

December 20, 2024

Via Email and Certified Mail Return Receipt Requested

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Re: Proposed Rulemaking re District Superintendents

Dear Sirs/Madams:

This firm is special counsel to Locust Valley Central School District, Cold Spring Harbor Central School District, Oyster Bay-East Norwich Central School District and Manhasset Union Free School District. I write on behalf of each school district to submit this public comment letter to set forth the illegality of the proposed rulemaking titled *District Superintendents* published in the New York State Register dated October 23, 2024 (I.D. No. EDU-43-24-00010-P) (the “Proposed Rule”). As you are aware, the Proposed Rule, calls for District Superintendents to, *inter alia*:

- “oversee[] the BOCES and the component school districts of supervisory districts. This role includes, but is not limited to, overseeing the development and implementation of regionalization plans pursuant to Subpart 124-2 of this Part, providing services for and facilitating collaboration among component school districts, carrying out duties and responsibilities as directed by the Commissioner” Proposed Rule, § 124-1.1(c).
- “act as an intermediary between the Department, BOCES, and component school districts to facilitate the successful execution of education initiatives within the sole supervisory district, including translating state educational priorities into actionable regionalization plans that align with the unique needs and resources of the component school districts.” Proposed Rule, § 124-1.4.

The Proposed Rule improperly attempts to strip school districts of their autonomy and local control. The Proposed Rule is arbitrary and capricious. It has been proposed in violation of various rulemaking requirements, including the State Administrative Procedure Act (“SAPA”) and is contrary to the Education Law. We respectfully request that the Proposed Rule be withdrawn.

I. The Proposed Rule Violates SAPA

a. The Rulemaking Violates Sections 202-A(3)(b) of SAPA

Section 202-A(3)(b) of SAPA provides that the regulatory impact statement for a proposed rule must include:

[A] citation for and summary, not to exceed five hundred words, of each scientific or statistical study, report or analysis that served as the basis for the rule, an explanation of how it was used to determine the necessity for and benefits derived from the rule, and the name of the person that produced each study, report or analysis.

Nothing in the publication of the Proposed Rule contains such discussion. There is no: (i) citation to any study, report or analysis that served as the basis for the Proposed Rule, or (ii) explanation of how any study, report or analysis was used to determine the necessity for and benefits derived from the Proposed Rule. It is impossible for the districts (or the public) to understand the basis for the Proposed Rule.

NYSED’s sole justification for the Proposed Rule is: “[g]iven the unique dual reporting structure of District Superintendents where they are accountable to both the BOCES Board of Trustees and the Commissioner – there is a critical need for guidelines that outline their authority, duties and benefits”. But District Superintendents and BOCES have existed for decades. This explanation does not describe why suddenly there is a ”critical need for guidelines that outline” District Superintendents’ authority, duties and benefits. The Proposed Rule similarly does not provide any basis for this “critical need” as the education system is running as it has for the last two centuries. See *N.Y. State Ass’n of Counties v. Axelrod*, 78 N.Y.2d 158, 168 (1991); *Jewish Memorial Hospital v. Whalen*, 47 N.Y.2d 331, 343 (1979).¹

¹ On December 3, 2024, the undersigned also submitted a request under section 104(1) of SAPA. To date, no response has been received.

b. The Rulemaking Violates Section 202-A of SAPA As NYSED Failed to Conduct a Cost Analysis

NYSED violated section 202-A of SAPA by failing to conduct a cost analysis. Specifically, section 202-A of SAPA requires NYSED’s Regulatory Impact Statement to contain, among other things:

A statement detailing the projected costs of the rule, which shall indicate:

- (i) The costs for the implementation of, and continuing compliance with, the rule to regulated persons; and
- (ii) The costs for the implementation of, and continued administration of, the rule to the agency and to the state and its local governments; and
- (iii) the information, including the source or sources of such information, and methodology upon which the cost analysis is based; or
- (iv) where an agency finds that it cannot fully provide a statement of such costs, a statement setting forth its best estimate, which shall indicate the information and methodology upon which such best estimate is based and the reason or reasons why a complete cost statement cannot be provided.

In the Regulatory Impact Statement, NYSED solely states: “[t]he proposed rule does not impose any costs on” State government, local government, private regulated parties or NYSED. See Proposed Rule, Regulatory Impact Statement, § 4. This is incorrect. The face of the Proposed Rule itself affords discretion to BOCES to award District Superintendents a supplemental salary, healthcare benefits, health insurance, disability insurance, life insurance or other form of insurance and moving expenses. The Proposed Rule does not dictate how these expenses will be paid. Because BOCES is funded by the State and component school districts, it is apparent that these expenses will be incurred and should be disclosed.

Indeed, Education Law § 1951 establishes that school districts will fund these costs as the statute states, in pertinent part:

The final administrative and capital budgets of the board of cooperative educational services as adopted shall be a charge against all of the school districts contained in the board of cooperative

educational services . . . expenditures for the board of cooperative educational services program, including office and central administrative expenses, traveling expenses and salaries and benefits of supervisors and all other central administrative personnel necessary to carry out its program shall be deemed administrative expenses which shall be a charge upon all component school districts notwithstanding the fact that such a component school district elects to not participate in any specific program offered by the board of cooperative educational services.

N.Y. Educ. Law § 1951

Further, if the Proposed Rule is promulgated, school districts will have another supervisor, increasing reporting obligations and audits/investigations, both of which cost money and cause school district personnel to dedicate time. School districts will be impacted.

A cost analysis is required. Without that cost analysis school districts cannot determine the costs the Proposed Rule will impose on them.

c. The Rulemaking Violates Section 202-B of SAPA as NYSED Failed to Complete a Regulatory Flexibility Analysis

“In proposing a rule for adoption . . . the agency shall issue a regulatory flexibility analysis regarding the rule being proposed for adoption” SAPA § 202-B. Each Regulatory Flexibility Analysis shall contain:

- (a) a description of the types and an estimate of the number of small businesses and local governments to which the rule will apply;
- (b) a description of (i) the reporting, recordkeeping and other compliance requirements of the rule, and (ii) the kinds of professional services that a small business or local government is likely to need in order to comply with such requirements;
- (c) an estimate of the initial capital costs and an estimate of the annual cost of complying with the rule, with an indication of any likely variation in such costs for small businesses or local governments of different types and of differing sizes;
- (d) an assessment of the economic and technological feasibility of compliance with such rule by small businesses and local governments;

(e) an indication of how the rule is designed to minimize any adverse economic impact of such rule on small businesses and local governments, including information regarding whether the approaches suggested in subdivision one of this section or other similar approaches were considered; and

(f) a statement indicating how the agency complied with subdivision six of this section.

SAPA § 202-B(2).. Further section 202-B(6) provides that a Regulatory Flexibility Analysis is not required for:

any rule which does not impose an adverse economic impact on small businesses or local governments and which the agency finds would not impose reporting, recordkeeping or other compliance requirements on small businesses or local governments. The agency's finding and the reasons upon which the finding was made, including what measures the agency took to ascertain that the rule would not impose such compliance requirements, or adverse economic impact on small businesses or local governments, shall be included in the rule making notice as required by section two hundred two of this chapter.

SAPA § 202-B(3).

In violation of the foregoing, under the “Regulatory Flexibility Analysis” heading for the Proposed Rule, NYSED in conclusory form states: “[t]he proposed rule does not have any adverse economic impact or impose any reporting, record keeping or any other compliance requirements on . . . local governments. Because it is evident from the nature of the proposed amendment that it does not affect . . . local governments, . . . a regulatory flexibility analysis for . . . local governments is not required . . . and one has not been prepared.” See Proposed Rule, Regulatory Flexibility Analysis, § 4.

This is incorrect and violates SAPA. As stated above, if the Proposed Rule is promulgated, school districts will incur costs, have increased reporting obligations and be subject to additional audits/investigations as it will have a new supervisor – the District Superintendent. Further, in violation of its mandatory duty, NYSED failed to explain any “measures the agency took to ascertain that the rule would not impose such compliance requirements, or adverse economic impact on small businesses or local governments.”

d. The Rulemaking Violates Section 202(3)(e) of SAPA As The Proposed Rule Mandates School District Compliance, Contrary to NYSED’s Representations Within the Rulemaking

SAPA § 202(3)(e) requires a proposed rulemaking to contain a Regulatory Impact Statement that contains a description of “Local government mandates. A statement describing any program, service, duty or responsibility imposed by the rule upon any county, city, town, village, school district, fire district or other special district . . .”

In its Regulatory Impact Statement, NYSED states: “[t]he proposed rule does not impose any program service, duty, responsibility, or other mandate on local governments.” Regulatory Impact Statement, § 5. This is incorrect.

The Proposed Rule states: “[t]he district superintendent . . . [is] responsible for overseeing . . . the component school districts of supervisory districts.” Proposed Rule, 124-1.1(c). This is a new power of District Superintendents not found in statutes or regulation, which is confirmed by NYSED itself as the Regulatory Impact Statement states that “[t]here are no other state or federal requirements on the subject matter of the proposed rule.”² Regulatory Impact Statement, § 5.

This new power imposes new mandatory obligations on component school districts to adhere to the District Superintendent’s oversight and authority. This is contrary to NYSED’s statement and is in violation of SAPA.

e. The Rulemaking Violates Section 202(3)(g) of SAPA As NYSED Failed to Analyze Alternatives to the Proposed Rule

SAPA § 202(3)(g) requires a proposed rulemaking to contain a Regulatory Impact Statement that contains a description of: “Alternative approaches. A statement indicating whether any significant alternatives to the Proposed Rule were considered by the agency, including a discussion of such alternatives and the reasons why they were not incorporated into the rule”.

In its Regulatory Impact Statement, NYSED states: “[t]he proposed rule is necessary to clarify the responsibilities and employment conditions for district superintendents. There are no significant alternatives to the proposed rule and none were considered.” But the Proposed Rule does more than “clarify” District Superintendents’ responsibilities and employment conditions; it creates entirely new powers and benefits, as well as obligations of school districts to comply therewith.

An obvious alternative to the Proposed Rule is the status quo, which has existed for decades. The status quo allows component school districts to maintain local control of their

² This statement is incorrect as the Proposed Rule is contrary to various sections of the Education Law as discussed *infra*.

operations as they have for over two centuries. NYSED failed to analyze the status quo or otherwise articulate why it is necessary to now give broad powers to District Superintendents to generally “oversee” individual school districts with no limits.

II. The Proposed Rule is Contrary to Various Sections of the Education Law

The Education Department is “without power to promulgate rules in contravention of the will of the Legislature. ‘Administrative agencies can only promulgate rules to further the implementation of the law as it exists; they have no authority to create a rule out of harmony with the statute’”. *Finger Lakes v. Racing Bd.*, 45 N.Y.2d 471, 480 (N.Y. 1978). The Proposed Rule violates numerous sections of the Education Law.

a. The Proposed Rule is Contrary to Education Law § 2215

Section 2215 of the Education Law sets forth an exclusive list of powers and duties of District Superintendents. Nowhere does the Education Law state, or even imply, that District Superintendents have the authority to “oversee” school districts in a general capacity as the Proposed Rule provides. The Legislature did not intend for school districts to answer to, or be overseen by, District Superintendents. To the contrary, a District Superintendent’s statutory powers include:

- ensuring school district boundaries are correctly described in the public record,
- holding conferences for teachers within his districts,
- holding meetings of school boards and other school officers to advise with and counsel them in relation to their powers and duties,
- examining and licensing teachers,
- investigating and issuing reports to the Commissioner upon request of the Commissioner,
- Reporting to the Commissioner on cost-effective practices in school districts.

None of these duties are close to the powers that the Proposed Rule would grant to District Superintendents. Authorizing District Superintendents to oversee school districts in a general capacity is contrary to the Legislature’s grant of authority and will change the way the New York State education system works in the manner it has for centuries. NYSED does not have authority to proceed in this manner.

b. The Proposed Rule is Contrary to Education Law § 1950

District Superintendents are executives of BOCES. Like District Superintendents, BOCES are creatures of statute and have no inherent powers other than as expressly authorized by statute. Indeed, section 1950(1) provides that BOCES was established “for the purpose of carrying out a

program of shared educational services in the schools of a supervisory district.” Educ. L., § 1950(1).

Section 1950(4) sets forth an exclusive list of BOCES powers. That section generally limits BOCES powers to provide services **at the request of component school districts**. Nowhere does section 1950 or other sections of the Education Law permit BOCES or District Superintendents to oversee school districts or compel actions. NYSED improperly attempts to bypass this statute and create power for District Superintendents to oversee school districts via the Proposed Rule. This legislative usurpation is improper.

a. The Proposed Rule Violates, *Inter Alia*, §§ 314, 1950, 1951, 1981, 2040, 2041, 2045, and 3202 of the Education Law

The Proposed Rule calls for District Superintendents to facilitate component school districts’ mandatory implementation of regionalization plans. This violates, *inter alia*, sections 314, 1950, 1951, 1981, 2040, 2041, 2045, and 3202 of the Education Law for the reasons set forth in the undersigned’s letters dated October 31, 2024 and November 22, 2024. Those letters are fully incorporated herein and are enclosed herewith. This is particularly the case as the Board of Regents passed the final regionalization rule on December 10, 2024. That final rule requires school districts to implement regionalization plans under District Superintendent direction as it states: “[c]omponent school districts and supervisory districts shall begin the implementation of approved regionalization plans no later than the start of the 2026-2027 school year.”

III. The Proposed Rule Is Arbitrary and Capricious Because The Education Department Failed to Identify Objective Standards By Which District Superintendents Can Exercise Their New Boundless Power Over School Districts

“[A]n administrative agency is forbidden from exercising its discretionary power without first detailing standards or guides to govern the exercise of that discretion ” *Matter of Nicholas v. Kahn*, 47 N.Y.2d 24, 34 (N.Y. 1979); *Lynch v. N.Y.C. Civilian Complaint Review Bd.*, 2021 N.Y. Slip Op. 32233, 8 (N.Y. Sup. Ct. 2021); *D.F. v. Carrion*, 986 N.Y.S.2d 769, 778 (N.Y. Sup. Ct. 2014).

As stated above, the Proposed Rule provides newfound broad authority contrary to the Education Law to District Superintendents over school districts. This broad grant of authority over school districts can be read to mean that school districts will be required to implement whatever the District Superintendent demands, whether on his/her own or from the Commissioner. This boundless power has zero parameters and is contrary to the Education Law. This vague grant of authority provides no standards or guidelines describing the scope of District Superintendents’ powers or how it may be used rendering the Proposed Rule arbitrary and capricious as a matter of law.

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Please be advised that this letter is only meant to summarize the many legal issues associated with the Proposed Rule. The foregoing is not exhaustive. Before seeking judicial intervention along with several other individuals and parties, we respectfully request that you withdraw, and not proceed with, final promulgation of the Proposed Rule. We look forward to hearing from you.

Very truly yours,

Nicholas C. Rigano
Nicholas C. Rigano

Enclosures