



THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK / ALBANY, NY 12234

TO: The Honorable Members of the Board of Regents

FROM: Angelique Johnson-Dingle 

SUBJECT: Proposed Amendment of Sections 200.7, 200.16, and 200.20 of the Regulations of the Commissioner of Education Relating to Remote Instruction and its Delivery Under Emergency Conditions and Length of School Day for Approved School-Age and Preschool Programs Serving Students with Disabilities

DATE: November 3, 2022

AUTHORIZATION(S): 

SUMMARY

Issue for Decision (Consent)

Should the Board of Regents adopt the proposed amendment of sections 200.7, 200.16, and 200.20 relating to remote instruction and its delivery under emergency conditions and length of school day requirements for approved school-age and preschool programs serving students with disabilities?

Reason(s) for Consideration

Review of Policy.

Proposed Handling

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

Procedural History

The proposed amendment was presented to the P-12 Education Committee for discussion and recommendation to the Full Board for adoption as an emergency rule at the September 2022 meeting of the Board of Regents. A Notice of Emergency Adoption and Proposed Rule Making was published in the State Register on September 28, 2022, for a 60-day public comment period.

Because the September 2022 emergency action will expire on December 11, 2022, a second 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 28, 2022. A copy of the proposed rule is attached. Supporting materials are available upon request from the Secretary to the Board of Regents.

Background Information

At the September 2022 meeting, the Full Board permanently adopted amendment of sections 100.1, 155.17, and 175.5 of the Regulations of the Commissioner of Education relating to remote instruction and delivery under emergency conditions. The Department is now proposing a similar amendment of sections 200.7, 200.16, and 200.20 of the Commissioner's regulations to address emergency remote instruction for approved special education programs.¹

Specifically, the Department proposes to add a new paragraph (10) to section 200.7(b) of the Commissioner's regulations to provide that if an: (1) approved private school for the education of students with disabilities; (2) state-supported school, (3) state-operated school, (4) Special Act School District, or (5) approved preschool special education program other than a multidisciplinary evaluation program would otherwise close due to an emergency, the school or program may remain in session and provide remote instruction, counting such instruction towards the 180-day requirement provided in section 200.7(b)(5) of the Commissioner's regulations. To qualify, instruction must be provided to all students and be consistent with the definition of remote instruction provided in section 100.1(u) of the Commissioner's regulations. In addition, beginning with the 2023-2024 school year, such remote instruction must be consistent with such school's or program's emergency remote instruction plan described in such section.²

¹ Emergency remote instruction provisions are applicable to the Special Act School Districts pursuant to the amendments to 100.1 and 155.17 of the Commissioner's regulations referenced above and the proposed amendments to 200.7 summarized here.

² Emergency remote instruction plans must include policies and procedures to ensure the availability of devices, internet access, provision of special education and related services for students with disabilities, and the expectations for time spent in different remote modalities. Schools and programs must provide an opportunity for public comment at least thirty days prior to the plan's adoption. These plans must be posted on the school or program website or other online platform if such school or program does not have a website.

Additionally, the Department proposes to amend section 200.7(b)(4) of the Commissioner's regulations regarding the length of school day requirements for operation and administration of full-day and half-day programs at approved private schools for the education of students with disabilities, state-supported schools, state-operated schools, and Special Act School Districts. This change is needed to remove a conflict in regulations and clarify the duration of in-person and remote instruction for the 180-day requirement in accordance with existing provisions in section 200.1 of the Commissioner's regulations. Specifically, the language stating that the school day must be comparable to section 175.5 of the Commissioner's regulations is removed and language is added to clarify that the minimum length of the school day shall be consistent with the applicable definition of full-day session or half-day session in section 200.1 of the Commissioner's regulations.³

The Department also proposes to amend section 200.16(f) of the Commissioner's regulations regarding educational programs for preschool students with disabilities to provide that:

- the provision of remote instruction due to emergency conditions by approved preschool programs serving preschool students with disabilities, other than a multidisciplinary evaluation program, must be provided in accordance with section 200.7(d)(10) of the Commissioner's regulations; and
- the provision of remote-related services for a student receiving related services only, and not as part of an approved half-day or full-day program, must be provided in accordance with the emergency remote instruction plan included either in the district-wide school safety plan pursuant to section 155.17(c)(1) of the Commissioner's regulations of the school district responsible for the provision of special education services and programs for such student or included in the student's individualized education program (IEP) or contingency plan developed by the committee on preschool special education of such school district. The remote-related services must also be provided in accordance with applicable professional practice guidelines for engaging in telepractice.

Finally, the Department proposes to amend section 200.20(a) of the Commissioner's regulations to add a reference to the newly added 200.7(b)(10) with regard to requirements for approval and operation of preschool programs for preschool students with disabilities.

³ In September 2018, [proposed amendments to section 175.2 and 175.5 of the regulations of the Commissioner relating to the minimum instruction requirement for state aid](#) were adopted. In response to public comment, the Department stated, "[t]he proposed regulation only relates to the minimum instructional hours required by school districts in order to receive their full allocation of Foundation Aid. Since 4410 and 853 programs do not receive Foundation Aid, their instructional requirements do not fall under either the existing or proposed regulations, and as such do not need to be addressed herein." As a result, the section 200.7(b)(4) reference to section 175.5 is improper and in conflict with the session day requirements in section 200.1. Therefore, the proposed amendments remove this reference.

Related Regents Items

September 2022: [Proposed Amendment of Sections 100.1, 155.17, and 175.5 of the Regulations of the Commissioner of Education Relating to Remote Instruction and its Delivery under Emergency Conditions](https://www.regents.nysed.gov/common/regents/files/922p12a4.pdf)

(<https://www.regents.nysed.gov/common/regents/files/922p12a4.pdf>)

September 2022: [Proposed Amendment of Sections 200.7, 200.16, and 200.20 of the Regulations of the Commissioner of Education Relating to Remote Instruction and its Delivery Under Emergency Conditions and Length of School Day for Approved School-Age and Preschool Programs Serving Students with Disabilities](https://www.regents.nysed.gov/common/regents/files/922p12a3.pdf)

(<https://www.regents.nysed.gov/common/regents/files/922p12a3.pdf>)

Recommendation

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

VOTED: That sections 200.7, 200.16, and 200.20 of the Regulations of the Commissioner of Education be amended, as submitted, effective December 12, 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 permit approved special education providers to provide remote instruction in the 2022-2023 school year on days they would otherwise close due to an emergency and to count such instructional days towards minimum requirements and to identify the ways in which such remote instruction may be delivered and to ensure the emergency action taken at the September 2022 meeting remains continuously in effect.

Timetable for Implementation

If adopted as an emergency rule at the November 2022 Regents meeting, the emergency rule will become effective on December 12, 2022. It is anticipated that the proposed amendment will be presented for permanent adoption at the January 2023 Regents meeting, after publication of the proposed amendment in the State Register and expiration of the 60-day public comment period required under the State Administrative Procedure Act. 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, 304, 4002, 4401, and 4410 of the Education Law.

1. Paragraph (4) of subdivision (b) of section 200.7 of the Regulations of the Commissioner of Education is amended to read as follows:

(4) The length of the school day for a full-day session shall meet the requirements of section 200.1(q) of this Part and the length of the school day for a half-day session shall meet the requirements of section 200.1(v) of this Part [shall be comparable to that required by section 175.5 of this Title]. The school day shall include instructional services and related services, as required, but shall not include transportation.

2. Subdivision (b) of section 200.7 of the Regulations of the Commissioner of Education is amended by adding a new paragraph (10) to read as follows:

(10) Remote instruction due to emergency conditions.

(i) If a school governed by this section or approved preschool program serving preschool students with disabilities, other than a multidisciplinary evaluation program, would otherwise close due to an emergency, including but not limited to, extraordinary adverse weather conditions, impairment of heating facilities, insufficiency of water supply, shortage of fuel, destruction of a school building, or a communicable disease outbreak, the school or program may remain in session and provide remote instruction, as defined in section 100.1(u) of this Title. Beginning with the 2023-2024 school year, such remote instruction shall be consistent with such school's or program's emergency remote instruction plan pursuant to subparagraph (ii) of this paragraph. Instruction

provided on these session days may be counted towards the 180-day requirement provided in paragraph (5) of this subdivision.

(ii) Emergency remote instruction plan. Beginning with the 2023-2024 school year, schools governed by this section and approved preschool programs serving preschool students with disabilities, other than a multidisciplinary evaluation component of a preschool program, shall develop and adopt an emergency remote instruction plan, and shall annually update such plan. Schools and programs must provide an opportunity for public comments at least thirty days prior to the plan's adoption to allow school personnel, parents, students, and any other interested parties to inform the emergency remote instruction plan. Such plan shall be posted on the school or program website, provided, however, that if a school or program does not have a public website, the school or program may identify an online platform that allows the plan to be directly communicated to students and parent(s) or person(s) in parental relationship, school or program staff, and the public. For purposes of this paragraph, remote instruction shall have the same meaning as defined in section 100.1(u) of this Chapter. Emergency remote instruction plans shall include:

(a) policies and procedures to ensure computing devices will be made available to students or other means by which students will participate in synchronous instruction and policies and procedures to ensure students receiving remote instruction under emergency conditions will access internet connectivity. Each school or program shall survey students and parents and persons in parental relation to such students to obtain information on student access to computing devices and access to internet connectivity to inform the emergency remote instruction plan;

(b) expectations for school or program staff as to the proportion of time spent in synchronous and asynchronous instruction of students on days of remote instruction under emergency conditions with an expectation that asynchronous instruction is supplementary to synchronous instruction;

(c) a description of how instruction will occur for those students for whom remote instruction by digital technology is not available or appropriate;

(d) a description of how special education and related services will be provided to students with disabilities, as defined in section 200.1(zz) of this Chapter, and preschool students with disabilities, as defined in section 200.1(mm) of this Chapter, as applicable, in accordance with their individualized education programs to ensure the continued provision of a free appropriate public education.

3. Subdivision (f) of section 200.16 of the Regulations of the Commissioner of Education is amended by adding a new paragraph (7) to read as follows:

(7)(i) The provision of remote instruction due to emergency conditions by approved preschool programs serving preschool students with disabilities, other than a multidisciplinary evaluation program, shall be provided in accordance with the requirements contained in 200.7(b)(10) of this Part;

(ii) The provision of remote related services to preschool students receiving related services only, and not part of an approved half-day or full-day program, shall be provided in accordance with (a) the emergency remote instruction plan included in the district-wide school safety plan pursuant to section 155.17(c)(1) of this Chapter of the school district responsible for the provision of special education services and programs for such student, or (b) as specified in the student's IEP or (c) as specified in the

student's contingency plan to address remote learning needs in the event of intermittent or extended school closures developed by the committee on preschool special education of such school district. Remote-related services shall only be provided by individuals appropriately licensed and registered under Title 8 of the Education Law or otherwise qualified individuals with appropriate certification or license in each area of related service and in accordance with applicable professional practice guidelines for engaging in telepractice.

4. The opening paragraph of subdivision (a) of section 200.20 of the Regulations of the Commissioner of Education is amended to read as follows:

(a) The approval and operation of preschool programs for preschool students with disabilities shall be conducted in a manner consistent with section 200.7(a)(1) through (3) and (b)(3), (5), (6), (8), ~~and~~ (9) and (10) of this Part, except that the following requirements shall apply:

STATEMENT OF FACTS AND CIRCUMSTANCES JUSTIFYING
EMERGENCY ACTION

At the September 2022 meeting, the Board of Regents permanently adopted amendments to sections 100.1, 155.17, and 175.5 of the Regulations of the Commissioner of Education relating to remote instruction and delivery under emergency conditions. The Department now proposes similar amendment of sections 200.7, 200.16, and 200.20 of the Commissioner's regulations to address emergency remote instruction for approved special education programs.⁴ Specifically, the Department proposes to add a new paragraph (10) to section 200.7(b) of the Commissioner's regulations to provide that if an: (1) approved private school for the education of students with disabilities; (2) state-supported school, (3) state-operated school, (4) Special Act School District, or (5) approved preschool special education program other than a multidisciplinary evaluation program would otherwise close due to an emergency, the school or program may remain in session and provide remote instruction, counting such instruction towards the 180-day requirement provided in section 200.7(b)(5) of the Commissioner's regulations. To qualify, instruction must be provided to all students and be consistent with the definition of remote instruction provided in section 100.1(u) of the Commissioner's regulations. In addition, beginning with the 2023-2024 school year,

⁴ Emergency remote instruction provisions are applicable to the Special Act School Districts pursuant to the amendments to 100.1 and 155.17 of the Commissioner's regulations referenced above and the proposed amendments to 200.7 summarized here.

such remote instruction must be consistent with such school's or program's emergency remote instruction plan described in such section.⁵

Additionally, the Department proposes to amend section 200.7(b)(4) of the Commissioner's regulations regarding the length of school day requirements for operation and administration of full-day and half-day programs at approved private schools for the education of students with disabilities, state-supported schools, state-operated schools, and Special Act School Districts. This change is needed to remove a conflict in regulations and clarify the duration of in-person and remote instruction for the 180-day requirement in accordance with existing provisions in section 200.1 of the Commissioner's regulations. Specifically, the language stating that the school day must be comparable to section 175.5 of the Commissioner's regulations is removed and language is added to clarify that the minimum length of the school day shall be consistent with the applicable definition of full-day session or half-day session in section 200.1 of the Commissioner's regulations.⁶

The Department also proposes to amend section 200.16(f) of the Commissioner's regulations regarding educational programs for preschool students with disabilities to provide that:

⁵ Emergency remote instruction plans must include policies and procedures to ensure the availability of devices, internet access, provision of special education and related services for students with disabilities, and the expectations for time spent in different remote modalities. Schools and programs must provide an opportunity for public comment at least thirty days prior to the plan's adoption. These plans must be posted on the school or program website or other online platform if such school or program does not have a website.

⁶ In September 2018, [proposed amendments to section 175.2 and 175.5 of the regulations of the Commissioner relating to the minimum instruction requirement for state aid](#) were adopted. In response to public comment, the Department stated, "[t]he proposed regulation only relates to the minimum instructional hours required by school districts in order to receive their full allocation of Foundation Aid. Since 4410 and 853 programs do not receive Foundation Aid, their instructional requirements do not fall under either the existing or proposed regulations, and as such do not need to be addressed herein." As a result, the section 200.7(b)(4) reference to section 175.5 is improper and in conflict with the session day requirements in section 200.1. Therefore, the proposed amendments remove this reference.

- the provision of remote instruction due to emergency conditions by approved preschool programs serving preschool students with disabilities, other than a multidisciplinary evaluation program, must be provided in accordance with section 200.7(d)(10) of the Commissioner’s regulations; and
- the provision of remote-related services for a student receiving related services only, and not as part of an approved half-day or full-day program, must be provided in accordance with the emergency remote instruction plan included either in the district-wide school safety plan pursuant to section 155.17(c)(1) of the Commissioner’s regulations of the school district responsible for the provision of special education services and programs for such student or included in the student’s individualized education program (IEP) or contingency plan developed by the committee on preschool special education of such school district. The remote-related services must also be provided in accordance with applicable professional practice guidelines for engaging in telepractice.

Finally, the Department proposes to amend section 200.20(a) of the Commissioner’s regulations to add a reference to the newly added 200.7(b)(10) with regard to requirements for approval and operation of preschool programs for preschool students with disabilities.

The proposed amendment was presented to the P-12 Education Committee for recommendation to the Full Board for adoption as an emergency rule at the September 2022 meeting of the Board of Regents, effective September 13, 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) and assessment of public comment would be the January 2023 Regents meeting. Furthermore, pursuant to SAPA 203(1), the earliest effective date of the proposed rule, if adopted at the January 2023 meeting, would be January 25, 2023, the date the Notice of Adoption would be published in the State Register.

However, the emergency rule will expire December 11, 2022. Therefore, emergency action is necessary at the November 2022 meeting, effective December 12, 2022, for the preservation of the general welfare in order to permit approved special education programs to provide remote instruction in the upcoming 2022-2023 school year on days they would otherwise close due to an emergency and to count such instructional days towards minimum requirements and to identify the ways in which such remote instruction may be delivered and to ensure the emergency action taken at the September 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 January 2023 meeting, which is the first scheduled meeting after expiration of the 60-day public comment period mandated by SAPA for state agency rulemaking.