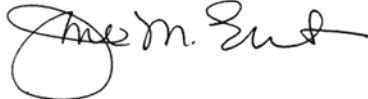






**TO:** P-12 Education Committee

**FROM:** Jhone M. Ebert 

**SUBJECT:** Proposed Amendment to Sections 175.2 and 175.5 of the Regulations of the Commissioner of Education Relating to the Minimum Instruction Requirement for State Aid

**DATE:** September 6, 2018

**AUTHORIZATION(S):**  

## SUMMARY

### Issue for Decision

Should the Board of Regents amend §§175.2 and 175.5 of the Commissioner's Regulations relating to the minimum instruction requirement for State Aid?

### Reason(s) for Consideration

Review of Policy.

### Proposed Handling

The proposed amendment is submitted to the P-12 Education Committee for adoption as a permanent rule at its September 2018 Board of Regents meeting (Attachment A is a copy of the proposed amendment).

### Procedural History

A Notice of Proposed Rule Making was published in the State Register on December 27, 2017. Following the 60-day public comment period, the Department received several comments on the proposed amendment. Based on the public comment received, the Department made several revisions to the proposed amendment. A Notice of Revised Rule Making was published in the State Register on April 25, 2018. Following the 30-day public comment period, the Department received several comments on the proposed amendment. Assessments of the public comment received during both public

comment periods are included as Attachments B and C, respectively. A Notice of Emergency Adoption and Notice of Revised Rule Making was published on June 27, 2018. A subsequent Notice of Emergency Adoption was published on August 29, 2018. One comment was received during the third public comment period (Assessment of the public comment received is included as Attachment D). Supporting materials for the proposed amendment are available upon request from the Secretary to the Board of Regents.

### **Background Information**

At its December 2017 meeting, the Board of Regents discussed a months-long process of stakeholder engagement and feedback related to the minimum instructional time required for State Aid. This proposed regulation reforms the existing instructional requirement, which is based on 180 days with a minimum number of instructional hours each day, to 180 days with a minimum number of instructional hours provided over the course of the school year.

### **Proposed Regulation**

At its December 2017 meeting, the Department proposed an amendment to the regulation to eliminate the current daily minimum instructional hour requirement and replace it with an aggregate yearly requirement, as explained above (i.e., 900/990 hours over 180 days for full-day kindergarten through grade six and grades seven through twelve, respectively), to provide school districts additional flexibility when establishing their school calendars. The proposed amendment seeks to provide clarity around existing procedures relating to the scheduling of examinations, superintendent conference days, and extraordinary weather conditions. This revision will provide school districts with maximum flexibility in providing instructional time for their students.

Following the 60-day public comment period required under the State Administrative Procedure Act, the Department made the following changes to the proposed amendment at its April 2018 meeting:

- **Removing references to BOCES:** BOCES do not receive Foundation Aid and are thus not subject to the 180-day requirement for State aid purposes.
- **Clarifying August Superintendent Conference Days:** The proposed amendment limits the number of Superintendent's Conference Days that may be held during the last two weeks of August to two. The proposed amendment is revised to eliminate this limitation, consistent with Education Law §3604(8).
- **Clarifying Parent-Teacher Conferences as a part of Superintendent Conference Days:** The proposed regulation allows parent-teacher conference days to be counted as a superintendent conference day as was permitted under the prior version of §175.5(f) of the Commissioner's regulations.
- **Conforming Change in §175.2:** This section of Commissioner's Regulations had a reference to 180 days that needs to be conformed to the new hourly structure.

Following the 30-day public comment period required under the State Administrative Procedure Act, the Department recommended the following change to the proposed amendment, which the Board approved at its June 2018 meeting:

- **Clarification of Amount of Instructional Time that Can be Credited for Superintendents' Conference Days:** Modifying the number of hours that can be credited toward annual instructional time for superintendents' conference days from 5.0 for elementary grades and 5.5 for secondary grades to the average scheduled school day for those grade levels using the district's school calendar.

### **Related Regents Items**

[December 2017](#)

<http://www.regents.nysed.gov/common/regents/files/1217p12d2.pdf>

[April 2018](#)

<http://www.regents.nysed.gov/common/regents/files/418p12a5revised.pdf>

[June 2018](#)

<http://www.regents.nysed.gov/common/regents/files/618p12a4.pdf>

### **Recommendation**

Department staff recommends that the Board of Regents take the following action:

VOTED: That §§175.2 and 175.5 of the Regulations of the Commissioner of Education, be amended as submitted, effective October 3, 2018.

### **Timetable for Implementation**

If adopted at the September 2018 meeting, the proposed amendment will become effective as a permanent rule on October 3, 2018.

AMENDMENT TO THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to Education Law sections 101, 207, 1704 and 3604.

1. That section 175.5 of the Regulations of the Commissioner of Education is repealed and a new section 175.5 is added, effective August 11, 2018, to read as follows:

Section 175.5. Minimum instructional hours and use of superintendents' conference days for State aid purposes.

(a) Purpose. The provisions of this section are intended to provide school districts with flexibility in meeting the 180-day requirement in order to receive State aid pursuant to Education Law §§1704(2) and 3604(7) for actual instructional time provided to students. Nothing in this section shall be construed to preclude school districts from lengthening the school day and/or school year beyond the annual minimum instructional requirement for both instructional and non-instructional activities, including but not limited to, homeroom periods, lunch, recess, staff development activities, parent-teacher conferences, or any other purpose the school district has determined is necessary for the development of the whole child and/or to improve student achievement.

(b) Definition. "Instructional hours" shall mean an hour or a fraction of an hour, during which students are receiving instruction from a certified teacher pursuant to Part 80 of this Title in an academic subject and/or periods of time during which students are engaged in supervised study activities, including completing homework and/or the review of homework. Instructional hours shall not include periods of time where instruction and/or supervised study time is not provided to students, such as lunch or recess.

(c) Annual Hourly Requirement. Commencing with the 2018-2019 school year, for the purpose of apportionment of State aid, any school district must be in session for at least 180 school days, and during such 180 days the school district must meet the following minimum annual instructional hour requirement:

(1) For pupils in half-day kindergarten, a minimum of 450 instructional hours.

(2) For pupils in full-day kindergarten and grades one through six, a minimum of 900 instructional hours.

(3) For pupils in grades seven through twelve, a minimum of 990 instructional hours.

(d) School calendar development. To ensure that school districts meet the annual instructional requirement in order to receive State aid, it is recommended that school districts establish school year calendars that exceed the minimum requirements as provided herein by at least the average number of emergency days that such district has taken over the previous five school years.

(e) Unscheduled school delays and early releases. Instructional hours that a school district scheduled but did not execute, either because of a delay to the start of a school day or an early release, due to extraordinarily adverse weather conditions, impairment of heating facilities, insufficiency of water supply, shortage of fuel, destruction of a school building, or such other cause as may be found satisfactory by the Commissioner, may still be considered as instructional hours for State aid purposes for up to two instructional hours per session day, provided, however, that the superintendent shall certify to the Department, on a form prescribed by the Commissioner, that an extraordinary condition existed on a previously scheduled session day and that school was in session on that day.

(f) Double or overlapping sessions. The provisions of subdivision (c) of this section shall not apply to schools which operate on double or overlapping sessions, provided the written approval of the Commissioner to operate such sessions has been obtained prior to the scheduling of such sessions for any school year.

(g) The provisions of subdivision (c) of this section shall not apply where the prior written approval of the Commissioner has been obtained to conduct, in a given school year, an experimental or alternative program involving daily sessions consisting of fewer hours than would otherwise be required by the provisions of subdivision (c) of this section.

(h) Use of superintendents' conferences.

(1) Superintendents' conferences to provide staff development activities that are related to implementation of the new high learning standards and assessments, general staff orientation, curriculum development, in service education, or parent-teacher conferences may be credited toward the annual instructional requirement. Provided, however, that the average scheduled hours for a school day based on the school calendar (e.g., 5 hours for elementary, 5.5 for secondary) shall be considered one superintendents' conference day authorized pursuant to Education Law §3604(8) and a district may use up to the product of four such hour amounts in a given school year, and provided that such conferences occur on days when the regular day schools of the school district may legally be in session, and provided further that such conference days may not be scheduled for routine school administrative matters such as the grading of assignments, the preparation of pupil assignments, record-keeping, or the preparation of lesson plans. Such superintendents' conferences authorized pursuant Education Law §3604(8), may be held, if the school district so elects, in the last two weeks of August,

subject to collective bargaining requirements pursuant to article fourteen of the Civil Service Law.

(i) Regents examinations and other state assessments.

(1) Regents examinations. For only the grade levels sitting for a Regents examination, a district may schedule the average number of instructional hours it provides on non-examination days for days on which Regents examinations or Rating Day(s) are held, and have such hours count toward the annual minimum hourly requirement. On such days, attendance need not be taken, and attendance may not be assumed and claimed for State aid purposes under any circumstances. If grades seven through twelve are housed in the same building, school district officials may excuse the students from any grade level for which an examination is not being offered if their class schedules are disrupted by the Regents examination schedule and if staff are needed to properly administer such examinations.

(2) New York State Assessments. Session days during which New York State Assessments, including but not limited to the Grades 3-8 English language arts and mathematics assessments, are administered are days on which attendance must be taken and which instructional hours count toward the annual minimum hourly requirement.

(3) Other state assessments. On session days during which alternative and/or pathway assessments, as defined in section 100.2(f) and (mm) of this Title, are administered, attendance must be taken and only actual instructional hours for pupils in attendance, including the examination time, may be included within the instructional hour requirement. Grade levels that are excused from instruction on those days may not have hours count toward the requirement.

(j) Short session aid deduction. For the purposes of reducing State aid pursuant to Education Law §3604(7), “one day” shall mean:

(1) For pupils in half-day kindergarten, two and one-half hours.

(2) For pupils in full-day kindergarten and grades one through six, five hours.

(3) For pupils in grades seven through twelve, five and one-half hours.

In the event that a school district has a total deficiency in hours that equals a fraction of hours per day pursuant to this paragraph, such deficiency shall be rounded up to the next whole day.

(k) Nothing in this section shall be construed to abrogate any conflicting provisions of any collective bargaining agreement in effect on June 30, 2018 during the term of such agreement and until the entry into a successor collective bargaining agreement to the extent required under article 14 of the Civil Service Law.

2. Section 175.2 of the Regulations of the Commissioner of Education is amended, effective July 1, 2018, to read as follows:

Section 175.2. Attendance records for examination days for State aid purposes.

Each school district in which Regents examinations are administered in January, April and June may omit the record of attendance for pupils in the grade levels in which such examinations are given, on the days designated for the administration of such examinations, for the purpose of computing average daily attendance for State aid. The record of attendance of pupils of the grade level in which the Regents Scholarship examination is given may also be omitted for the day on which such examination is administered. The record of attendance for grades located in the same buildings in which such examinations are administered may be omitted, if it is necessary to suspend instruction for such grades in order to provide adequate staff and space for the



administration of such examinations. The hours used on examination days, as well as the days themselves, referred to in this section shall be counted for the purpose of satisfying the minimum instructional hour requirement [that school districts shall provide 180 days of instruction] pursuant to section 175.5 of this Part.

ASSESSMENT OF PUBLIC COMMENT

Since publication of Proposed Rule Making in the State Register on January 17, 2018, the State Education Department (SED) received several comments:

1. COMMENT:

One commenter asked that school districts be allowed to begin the school year prior to Labor Day.

DEPARTMENT RESPONSE:

SED has proposed legislation that would authorize school districts to commence the school prior to September 1, subject to local discretion.

2. COMMENT:

Multiple commenters were concerned about the provision that allows for up to two hours of a weather delay or early release to be counted toward the total yearly aggregate instructional hours, noting that their district often utilizes three-hour delays.

DEPARTMENT RESPONSE:

School districts have, traditionally but not necessarily universally, utilized one or two-hour delays on days with inclement weather to allow for their local municipalities to clear the roads. The existing regulation allows for such delays to occur without penalizing the district for State aid purposes (i.e., allowing the day to count).

SED believes that allowing anything more than two hours would significantly reduce the amount of instructional time provided to students, and that a delay of three hours, for example, would mean in many cases districts would be providing as little as a half or less

of a scheduled school day; with such a reduced amount of hours, the school district should consider simply closing for the full day for the sake of student safety.

3. COMMENT:

One commenter was concerned about the provision that allowed, in buildings where grades seven through twelve are housed together, for non-tested grades to be released for the day of a Regents examination, but still have their scheduled hours count, if staff were needed to administer the exams. The concern is that the regulation applies only to buildings with seven through twelve, but that the same issue arises in buildings that are just the high school grades (nine through twelve).

DEPARTMENT RESPONSE:

The allowance for dismissals included in the regulation is consistent with current guidance. Moreover, the Department does not believe that many staff (outside of 7-12) would be needed to administer these exams.

4. COMMENT:

One commenter requested that the hours for final exams for grades seven and eight be counted in the same manner as the Regents exams for grades nine through twelve.

DEPARTMENT RESPONSE:

If the commenter means that some final exams for grades seven and eight should be offered during Regents examination week, but students who are not taking such exams can be dismissed from school, the Department points out that the Regents exams are the only exams treated in this way, and this is consistent with past practice. Other exams, such as local examination finals and the grades 3-8 State assessments, still require all

students to be in session for those session days to count toward the 180-day requirement. The revised regulation is not changing that practice; districts are still required to schedule instructional time for students in those grade levels who are not taking exams.

5. COMMENT:

Multiple commenters requested that time that students spend travelling between class periods (“passing time”) be counted as instructional time.

DEPARTMENT RESPONSE:

The proposed amendment merely sets the minimum amount of instructional time for State aid purposes. Minimum instructional hours, by definition, are not intended to capture the full school day that a district may offer to its students. Passing time is not time during which the students are engaged in actual instructional activities, and it is assumed that districts are building in both the required minimum instructional time and any operational non-instructional time such as passing time and homeroom. In addition, see Response to Comment #27.

6. COMMENT:

One commenter recommended that the regulations be clarified in its application to preschool special education (“4410”) and 853 school programs, including an allowance for “instructional lunch,” which is provided in some early and special education programs, to be considered as instructional time.

DEPARTMENT RESPONSE:

The 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.

7. COMMENT:

Multiple commenters were concerned about the proposed regulation's limit to two days on the number of Superintendent's Conference Days that can be held in the last two weeks of August, citing that neither statute nor existing guidance carry such limitation.

DEPARTMENT RESPONSE:

SED agrees that Education Law §3604(8) does not contain a limitation of two superintendent conference days in August and has revised the proposed regulation to remove this limitation and reflect the statutory allowance.

8. COMMENT:

Multiple commenters wrote in support of the proposed regulation, specifically related to the additional flexibility offered to school districts in the development of their calendars. In addition, one commenter supported the codification of the Department's longstanding practice of defining instructional time as being exclusive of lunch and recess.

DEPARTMENT RESPONSE:

No response is required because the comment was supportive.

9. COMMENT:

Multiple commenters were concerned about the apparent exclusion of parent-teacher conferences as an allowable use of the four Superintendent Conference Days that are

included within the minimum instruction requirement. They stated that parent-teacher conferences were specifically authorized in the statute governing Superintendent Conference Days and in existing regulation and guidance and were concerned that removing that allowance could potentially create collective bargaining issues.

DEPARTMENT RESPONSE:

SED agrees and the proposed amendment has been revised to reflect this allowance.

10.COMMENT:

One commenter requested that the regulation be amended to allow for session days for middle and high school students to be held after the end of the June Rating Day but before July 1<sup>st</sup>, noting that such allowance would establish consistency across grade levels.

DEPARTMENT RESPONSE:

The Department understands the concern, but is equally concerned with the quality of instructional time that would be offered after all Regents and final examinations have been administered and course grading is completed in anticipation of graduation, which typically occurs before July 1<sup>st</sup>. In recent years, including the current 2017-18 school year, when significant weather conditions have impacted schedules statewide, SED has allowed for one day after Rating Day to be used for an unused Superintendents' Conference Day to make up one such cancelled day (information available here: [https://stateaid.nysed.gov/attendance/sched\\_superintendents\\_conf\\_day\\_june\\_2018.htm](https://stateaid.nysed.gov/attendance/sched_superintendents_conf_day_june_2018.htm)). The Department will continue this practice. Therefore, no revisions are necessary.

11.COMMENT:

One commenter requested clarification about whether districts must still meet the 180-day requirement so long as they've met the annual aggregate minimum hourly requirement.

DEPARTMENT RESPONSE:

Yes, Education Law §3604 requires that districts be in session for no less than 180 days or be subject to a financial penalty. Therefore, school districts must continue to hold session for 180 days and meet the annual minimal instructional time over those 180 days.

12.COMMENT:

Two commenters recommended that references to BOCES be removed from the proposed regulation as they ultimately do not receive state aid.

DEPARTMENT RESPONSE:

SED agrees and has removed references to BOCES from the proposed regulatory language.

13.COMMENT:

One commenter noted that it is not mandated that districts provide education at the kindergarten level, and it could be problematic to require a minimum number of hours.

DEPARTMENT RESPONSE:

The commenter is correct that kindergarten is not mandated in all districts. The proposed regulation does not mandate kindergarten by virtue of establishing a minimum number of hours for kindergarten. Instead, it is establishing the minimum number of hours

required for either a half day or full day kindergarten program, *if* a school district decides to offer it for State aid purposes only.

14.COMMENT:

One commenter asked for clarification on how study halls are counted for purposes of the requirement, as not all students have them built into their schedules.

DEPARTMENT RESPONSE:

Supervised study halls count toward the minimum instructional time. With respect to the commenter's question relating to what happens if not all students have them built into their calendars, the school district must review its calendar and student schedules to determine if it is providing the minimum instructional time to its students (which can be done in a variety of ways for its varying student population).

15.COMMENT:

One commenter asked for clarification about how time for administering non-state assessments will or will not be counted within the requirement.

DEPARTMENT RESPONSE:

In general, all time for administering local exams can be treated as regular instruction time. This does not preclude districts from having students sit for other examinations and still have that time count as instructional time.

16.COMMENT:

One commenter asked for clarification on how time for Regents examinations are defined and counted within the new proposed requirement.



## DEPARTMENT RESPONSE:

In general, if all students in a school remain in class session during the administration of Regents examinations, those days may be counted in the same manner that an average instructional day is counted.

However, if a school is electing to dismiss students who are not taking tests on days during which Regents exams are administered in a building housing grades seven through twelve, the following rules will apply:

- If the dismissals are occurring in a school building where no Regents exams are being administered, no time after dismissal may count toward the minimum instructional time requirement (i.e., if there is a half-day dismissal, no time after dismissal may be counted).
- If the dismissals occur in a building where Regents exams are being administered, and the students' schedules are disrupted by the exams because of staff needs for administering them or because some number of students are taking said exams, the district may claim—for the dismissed grades—the number of hours the exams are administered for the students taking exams. For instance, if a grade is dismissed for the full day, and they are normally scheduled for six instructional hours, and the Regents exams are scheduled for three hours, the dismissed grades may be credited for three instructional hours that day.

Again, as noted in comment #4, the regulation limits this practice to only buildings that house grades seven through twelve.

## 17.COMMENT:

One commenter asked for clarification on the definition of “overlapping sessions”.

## DEPARTMENT RESPONSE:

Overlapping sessions refer to a historical occurrence where large city school districts had building space limitations that required them to split their student populations and hold two independent sessions during the course of one school day to accommodate the student population. It is the Department's understanding that currently, no school districts are utilizing this exception.

18.COMMENT:

One commenter noted that the provision allowing for up-to-two hours per day for weather delays or early dismissals will require superintendents to certify those occurrences and could be a new reporting burden. They asked for clarification and potentially relief as it could be seen as an added mandate.

DEPARTMENT RESPONSE:

The Department will be developing additional guidance and forms to implement the proposed regulation. It is important that the Department maintains its ability to ensure full compliance with the requirement. However, the Department will take this concern under consideration and will attempt to develop guidelines and a process that are as least burdensome as possible.

19.COMMENT:

One commenter asked how the Department calculated the number of hours authorized for Superintendent's Conference Days and for clarification on whether half days used for professional development can be combined into full days. Another also asked for confirmation that time can be done in increments less than one full day.

DEPARTMENT RESPONSE:

The number of hours allowed permitted for Superintendent's Conference Days under the proposed regulation is an extension of the current statute and regulation. Currently, Education Law §3604 allows for four superintendent conference days, and the regulations define a minimum day as two and one-half hours for half-day kindergarten, five hours for kindergarten through grade six, and five and one-half hours for grades seven through twelve. The proposed regulation is simply the product of the four statutory days multiplied by the existing minimum daily hours for the respective grade levels to determine an aggregate number of hours.

Under the proposed regulation, these hours can be used in increments as small as an hour and as much as a full-day, subject to the school district's local discretion, subject to collective bargaining if required under Article 14 of the Civil Service Law.

#### 20.COMMENT:

One commenter asked for clarification on how travel time to and from BOCES should be counted for students who attend programs at those facilities.

#### DEPARTMENT RESPONSE:

The regulation is intended to apply to the schedule the district is providing to the majority of students. Small variances in individual schedules for a subset of students, such as travel time to a BOCES facility, independent study programs, or extended day programs, will neither count toward or against districtwide compliance.

#### 21.COMMENT:

One commenter requested that the Department consider the possibility of offering districts the ability to implement "virtual snow days" that allow students and teachers to

engage in instructional activities online on days during which school is unexpectedly cancelled.

DEPARTMENT RESPONSE:

This particular allowance is not contemplated under the existing or proposed regulations. The Department would need to research further the legal authorizations for such an allowance and the practicality of its implementation.

22.COMMENT:

One commenter asked for clarification on how school districts should comply with the proposed regulation in the interim while, in some cases, a new collective bargaining agreement is negotiated.

DEPARTMENT RESPONSE:

The proposed amendment provides that “nothing in this section shall be construed to abrogate any conflicting provisions of a collective bargaining agreement in effect on June 30, 2018 during the term of such agreement and until the entry into a successor collective bargaining agreement to the extent required under article 14 of the Civil Service Law.”

23.COMMENT:

One commenter requested clarification about whether or not a school district can use a full day of Superintendent’s Conference Day time for parent-teacher conferences.

DEPARTMENT RESPONSE:

As noted in comment #10, the Department recommends that the proposed amendment be revised to allow Superintendent’s Conference Days to be used for parent-

teacher conferences. The amount of such hours that can be used for such purpose is up to the district's local discretion and may be executed as a full day within the limitations of the authorized time (i.e., up to the maximum of ten hours for half-day kindergarten, twenty hours for kindergarten through grade six, or twenty-two and one-half hours for grades seven through twelve).

24. COMMENT:

One commenter asked for clarification about during which school year the proposed regulations would take effect.

DEPARTMENT RESPONSE:

The proposed regulations will be in effect for school years beginning with 2018-19. The existing regulation will still apply for the 2017-18 school year calendars, which school districts will report to SED as a part of their Fall 2018 aid claim submissions.

25. COMMENT:

One commenter asked for clarification if the rules for half-day parent-teacher conferences would change under the proposed regulations.

DEPARTMENT RESPONSE:

Under the proposed regulation, the rule related to what was previously referred to as "shortened session" parent-teacher conferences will no longer apply. They are being replaced with parent-teacher conferences that can be scheduled in one of two ways:

1. As part of the four authorized Superintendent's Conference Days, up to the maximum of ten hours for half-day kindergarten, twenty hours for kindergarten through grade six, or twenty-two and one-half hours for grades seven through

twelve. Parent-teacher conference hours may be included within the required aggregate annual minimum instructional hours; or

2. If scheduled outside of the four authorized Superintendent's Conference Days, parent-teacher conferences can be scheduled at local district discretion at any time, for any length of time, consistent with the scheduling on non-instructional time described in comment #1. Such hours may not be included in the aggregate annual minimum instructional hours.

#### 26.COMMENT:

One commenter asserted that the annual aggregate minimum instructional hours required in the proposed regulation are incongruent with the instructional units of study and graduation requirements detailed in the Commissioner of Education's Part 100 Regulations. Specifically, in that regulation, units of study are defined as 180 minutes (three hours) per week, and twenty-two credits are required to graduate. They assert that those requirements translate to 720 hours at the high school level, rather than the 990 hours in the proposed regulation, even after accounting for additional instructional time (forty minutes instead of thirty-six) and one forty-minute study hall.

#### DEPARTMENT RESPONSE:

First, the computation of the aggregate annual minimum instructional hours in the proposed regulation is the product of the current daily minimum instructional hours over the required 180 days. Therefore, there are no changes, in the interpretation of the Department, to how many hours are required and what may be counted in those hours in the shift from minimum daily hours to the annual requirement.

Second, the claim that the graduation requirements (plus two courses and study halls) translate to 720 hours per year is incorrect. The example used appears to include study hall time, which would increase the estimate from 720 hours to 840 hours. Second, the estimate also fails to include time for science labs, which are required to qualify to take a science Regents examination and are in addition to the required classroom instruction associated with earning a unit of credit. Moreover, SED believes that, as is currently the case, students should be provided more instruction than the minimum required for graduation to ensure the development of the whole child.

#### 27.COMMENT:

Multiple commenters requested that the proposed regulation be amended to allow for recess or physical activity periods to count as instructional hours, noting that such activities are important to the overall physical and social development of students.

#### DEPARTMENT RESPONSE:

SED recognizes the importance of physical education instruction and any physical education instruction that complies with Part 135 of the Commissioner's regulations by a certified instructor shall count toward the minimum instructional time for State aid purposes. SED also recognizes that there are a variety of non-instructional activities that may occur in the school day that may positively impact the development of students, including recess.

The proposed amendment is only a minimum. Therefore, the Department also added a provision to the regulations to make it clear that nothing in the proposed regulation should be construed as precluding school districts from lengthening the school day and/or school year beyond the annual minimum instructional requirement. Extensions may

include both instructional and non-instructional activities including but not limited to homeroom periods, lunch, recess, staff development activities, parent-teacher conferences, or any other purpose the school district has determined is necessary for the development of the whole child and/or to improve student achievement.

28. COMMENT:

One commenter requested that final guidance from the Department and any Frequently Asked Questions document published should also include information from the Office of Special Education and the State Office for Religious and Independent Schools as to how the requirement impacts those programs.

DEPARTMENT RESPONSE:

The Department will take that request under consideration and attempt to provide as much information as possible in the guidance it produces.

29. COMMENT:

One commenter noted concern about the additional flexibility provided to school districts under the proposed regulation could lead to some scheduling conflicts for nonpublic schools, as the public schools utilize the flexibility in ways to add additional half days.

DEPARTMENT RESPONSE:

The proposed regulation does not in any way change the obligations that public school districts have in providing transportation and certain educational services to nonpublic school students. The Department understands this concern and will monitor the developments closely as school districts make changes to their calendars because of this



proposed regulation. The Department also recommends that nonpublic schools and school districts work collaboratively when developing their respective school calendars.

30.COMMENT:

One commenter requested clarification confirming whether “preannounced” closings or “delayed starts” due to weather or other emergencies must be rescheduled, specifically as they relate to half-day preschool special education programs which are generally two and one-half hours in length.

DEPARTMENT RESPONSE:

As stated above, the proposed amendment does not apply to 4410 programs or 853 schools.

31.COMMENT:

Multiple commenters were concerned about the potential impact that “significant” changes to the school year calendar could have on the state’s tourism industry, including the Department’s proposed legislation to allow for student instructional days to be held prior to September 1<sup>st</sup>.

DEPARTMENT RESPONSE:

The proposed regulation does not add any additional time requirements on school districts or preclude districts from adopting any existing vacation schedules. The overall amount of instructional time remains the same as it was under the previous regulation, with additional flexibility for school districts to meet the minimum requirement.

The Department has proposed legislation to allow session days prior to September 1, but that legislation has not yet been enacted, and would only be utilized at the discretion of local school districts.

ASSESSMENT OF PUBLIC COMMENT

Since publication of the Revised Rule Making in the State Register on April 25, 2018, the State Education Department (SED) received the following written comments:

1. COMMENT:

Multiple commenters requested that homeroom, recess, and “passing time” be counted as instructional time. At least one commenter cited research to suggest that recess improves not just physical health, but social and emotional health. The same commenter also indicated that evidence shows that student mental health issues have been growing at an alarming rate and therefore encouraging and supporting recess will help.

A commenter also suggested that the State’s assertion that recess, hall passing time and homeroom have never counted is also incorrect. The commenter asserts that in the past, homeroom and hall passing time counted, citing to a guidance memo regarding half days where schools were told to determine instructional minutes by taking the length of the school day, from start to dismissal, subtracting out only lunch for high schools, and subtracting out only lunch and recess for elementary schools (<https://stateaid.nysed.gov/attendance/sched> halfdays 180 days of session.htm).

DEPARTMENT RESPONSE:

Education Law §3604(7) requires the 180 days of school session counted for State aid purposes must be instructional time “taught by a qualified teacher.” Therefore, any homeroom and/or recess that is not taught by a qualified teacher and passing time has not been included as instructional time for State aid purposes. However, the regulation recognizes that for these other time periods within a school district schedule, nothing in

the regulation shall be construed to preclude school districts from lengthening the school day and/or school year beyond the annual minimum instructional requirement for both instructional and non-instructional activities or for any other purpose the school district has determined is necessary for the development of the whole child and/or to improve student achievement. This has been the guidance of the Department prior to this regulation and nothing in this regulation speaks to recess, passing time or homeroom. Therefore, the Department believes that these suggested changes are outside the scope of the regulation and does not believe that any change is warranted.

2. COMMENT:

One commenter recommended that the June Regents examination period be moved to an earlier set of dates in June in order to provide two additional weeks of summer vacation time for students.

DEPARTMENT RESPONSE:

The Department has compressed, to the extent possible, the June 2019 Regents examination schedule to provide school districts with more available days to hold session.

However, Education Law §3604(7) requires that there be 180 days of session to be eligible for State aid. Therefore, even if a school district ended school earlier in June, it would then need to begin school earlier (such as in August) to ensure that it met the statutory requirement of 180 instructional days. SED has proposed legislation that would authorize school districts to commence the school prior to September 1, subject to local discretion.

3. COMMENT:

One commenter asserted that the annual aggregate minimum instructional hours required in the proposed regulation are incongruent with the instructional units of study and graduation requirements. The commenter indicated that students currently need to complete 22 credits for graduation and the instructional hours required to meet the 22 credit mandate is less than the 990 hours being proposed now. This disconnect will make it challenging for some high schools to meet the 990 instructional hour mandate because they have created schedules to meet the 22 credit requirements and the two don't necessarily align.

DEPARTMENT RESPONSE:

First, the computation of the aggregate annual minimum instructional hours in the proposed regulation is the product of the current daily minimum instructional hours over the statutorily required 180 days. Therefore, there are no changes, in the interpretation of the Department, as to how many instructional hours are required for State aid and what may be counted in those hours in the shift from minimum daily hours to the annual requirement. Therefore, SED does not believe any changes are warranted.

Moreover, SED believes that, as is currently the case, students should be provided more instruction than the minimum required for graduation to ensure the development of the whole child.

4. COMMENT: Another commenter asked that the Department reconsider whether recess should count if it complies with Part 135 of the Commissioner's regulations and instead allow recess to count as instructional time if any certified professional is providing the requisite supervision and instruction during this time, not just the certified professionals listed in the regulation.

RESPONSE: If physical education instruction is provided during recess, it therefore must meet the requirements of Part 135 of the Commissioner's regulations. Therefore, no changes are warranted.

5. COMMENT: Another commenter indicated that she had several concerns about the minutes per day requirement for students. She indicated that with the minimum instructional requirements, recess, lunch and passing time, it could mean students are in school for 7 or 8 hours a day, which is too much.

She further indicates that she teaches high school and that students who are not in music have a period where they can connect with any content teacher they need to get help. It is unstructured time, but with a purpose.

RESPONSE: Prior to this proposed amendment, the regulations required that students have 5.0 minimum hours of instruction a day in elementary and 5.5 hours in middle and high schools. The purpose of the proposed regulation is merely to provide school districts with flexibility and allow them to spread the minimum instructional time over the school year, within their discretion. It does not provide for a longer school day, as the commenter suggests.

Second, the regulation is intended to apply to the schedule the district is providing to the majority of students. Small variances in individual schedules for a subset of students do not count against the district for State aid purposes.

6. COMMENT: Another comment expressed concern about the timing of the proposed amendment. The commenter indicated that adopting the proposed amendment as an emergency does not allow the time necessary for districts to fully understand the changes, negotiate with unions and plan for the changes.

RESPONSE: Based on concerns from the field requesting additional flexibility in their school calendars for the 2018-2019 school year, the Department is adopting the proposed regulations on an emergency basis for the new school year. However, the regulation also contains a provision that says that nothing in the regulation shall override an existing collective bargaining and that any existing collective bargaining shall remain in effect until a successor agreement is reached.

7. COMMENT: One commenter requested non-attendance days for primary and general elections, particularly on Primary Day and Election Day in November and/or that the school year be extended beyond the current rating day so that school districts can have more flexibility to schedule their school calendar around these important voting days.

RESPONSE: To the extent the commenter is requesting that schools be prohibited from being open on primary and general election days, a statutory amendment would be needed to include these in the list of legal holidays on which school districts are prohibited from being open.

With respect to the comment on Rating Day, the Department understands the concern, but is equally concerned with the quality of instructional time that would be offered after all Regents and final examinations have been administered and course grading is completed in anticipation of graduation, which typically occurs before July 1<sup>st</sup>. In recent years, including the current 2017-18 school year, when significant weather conditions have impacted schedules statewide, SED has allowed for one day after Rating Day to be used for an unused Superintendent's Conference Day to make up one such cancelled day (information available here:

). The Department will continue this practice. Therefore, no revisions are necessary.

8. COMMENT: At the elementary level, recess should count in the daily minutes. There is so much learning that occurs during this period, instructed and/or supervised by certified teachers. In addition to the team building skills that are addressed, students learn to exercise their leadership skills, resolve conflict, as well as teaching others through different aptitudes and abilities. Research shows many benefits of recess. Not counting recess means some districts will need to eliminate it to meet the time requirements. Please consider counting this recess time as part of the requirements for calendar minutes.

Transition time at the elementary level is another issue. The commenter indicated that the district is incorporating 18 minutes of passing time at the elementary level which is “crazy” in self-contained classrooms. Passing time should not even be a factor at the elementary level.

RESPONSE:

See Response to Comment #1 on recess and passing time.



Since publication of the Revised Rule Making in the State Register on June 27, 2018, the State Education Department (SED) received the following written comments:

1. COMMENT:

One commenter requested that homeroom and “passing time” be counted as instructional time. The commenter also suggested that the State’s assertion that recess, hall passing time and homeroom have never counted is also incorrect. The commenter asserts that in the past, homeroom and hall passing time counted, citing to a guidance memo regarding half days where schools were told to determine instructional minutes by taking the length of the school day, from start to dismissal, subtracting out only lunch for high schools, and subtracting out only lunch and recess for elementary schools ([https://stateaid.nysed.gov/attendance/sched\\_halfdays\\_180\\_days\\_of\\_session.htm](https://stateaid.nysed.gov/attendance/sched_halfdays_180_days_of_session.htm)).

DEPARTMENT RESPONSE:

Education Law §3604(7) requires the 180 days of school session counted for State aid purposes must be instructional time “taught by a qualified teacher.” Therefore, any homeroom and/or recess that is not taught by a qualified teacher and passing time has not been included as instructional time for State aid purposes. However, the regulation recognizes that for these other time periods within a school district schedule, nothing in the regulation shall be construed to preclude school districts from lengthening the school day and/or school year beyond the annual minimum instructional requirement for both instructional and non-instructional activities or for any other purpose the school district has determined is necessary for the development of the whole child and/or to improve student achievement. This has been the guidance of the Department prior to this regulation and nothing in this regulation speaks to recess, passing time or homeroom.

Therefore, the Department believes that these suggested changes are outside the scope of the regulation and does not believe that any change is warranted.