amendments at its December 2020 meeting allowing a school district or BOCES to employ certain substitute teachers—those who did not hold a valid certificate and were not working towards certification but held a high school diploma or its equivalent—to be employed for more than 40 days during the 2020-2021 school year. The regulation permitted the employment of these substitute teachers beyond this period under the following extraordinary circumstances:

- Up to an additional 50 days (90 days total in a school year) if the district superintendent or the superintendent (for school districts that are not a component district of a BOCES) certifies that the employer has conducted a good faith recruitment search for a properly certified candidate and determined that there are no available certified teachers that can perform the duties of such position; or
- Beyond the 90 days, if a district superintendent or the superintendent attests that a good faith recruitment search has been conducted, that there are still no available certified teachers who can perform the duties of such position, and that a particular substitute teacher is needed to work with a specific class or group of students until the end of the school year.

At its October 2021 meeting, the Board of Regents permanently adopted regulatory amendments to extend this flexibility to the 2021-2022 school year.

The Department now proposes to extend these flexibilities for incidental teaching and substitute teaching again to the 2022-2023 school year. This proposal enables school districts to address their continuing teacher shortages by providing them with flexibility in making teaching assignments.

### **Related Regents Items**

October 2021: [Proposed Amendment to Sections 52.30, 63.9, 70.4, 74.6, 75.2, 75.5, 76.2, 79-9.3, 79-10.3, 79-11.3, 79-12.3, 80-5.3, 80-5.4, 83.5, 87.2, 87.5, 145-2.15, 155.17, 200.5, 200.6, and 279.15 of the Regulations of the Commissioner of Education Relating to Addressing the COVID-19 Crisis](https://www.regents.nysed.gov/common/regents/files/1021brca7.pdf)  
(<https://www.regents.nysed.gov/common/regents/files/1021brca7.pdf>)

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>)

### **Recommendation**

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

VOTED: That sections 80-5.3 and 80-5.4 of the Regulations of the Commissioner of Education be amended, as submitted, as an emergency measure, effective May 17, 2022, upon a finding by the Board of Regents that such action is necessary for the preservation of the general welfare to continue allowing certified teachers to teach up to 10 classroom hours a week in a subject area not covered by their certificate and substitute teachers to work more than 40 days in a school district or BOCES in a school year under certain conditions for the 2022-2023 school year to address teacher shortages.

### **Timetable for Implementation**

If adopted as an emergency rule at the May 2022 Regents meeting, the emergency rule will become effective May 17, 2022. It is anticipated that the proposed rule will be presented to the Board of Regents for permanent adoption at the September 2022 Regents meeting, after publication of the proposed amendment in the State Register and the expiration of the 60-day public comment period required under the State Administrative Procedure Act. Because the emergency action will expire before the September Regents meeting, it is anticipated that an additional emergency action will be presented for adoption at the July 2022 meeting. If adopted at the September 2022 meeting, the proposed amendment will become effective on September 28, 2022.

AMENDMENT TO THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to sections 101, 207, 208, 305, 308, 3001, 3004 and 3009 of the Education Law.

1. The opening paragraph of section 80-5.3 of the Regulations of the Commissioner of Education shall be amended to read as follows:

A superintendent of schools may assign a teacher to teach a subject not covered by such a teacher's certificate or license for a period not to exceed five classroom hours a week, and [due to the COVID-19 crisis] during the 2020-2021[ and/or], 2021-2022, and 2022-2023 school years for a period not to exceed ten classroom hours a week, when no certified or qualified teacher is available after extensive and documented recruitment and provided that approval of the commissioner is obtained in accordance with the following requirements:

2. Subparagraph (ii) of paragraph (3) of subdivision (c) of section 80-5.4 of the Regulations of the Commissioner of Education shall be amended to read as follows:

(ii) In extreme circumstances where there is an urgent need for a substitute teacher and the district has undertaken a good faith recruitment search for a properly certified candidate, and determined that there are no available certified teachers to perform the duties of such position, a substitute teacher, without a valid teaching certificate and who is not working towards certification, but who holds a high school diploma or its equivalent, may be employed by the school district or board of cooperative educational services beyond the 40-day limit, for up to an additional 50 days (90 days total in a school year), if the district superintendent (for districts that are a component district of a board of cooperative educational services and boards of

cooperative educational services) or the superintendent (for school districts that are not a component district of a board of cooperative educational services) certifies that the district or board of cooperative educational services, as applicable, has conducted a good faith recruitment search and there are no available certified teachers that can perform the duties of such position. In rare circumstances, a district or BOCES may hire a substitute teacher beyond the 90 days, if a district superintendent or superintendent attests that a good faith recruitment search has been conducted and that there are still no available certified teachers who can perform the duties of such position and that a particular substitute teacher is needed to work with a specific class or group of students until the end of the school year. The provisions of this subparagraph shall be applicable during the 2020-2021[ and], 2021-2022, and 2022-2023 school years[ due to the COVID-19 crisis].

STATEMENT OF FACTS AND CIRCUMSTANCES WHICH NECESSITATE  
EMERGENCY ACTION

At its December 2020 meeting, the Board of Regents permanently adopted regulatory amendments to increase the amount of incidental teaching permitted in schools from up to five classroom hours a week to up to 10 classroom hours a week during the 2020-2021 school year in response to the COVID-19 pandemic.

At its October 2021 meeting, the Board of Regents permanently adopted regulatory amendments to extend this flexibility to the 2021-2022 school year. Through incidental teaching, certified teachers can teach a subject not covered by their certificate when no certified or qualified teachers are available after extensive and documented recruitment.

The Board of Regents permanently adopted regulatory amendments at its December 2020 meeting allowing a school district or BOCES to employ certain substitute teachers—those who did not hold a valid certificate and were not working towards certification but held a high school diploma or its equivalent—to be employed for more than 40 days during the 2020-2021 school year. The regulation permitted the employment of these substitute teachers beyond this period under the following extraordinary circumstances:

- Up to an additional 50 days (90 days total in a school year) if the district superintendent or the superintendent (for school districts that are not a component district of a BOCES) certifies that the employer has conducted a good faith recruitment search for a properly certified candidate and

determined that there are no available certified teachers that can perform the duties of such position; or

- Beyond the 90 days, if a district superintendent or the superintendent attests that a good faith recruitment search has been conducted, that there are still no available certified teachers who can perform the duties of such position, and that a particular substitute teacher is needed to work with a specific class or group of students until the end of the school year.

At its October 2021 meeting, the Board of Regents permanently adopted regulatory amendments to extend this flexibility to the 2021-2022 school year.

The Department now proposes to extend these flexibilities for incidental teaching and substitute teaching again to the 2022-2023 school year. This proposal enables school districts to address their continuing teacher shortages by providing them with flexibility in making teaching assignments.

Since the Board of Regents meets at fixed intervals, the earliest the proposed amendment could be adopted by regular (non-emergency) 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 September 2022 Regents meeting. Furthermore, pursuant to SAPA 203(1), the earliest effective date of the proposed rule, if adopted at the September meeting, would be September 28, 2022, the date the Notice of Adoption would be published in the State Register.

Therefore, emergency action is necessary at the May 2022 meeting for the preservation of the general welfare and public health to continue allowing certified teachers to teach up to 10 classroom hours a week in a subject area not covered by their certificate and substitute teachers to work more than 40 days in a school district or

BOCES in a school year under certain conditions for the 2022-2023 school year prior to September 28, 2022.

It is anticipated that the proposed rule will be presented to the Board of Regents for adoption as a permanent rule at its September meeting, which is the first scheduled meeting after expiration of the 60-day public comment period mandated by SAPA for State agency rulemaking. However, since the emergency action will expire before the September Regents meeting, it is anticipated that an additional emergency action will be presented for adoption at the July 2022 Regents meeting.