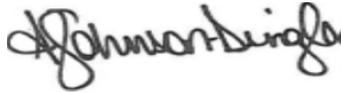




**TO:** The Honorable Members of the Board of Regents

**FROM:** Angelique Johnson-Dingle 

**SUBJECT:** Proposed Addition of Section 100.22 and Amendment of Section 200.6 of the Regulations of the Commissioner of Education Relating to Instruction Provided to Students in a Home, Hospital, or Institutional Setting Other Than a School (Homebound Instruction)

**DATE:** November 3, 2022

**AUTHORIZATION(S):** 

### SUMMARY

#### **Issue for Decision (Consent)**

Should the Board of Regents adopt the proposed addition of section 100.22 and amendment of section 200.6 of the Regulations of the Commissioner of Education relating to the instruction provided to students in a home, hospital, or institutional setting other than a school (also referred to as Homebound Instruction)?

#### **Reason(s) for Consideration**

Review of policy.

#### **Proposed Handling**

The proposed amendment is submitted to the Full Board for adoption as an emergency rule at the November 2022 Regents meeting. A copy of the proposed rule is included (Attachment A) and a statement of facts and circumstances justifying emergency action is included (Attachment B).

#### **Procedural History**

The proposed amendment was presented to the P-12 Education Committee for discussion and recommended to the Full Board for adoption as an emergency rule at the May 2022 meeting, effective July 1, 2022. A Notice of Proposed Rule Making was published in the State Register on June 1, 2022, for a 60-day public comment period and a Notice of Emergency Adoption was published in the State Register on July 20,

2022. Emergency action was necessary at the September 2022 meeting, effective September 29, 2022, to ensure the rule remained in effect for the coming 2022-2023 school year. A Notice of Emergency Adoption will be published in the State Register on October 19, 2022.

Following publication in the State Register, the Department received public comment on the proposed amendment. An Assessment of Public Comment is included (Attachment C). At the October 2022 Regents meeting, the proposed amendment was revised in response to public comment. A Notice of Emergency Adoption and Revised Rule Making was published in the State Register on October 19, 2022, for a 45-day public comment period. Because the October 2022 emergency action will expire on December 2, 2022, a fourth emergency action is necessary to ensure the emergency rule remains continuously in effect until it can be permanently adopted at the January 2023 Regents meeting. A Notice of Emergency Adoption will be published in the State Register on December 21, 2022. Supporting materials are available upon request to the Secretary of the Board of Regents.

### **Background Information**

Homebound instruction is an educational service provided by a school district to resident students (public and non-public) who are anticipated to be unable to attend school in person for at least ten days in a three-month period due to physical, mental, or emotional illness or injury. Homebound instruction ensures that students can continue learning and working towards mastery of learning standards while unable to attend school for a significant period of time for reasons beyond their control.

Currently, Commissioner's regulations only address instruction provided to students cared for in hospitals or other institutions which provide for the care, custody, and treatment of children, other than a school setting, pursuant to Education Law §3202(6) (8 NYCRR 175.21). This section of regulation pertains to average daily attendance and average daily membership for determination of state aid and establishes a minimum of 5 (elementary school level) or 10 (secondary level) hours of instruction per week.

For students with disabilities who are recommended for home, hospital, or institutional instruction by a committee on special education (CSE), section 200.6 of the Commissioner's regulations requires the same minimum hours for elementary and secondary levels as prescribed in section 175.21 of the Commissioner's regulations and reserves the determination of the instruction and related services to the CSE. There currently exists no instructional requirements for the general student population in need of such instruction, other than these stated minimums.

Throughout the 2021-2022 school year, the State Education Department received numerous inquiries from parents and caregivers regarding the extent to which they could request or were entitled to receive, "homebound" instruction for students, including those who were immunocompromised. Schools also inquired as to how they should determine a student's eligibility for such instruction.

## **Original Proposed Amendment**

The proposed rule will give districts and parents or guardians clarity on the requirements for the application and provision of such instruction. The proposed rule will also establish, beginning with the 2023-2024 school year, increased minimum instructional requirements for students who are unable to attend school in person for at least ten days out of the next three months due to illness or injury that requires the student to remain at home or in a hospital or other institution for the treatment of children other than a school.

Thus, the Department proposes to add a new section 100.22 to the Commissioner's regulations that:

- defines the terms tutor, school district of residence, and healthcare provider;
- requires medical verification from the student's treating healthcare provider as well as a request for home, hospital, or institutional instruction from a parent or guardian;
- establishes a time frame for review of the request, including the ability to appeal a denial thereof to a board of education;
- identifies minimum requirements for instruction to continue a student's academic progress, including the development of an instructional plan in consultation with the parent or guardian and, where appropriate, the student; and
- effective July 1, 2023, increases the minimum instruction hours to at least 10 hours of instruction per week at the elementary level and at least 15 hours of instruction at the secondary level unless a lesser period is requested by the parent or guardian and supported by documentation submitted by a treating physician.

Additionally, the Department proposes to amend section 200.6 of the Commissioner's regulations to provide that the amount of home, hospital and institutional instruction for students with disabilities conforms to the increased requirements of section 100.22.

## **Revised Proposed Amendment Following the First Public Comment Period**

In response to public comment, section 100.22(d)(1) of the proposed rule has been revised to provide that, when requesting home, hospital, or institutional instruction, the parent or guardian must submit written consent authorizing the school medical director or designee to contact the student's treating healthcare provider. If consent is not provided, this will result in a denial of the request for instruction.

Additionally, section 100.22(d)(5) of the proposed rule has been revised to provide that the parent or guardian may appeal the medical director's denial for home, hospital, or institutional instruction to the board of education within ten school days of receipt of the denial, rather than five school days.

Finally, section 100.2(e)(1) of the proposed rule, regarding the written instruction delivery plan has been revised. The requirement that the plan be developed in

consultation with the parent, guardian, and student, where appropriate, did not make clear that the school district remains responsible for making the final determination as to how the instruction will be provided. The proposed rule has therefore been clarified to require that the school district obtain and consider input from the parent/guardian and, if appropriate, the student. Further, the revised proposed rule requires that the instruction plan be reviewed by the school district as needed, based upon a changed condition and/or needs of the student.

### **Related Regents Items**

October 2022: [Proposed Addition of Section 100.22 and Amendment of Section 200.6 of the Regulations of the Commissioner of Education Relating to Instruction Provided to Students in a Home, Hospital, or Institutional Setting Other Than a School \(Homebound Instruction\)](https://www.regents.nysed.gov/common/regents/files/1022p12a2.pdf)

(<https://www.regents.nysed.gov/common/regents/files/1022p12a2.pdf>)

September 2022: [Proposed Addition of Section 100.22 and Amendment of Section 200.6 of the Regulations of the Commissioner of Education Relating to Instruction Provided to Students in a Home, Hospital, or Institutional Setting Other Than a School \(Homebound Instruction\)](https://www.regents.nysed.gov/common/regents/files/922brca13.pdf)

(<https://www.regents.nysed.gov/common/regents/files/922brca13.pdf>)

May 2022: [Proposed Addition of Section 100.22 and Amendment of Section 200.6 of the Regulations of the Commissioner of Education Relating to Instruction Provided to Students in a Home, Hospital, or Institutional Setting Other Than a School \(Homebound Instruction\)](https://www.regents.nysed.gov/common/regents/files/522p12a4.pdf)

(<https://www.regents.nysed.gov/common/regents/files/522p12a4.pdf>)

June 2008: [Proposed Amendments to and Repeals of the Regulations of the Commissioner Relating to State Aid](https://www.regents.nysed.gov/meetings/2008/2008-06-27)

(<https://www.regents.nysed.gov/meetings/2008/2008-06-27>)

### **Recommendation**

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

VOTED: That section 200.6 of the Commissioner’s regulations be amended, and section 100.22 of the Regulations of the Commissioner of Education be added, as submitted, effective December 3, 2022, 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 ensure that districts and parents or guardians receive clarity as to the circumstances under which “homebound” instruction may be requested and delivered for the upcoming school year and to ensure the emergency action taken at the October 2022 meeting, remains continuously in effect.

### **Timetable for Implementation**

If adopted as an emergency rule at the November 2022 meeting, the emergency rule will become effective on December 3, 2022. It is anticipated that the proposed amendment will be presented for permanent adoption at the January 2023 Regents meeting. If adopted at the January 2023 meeting, the proposed amendment will become effective as a permanent rule on January 25, 2023.

AMENDMENT OF THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to sections 101, 207, 215, 305, 1604, 1709, 2503, 2554, 3202, 3204, and 3205 of the Education Law.

1. Part 100 of the Regulations of the Commissioner of Education, is amended by adding a new section 100.22 to read as follows:

§100.22 Instruction provided to students in a home, hospital, or institutional setting other than a school (homebound instruction).

(a) Purpose. The purpose of this section is to establish minimum instructional requirements that must be provided to students who are anticipated to be unable to attend school in person for at least ten days during a three-month period due to illness or injury which requires the student to remain at home or in a hospital or other institution for the treatment of children, other than a school.

(b) Definitions. As used in this section:

(1) Remote instruction shall have the same meaning as defined in section 100.1(u) of this Part.

(2) Tutor means an individual with whom the school district of residence contracts to provide home, hospital, or institutional instruction pursuant to this section. Such tutor must hold a New York State teaching certificate pursuant to Part 80 of this Title. A tutor may include a teacher employed by a board of cooperative educational services (BOCES) that contracts with the school district of residence to provide such instruction pursuant to Education Law §1950.

(3) Instruction delivery plan means a written plan to continue the student's academic progress and to maintain a record of delivery of instructional services and student progress, in accordance with paragraph (1) of subdivision (e) of this section.

(4) School district of residence means the public school district within the State of New York where students legally reside with their parents or guardians.

(5) Treating health care provider means a person who is treating a student and is licensed or otherwise authorized to provide diagnosis pursuant to a profession enumerated in Title VIII of the Education Law.

(c) Responsibility for instruction.

(1) The board of education of the school district of residence shall provide instructional services to all resident students enrolled in a public or nonpublic school from kindergarten to age 21 when, due to a temporary or chronic physical, mental, emotional illness or injury, as documented by the student's treating healthcare provider, the student is unable to participate in their usual education setting.

(2) Such instruction may be provided by the district or by a tutor; provided, however, that for hospital and institutional instruction, such instruction may also be provided via contract with a school connected with such hospital or institution, or by contract with the local public school district in which such hospital or institution is located. Such contract shall be limited to the cost of educational services and shall not include maintenance or medical services.

(d) Request for instruction.

(1) When requesting home, hospital, or institutional instruction, the parent or guardian must submit a request to the school district of residence that includes written medical verification from the student's treating healthcare provider demonstrating the

student's anticipated inability to attend school in person for at least ten days during the next three months and written consent authorizing the school medical director or designee to contact the treating healthcare provider. Refusal to provide such written consent will result in a denial of the request for home, hospital, or institutional instruction.

(2) The school district shall forward the request to the school's medical director, who shall review the need for home, hospital, or institutional instruction. The school's medical director may contact the student's treating healthcare provider to obtain additional information necessary regarding the student's health or mental health.

(3) The school district shall provide instructional services to the student within five school days after the school district receives notification of the student's medical condition or within five school days from the parent or guardian's request for home, hospital, or institutional instruction, whichever occurs first.

(4) The school district shall notify the parent or guardian regarding the medical director's approval or reason(s) for denial within five school days after receipt of written medical verification from the student's treating healthcare provider.

(5) The parent or guardian may appeal the medical director's denial to the school district's board of education within ten school days of receipt thereof.

(6) Instructional services shall be provided during the timeframe prescribed in paragraph (3) of this subdivision while an appeal of a denial of home, hospital or institutional instruction is pending before the school district's board of education pursuant to paragraph (5) of this subdivision.

(e) Instructional requirements. Home, hospital, or institutional instruction, which may include remote instruction, shall meet the following minimum requirements:

(1) The school district shall establish a written home, hospital, or institution instruction delivery plan to continue the student's academic progress, obtaining and considering input from the parent/guardian and, if appropriate, the student, where appropriate. The instruction plan shall be reviewed by the school district as needed, based upon changed condition and/or needs of the student. The school district shall maintain a record of delivery of instructional services and student progress. The instruction delivery plan shall include, but not be limited to:

(i) the number of hours per week and hours per day that the student will receive instructional services;

(ii) the method by which instructional services will be delivered;

(iii) the location where instructional services will be provided, such as the home, hospital, or institution; and

(iv) an explanation of how the instructional services will enable the student to maintain academic progress.

(2) (i) Prior to July 1, 2023, the student shall receive instruction for the number of days and length of time necessary to continue the student's academic progress, which includes at a minimum:

(a) at the elementary school level, 5 hours of instruction per week. To the extent possible, at least one hour of instruction shall be provided each day.

(b) at the secondary school level, 10 hours of instruction per week. To the extent possible, at least two hours of instruction shall be provided daily.

(ii) On and after July 1, 2023, the student shall receive instruction for the number of days and length of time necessary to continue the student's academic progress, which includes at a minimum:

(a) at the elementary school level, 10 hours of instruction per week. To the extent possible, at least two hours of instruction shall be provided daily.

(b) at the secondary school level, 15 hours of instruction per week. To the extent possible, at least three hours of instruction shall be provided daily.

(3) Notwithstanding paragraph (2) of this subdivision, students may receive less than the required amount of instruction per week if requested by their parent(s) or guardian(s) and supported by documentation submitted by their treating healthcare provider. The district must ensure that the student is unable to receive the additional hours of instruction required by such paragraph and that the reason why the student is receiving less instruction is documented in the instruction delivery plan required pursuant to paragraph (1) of this subdivision. Under these circumstances, the district must ensure that the student's instruction delivery plan is reviewed regularly, but not less than once a month, to determine when the student's instructional hours may be increased; provided, however, that for purposes of determining average daily attendance pursuant to Education Law §3602(1)(d) and average daily membership pursuant to Education Law §3602(1)(l), a student must receive the minimum amount of instruction as prescribed in section 175.21 of this Chapter.

(4) The school district of residence shall maintain a record of the dates, amount, and type of instructional services the student received, including the teacher's name, subjects taught, and the location where the instructional services were provided.

(f) Students with disabilities. Notwithstanding the provisions of this section, students with disabilities who are recommended for home, hospital, or institutional instruction by the committee on special education pursuant to section 200.6(i) of this Chapter shall be provided instruction and related services as prescribed in such section.

2. Subdivision (i) of section 200.6 of the Regulations of the Commissioner of Education is amended to read as follows:

(i) Home and hospital instruction. Students with disabilities who are recommended for home and/or hospital instruction by the committee on special education shall be provided instruction and appropriate related services as determined and documented by the committee on special education in consideration of the student's unique needs. Home and hospital instruction shall only be recommended if such placement is in the least restrictive environment and must be provided for at least the number of days and length of time as provided in section 100.22(e)(2) of this Chapter.

[(1) a minimum of five hours per week at the elementary level, preferably one hour daily; or

(2) a minimum of 10 hours per week at the secondary level, preferably two hours daily].

STATEMENT OF FACTS AND CIRCUMSTANCES JUSTIFYING  
EMERGENCY ACTION

Homebound instruction is an educational service provided by a school district to resident students (public and non-public) who are anticipated to be unable to attend school in person for at least ten days in a three-month period due to physical, mental, or emotional illness or injury. Homebound instruction ensures that students can continue learning and working towards mastery of State learning standards while unable to attend school for a significant period of time for reasons beyond their control.

Currently, Commissioner's regulations only address instruction provided to students cared for in hospitals or other institutions which provide for the care, custody, and treatment of children, other than a school setting, pursuant to Education Law §3202(6) (8 NYCRR 175.21). This section of regulation pertains to average daily attendance and average daily membership for determination of state aid and establishes a minimum of 5 (elementary school level) or 10 (secondary level) hours of instruction per week.

For students with disabilities who are recommended for home, hospital, or institutional instruction by a committee on special education (CSE), section 200.6 of the Commissioner's regulations requires the same minimum hours for elementary and secondary levels as prescribed in section 175.21 of the Commissioner's regulations and reserves the determination of the instruction and related services to the CSE. There currently exists no instructional requirements for the general student population in need of such instruction, other than these stated minimums.

Throughout the 2021 -2022 school year, the State Education Department received numerous inquiries from parents and caregivers regarding the extent to which they could request or were entitled to receive, “homebound” instruction for students, including those who were immunocompromised. Schools also inquired as to how they should determine a student’s eligibility for such instruction.

The proposed rule will give districts and parents or guardians clarity on the requirements for the application and provision of such instruction. The proposed rule will also establish, beginning with the 2023-2024 school year, increased minimum instructional requirements for students who are unable to attend school in person for at least ten days out of the next three months due to illness or injury that requires the student to remain at home or in a hospital or other institution for the treatment of children, other than a school.

Thus, the Department proposes to add a new section 100.22 to the Commissioner’s regulations that:

- defines the terms tutor, school district of residence, and healthcare provider;
- requires medical verification from the student’s treating healthcare provider as well as a request for home, hospital, or institutional instruction from a parent or guardian;
- establishes a time frame for review of the request, including the ability to appeal a denial thereof to a board of education;
- identifies minimum requirements for instruction to continue a student’s academic progress, including the development of an instructional plan in consultation with the parent or guardian and, where appropriate, the student; and

- effective July 1, 2023, increases the minimum instruction hours to at least 10 hours of instruction per week at the elementary level and at least 15 hours of instruction at the secondary level unless a lesser period is requested by the parent or guardian and supported by documentation submitted by a treating physician.

Additionally, the Department proposes to amend section 200.6 of the Commissioner's regulations to provide that the amount of home, hospital and institutional instruction for students with disabilities conforms to the increased requirements of section 100.22.

The proposed amendment was presented to the P-12 Education Committee for discussion and recommended to the Full Board for adoption as an emergency rule at the May 2022 meeting, effective July 1, 2022. An additional emergency action was taken at the September 2022 Regents meeting to ensure the emergency action taken at the May 2022 meeting remained continuously in effect. In response to public comment, the Department revised the proposed amendment at the October 2022 Regents meeting. Since the Board of Regents meets at fixed intervals, the earliest the revised proposed amendment could be adopted by regular (non-emergency) action after expiration of the 45-day public comment period provided for in the State Administrative Procedure Act (SAPA) section 201(4-a) for revised rulemakings would be the January 2023 Regents meeting. Furthermore, pursuant to SAPA 203(1), the earlier effective date of the revised proposed rule, if adopted at the January meeting, would be January 25, 2023, the date the Notice of Adoption would be published in the State Register.

Therefore, a fourth emergency action is necessary at the November 2022 meeting, effective December 3, 2022, for the preservation of the general welfare to

ensure that districts and parents or guardians receive clarity as to the circumstances under which “homebound” instruction may be requested and delivered for the upcoming school year and to ensure the emergency action taken at the October 2022 meeting, remains continuously in effect. It is anticipated that the revised proposed rule will be presented to the Board of Regents for adoption as a permanent rule at the January 2023 meeting, which is the first scheduled meeting after expiration of the 45-day public comment period mandated by SAPA for revised proposed rulemakings.

ASSESSMENT OF PUBLIC COMMENT

Following publication of the Notice of Emergency Adoption and Proposed Rule Making in the State Register on June 1, 2022, the Department received the following comments on the proposed amendment. These comments were previously published as part of the October 2022 Regents item.

1. COMMENT: A commenter, on behalf of an organization dedicated to protecting children’s rights to a quality education, wrote in favor of the proposed amendment. The commenter expressed that their organization “agree[s] with the State Education Department that increasing the minimum number of hours of instruction is appropriate and important;” and that the proposed minimum hours of instruction are “a good start.” The commenter did note that “for many students, 10 or 15 hours will be insufficient.” The commenter also indicated that their organization supports “the provision extending the school district’s obligation to provide home instruction to students who are unable to attend school in person for at least 10 days in a 3-month period,” and “the proposed timelines that would put instructional services in place within 5 days of a student’s family notifying their school district of the student’s condition or of the family’s request for home instruction, whichever comes first.” The commenter asserted that their organization has “historically seen home instruction stalled for inexplicably long periods of time – leaving students with no instruction for months at a time, forcing those students to fall further and further behind their peers until they can eventually return to school.”

The commenter proposed additional recommendations as follows: “districts should aid families in requesting and documenting the need for home instruction;” “[t]he

regulations should include a requirement that the total number of home instruction hours each week be revisited periodically for long stretches of learning from home, hospital or institution;" "[t]he regulations should be specific in requiring home instruction be delivered daily during the school week and not clustered in 1, 2 or 3 days;" "[t]he regulations should eliminate the requirement for families to appeal within 5 school days;" and that "[a]t-home or remote related services and home instruction must be better coordinated to ensure that students receive both instruction and services during their time out of their school buildings[, and] require school districts to take additional steps to ensure students receive all mandated support, including their related services, whether delivered remotely or in-person as needed during the time the student is home, in the hospital or in an institution."

DEPARTMENT RESPONSE: The Department appreciates the supportive comments. Regarding instructional hours, the proposed number of instructional hours is a minimum standard, and the Department encourages districts to provide additional hours of instruction as best meets the needs of the individual child. Regarding assistance by school districts, the Department plans to publish guidance regarding the Department's expectation for school districts to support families requesting home, hospital, or institutional instruction. Regarding periodic revisitation of the total number of home instruction hours, the proposed rule has been revised to provide that the instruction plan, which includes the number of hours per week and per day that the student will receive instructional support, be reviewed by the school district as needed, based upon a changed condition and/or needs of the student. Regarding the request to specify that home instruction be delivered daily during the week, the proposed rule provides that to the extent possible, at least two hours of instruction shall be provided

each day at the elementary school level and at least three hours of instruction shall be provided each day at the secondary level.

Regarding the request for a requirement that “school districts...take additional steps to ensure students receive all mandated support, including their related services, whether delivered remotely or in-person as needed during the time the student is home, in the hospital or an institution,” the Department does not believe that additional requirements are necessary. Commissioner’s Regulations section 200.6(i) requires that students with disabilities recommended for home and/or hospital instruction by a committee on special education (CSE) receive special education programs and services as determined by the CSE. The CSE must consider each student’s needs and document its request in the student’s IEP, regardless of the manner of instruction.

The Department acknowledges that the five-day appeal window may cause undue burden on parents or guardians. In response to public comment, the Department has amended the proposed rule to allow the parent or guardian to appeal the medical director’s denial to the school district’s board of education within ten school days of receipt thereof.

No further changes to the proposed rule are necessary.

2. COMMENT: A commenter, writing on behalf of two professional organizations that represent school superintendents and boards of education, expressed sympathy with the concerns addressed in the proposed regulation but articulated a number of objections and concerns:

a. The commenter expressed concern about “the possibility of an expansive interpretation” of the requirement for school districts to consult with the parent, guardian, and student when establishing the instruction delivery plan. The commenter suggests

omitting the clause, “in consultation with the parent, guardian, and student, where appropriate” or clarifying that the provision does “*not* require the school district to obtain agreement with its determinations from the family”.

b. The commenter asserts that “[t]he Department has not provided clear educational justification for the need to increase the mandated hours of instruction.”

c. The commenter expressed concern about the capacity and cost related to the expanded instructional hour requirements. The commenter noted that they “have found widespread concern among school officials over the costs and staffing challenges [the proposed amendment] can be expected to impose.” The commenter noted “while the Department has indicated providing remote instruction would comply with this regulation, many teacher bargaining units have objected to the use of simultaneous in-person and remote teaching making use of this cost-saving technology in the majority of school districts unworkable, in the absence of it being collectively bargained.” The commenter suggests the Department “make this regulation effective only upon the state appropriating sufficient funds to cover the additional costs that schools will incur on an annual basis.”

d. The commenter expressed concern about the “intended applicability of the proposed rules to instruction offered to suspended students.” The commenter states that an inability to meet the increased hourly requirements may lead to prolonged disruptions in learning for other students. The commenter notes, “[s]tudent discipline referrals have increased, likely as a result of pandemic-related educational disruptions and, until discipline-related issues recede, the increase in hours pursuant to this regulation will make compliance exceptionally challenging.”

e. The commenter expressed a concern about the requirement for school districts to provide homebound instruction “within five school days after the school district receives notification of the student’s medical condition or within five school days from the parent or guardian’s request...whichever occurs first.” The commenter notes “under this framework, there is nothing in the proposed regulations to protect against inadequate or fraudulent requests.” The commenter goes on to note “districts and their taxpayers may be compelled to expend scarce financial and staff resources to provide services which, ultimately may be determined to be without merit.” The commenter recommends a preliminary review of medical information, including the ability for the district to request additional information, prior to the district determining whether or not to accept or deny a request for the provision of instruction in a home, hospital, or institutional setting.

f. The commenter recommends “if the parent/guardian refuses to consent to allow the health care provider to answer questions the district may have, that the homebound instruction request can be denied with no right to appeal such determination.”

g. The commenter noted the definition of providers “seems excessively broad.” The commenter notes, “districts commonly require a request be documented by a physician or psychologist, though we are amendable to a slightly broader list of *appropriate* providers, but not all licensed individuals that may treat students.” The commenter also recommends “requiring that verification for some diagnoses be supported by documentation [from] a healthcare provider whose expertise aligns with the diagnosis cited as necessitating the service requested.”

## DEPARTMENT RESPONSE:

Initially, the commenter offers no evidence to support their suggestions that homebound instruction requests will be numerous, costly, potentially frivolous, or present a zero-sum arrangement between homebound students and those in the classroom. While the Department understands that school districts have practical limitations, it will not diminish educational opportunities to students receiving homebound instruction—some of the most vulnerable students—based on pessimistic predictions alone.

The commenter's specific contentions are addressed below.

a. The Department has clarified that the school district retains ultimate responsibility to establish the details of the plan. However, school districts remain responsible for obtaining and consider input in plan development from the parent/guardian and, if appropriate, the student.

b. It is the Department's position that the previous minimum of five hours per week for elementary students and ten hours per week for secondary students is inadequate to ensure students have the opportunity to continue to progress at a similar rate to their peers. Additionally, while these hours represent the bare minimum a district must provide, few districts have provided hours of instruction beyond the minimum. Therefore, the Department believes it is necessary to increase the minimum hours of instruction. No changes to the proposed rule are necessary.

c. School districts determine the manner in which homebound instruction is provided. However, even if a district elected to utilize remote instruction for this purpose, there is no requirement that it be provided through "simultaneous in-person and remote teaching." Schools may consider utilizing remote programs developed by

Boards of Cooperative Educational Services (BOCES), other districts, or their own teachers to avoid the need to hire additional teachers for the purpose of providing homebound instruction. No changes to the proposed rule are necessary.

d. Comments regarding student discipline are outside the scope of the proposed rule. However, the Department notes that, if a student of compulsory age is suspended from school, “immediate steps shall be taken for his or her attendance upon instruction elsewhere...” (Education Law § 3214 [e]). That instruction must be substantially equivalent to the instruction the student would have received in the regular education environment (*Appeal of Camille S.*, 39 Ed Dept Rep 574, Decision No. 14,316; *Matter of Watts*, 23 *id.* 459, Decision No. 11,282). Thus, suspended students are entitled to continue learning and working towards mastery of learning standards no matter the length of their out-of-school suspension. No changes to the proposed rule are necessary.

e. The commenter’s proposed recommendation to include a preliminary review of medical information prior to the provision of instructional services could result in days or weeks of missed instruction for students. The Department is unwilling to support such a delay. No changes to the proposed rule are necessary.

f. In response to public comment, the Department has revised the proposed rule to provide an automatic denial if a parent or guardian refuses to provide consent to the district to contact the student’s treating healthcare provider (vis-à-vis its school medical director or designee). Regarding appeals of the district’s determination, any person considering themselves aggrieved by an action taken at a school district meeting or by school authorities has a statutory right to appeal to the Commissioner of Education

(Education Law §310). The Department has no authority to abrogate that right by regulation. No further changes to the proposed rule are necessary.

g. The definition of “treating health care provider” does not include all licensed professionals. The proposed amendment defines a treating health care provider as “a person who is treating a student and is licensed or otherwise authorized to provide diagnosis pursuant to a profession enumerated in Title VIII of the Education Law.” Thus, only professionals that are authorized to provide diagnosis may act as a treating health care provider. No changes to the proposed rule are necessary.