

New York State Education Department Proposes Rules Relating to Affiliations Between New York and Out-of-State Institutions of Higher Education

The New York State Education Department (“SED”) has proposed an [amendment](#) to Title 8, Section 3.59 of the Rules of the Board of Regents that would clarify how a New York State institution of higher education (an “IHE”) might enter into certain corporate relationships with a “highly qualified out-of-state institution.” The proposed amendment follows attempts by New York IHEs to merge, consolidate, or otherwise affiliate with other institutions, including out-of-state institutions, due to challenges relating to enrollment and other financial and operational challenges. Section 3.59 generally describes the requirements for seeking authorization to offer postsecondary degree programs in New York. However, the rules regarding how an out-of-state institution can affiliate with an in-state institution to offer degrees or consolidate activities have long been unclear.

Under the proposed rule, a highly qualified out-of-state institution (“OSI”) is defined as an independent, not-for-profit institution of higher education that:

- (i) [has been] 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 federal 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.*

Where a New York IHE and an OSI seek to merge or consolidate, the proposed rule would require both institutions to enter into a written agreement and file a petition with the Board of Regents pursuant to Section 223 of the New York State Education Law.

Where an OSI seeks to become the sole member of a New York IHE, the proposed rule would require a charter amendment from the Board of Regents pursuant to Section 219 of the New York Education Law.

In all cases, the OSI would need to apply for a charter as an education corporation in New York and petition the Board of Regents for degree-conferring authority. In so doing, the OSI would be required to demonstrate that it meets the requirements for a provisional or absolute charter (other than the requirement to have a New York State-based governing board that is independent of the OSI). Additionally, prior to recruiting or enrolling students in any curricula not currently registered with SED, the institution would need to apply for new program registration and a master plan amendment, if applicable.

The proposed rules provide clarity regarding the SED process for establishing corporate relationships between OSIs and New York IHEs. Nevertheless, these rules would impose significant regulatory hurdles for transactions in which the OSI seeks to be the surviving entity in a merger with a New York IHE or seeks to become the sole member of a New York IHE.

The Notice of Proposed Rule Making was published in the New York State Register on January 24, 2024, and public comments will be accepted for sixty (60) days following publication. It is anticipated that the proposed amendment will be presented for adoption at the May 2024 Regents meeting. If adopted at the May 2024 meeting, the proposed amendment will become effective on May 22, 2024.

This alert is for general informational purposes only and should not be construed as specific legal advice. If you would like more information about this alert, please contact one of the following attorneys or call your regular Patterson contact.

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