





**TO:** P-12 Education Committee

**FROM:** James N. Baldwin 

**SUBJECT:** Proposed Addition of Part 130 of the Regulations of the Commissioner of Education Relating to Substantially Equivalent Instruction for Nonpublic School Students

**DATE:** September 1, 2022

**AUTHORIZATION(S):** 

**SUMMARY**

**Issue for Decision**

Should the Board of Regents adopt a new Part 130 of the Regulations of the Commissioner of Education relating to nonpublic schools and substantially equivalent instruction for nonpublic school students?

**Reason(s) for Consideration**

Review of Policy.

**Proposed Handling**

The proposed amendment is presented to the P-12 Education Committee for discussion and recommendation to the Full Board for adoption as a permanent rule at the September 2022 meeting of the Board of Regents. A copy of the proposed amendment is attached (Attachment A).

**Procedural History**

The proposed amendment was presented to the P-12 Education Committee for discussion at the March 2022 Regents meeting. A Notice of Proposed Rulemaking was published in the State Register on March 30, 2022 for a 60-day public comment period.

Following publication in the State Register, the Department received approximately 350,000 comments on the proposed amendment. An Assessment of Public Comment is included as Attachment B. The Department made non substantial revisions to the proposed rule in response to public comment and to provide

clarification. Supporting materials are available upon request from the Secretary to the Board of Regents.

### **Background Information**

In New York State, the Compulsory Education Law requires children aged 6 to 16 (or 17) to attend “upon full time instruction” (Education Law §3205[1], [3]). The purpose of the Compulsory Education Law is to ensure that children are not left in ignorance, that they receive, from one source or another, instruction that will prepare them for their place in society.

Since 1895, the Compulsory Education Law has required that, if a child of compulsory attendance age “attend[s] upon instruction elsewhere than at a public school, such instruction shall be at least substantially equivalent to the instruction given to children of like age at the public school of the city or district in which such child resides.” (Education Law of 1894, ch. 671, §3). Despite various statutory amendments and reenactments, today, the substantial equivalency requirement remains largely unchanged. Education Law §3204(2) currently provides that “Instruction given to a minor elsewhere than at a public school shall be at least substantially equivalent to the instruction given to minors of like age and attainments at the public schools of the city or district where the minor resides.”

Likewise, Education Law §3210(2) provides that a student who attends “elsewhere than at a public school . . . shall attend for at least as many hours, and within the hours specified therefor.” This provision allows for attendance “for a shorter school day or for a shorter school year or for both,” so long as the “school authorities” deem the instruction provided “as being substantially equivalent in amount and quality to that required by the provisions of [the Compulsory Education Law].” As noted above, substantial equivalence is determined by reference to the instruction “given to the children of like age at the public school of the city or district in which such child resides” (Education Law §§3210[2]; 3204[2]). The Education Law defines “school authorities” as the board of education or corresponding officers of a school district. (Education Law §2[12]). Taken together, the relevant statutory provisions of the Education Law squarely place the responsibility for determining the substantial equivalency of instruction in nonpublic schools on local school authorities (“LSAs”), except when otherwise specified by the Legislature. see e.g. Education Law §3204(2)(ii). The Department has published guidance on this requirement for decades, which was neither controversial nor challenged.

In 2015, parents, former students, and former teachers filed a complaint against the New York City Department of Education (“NYCDOE”), asserting that certain religious schools provided only limited secular education that did not meet the “substantial equivalence” standard mandated by state law. They also alleged that the schools failed to provide sufficient instruction in core content areas. Thereafter, NYCDOE commenced an investigation. The Department subsequently received

inquiries and questions from both LSAs and nonpublic schools relating to the Department's guidance on substantial equivalence.

At the December 2015 Board of Regents meeting, Department staff provided the P-12 Education Committee with an overview of nonpublic schools in New York State. This overview included a discussion of the constitutional right of parents to send their students to nonpublic schools, the Compulsory Education Law, and the obligation of LSAs to ensure that students in nonpublic schools receive substantially equivalent instruction. In April 2016, the State's Enacted Budget included funding for the creation of a new State Office of Religious and Independent Schools ("SORIS") within the Department, which would be responsible for providing guidance and assistance to the nonpublic school community. Based on the events described above and the volume of questions from the field, the Commissioner directed SORIS to review [existing guidance](#) related to substantial equivalency and provide recommendations to better assist the field in making these determinations. The Department then engaged in a consultative process for approximately two years to update the guidance as it applied to all public and nonpublic schools statewide.

In April 2018, the Legislature amended the Education Law relating to the substantial equivalence determination for nonpublic schools that met certain criteria – namely, (1) they must be a non-profit corporation; (2) they must have a bilingual program; (3) elementary and middle schools must have an educational program that extends from no later than nine a.m. until no earlier than four p.m. for grades one through three, and no earlier than five-thirty p.m. for grades four through eight on the majority of weekdays; and (4) secondary schools must have been established for pupils in high school who have graduated from an elementary school that provides instruction as described in Education Law §3204 and have an educational program that extends from no later than nine a.m. until no earlier than six p.m. on the majority of weekdays. For these schools, the amendment: (i) shifts ultimate responsibility for making the final substantial equivalence determination to the Commissioner of Education; and (ii) requires the Commissioner to consider, without limitation, additional enumerated factors in making the final substantial equivalence determination (see Education Law §3204[2][ii]-[iii], [v]). This statutory exception was included in the budget; as such, there is no Legislative history to guide the Department's interpretation of its provisions.

The Department issued updated substantial equivalency guidance on November 20, 2018. Staff began to provide training to both public and nonpublic school leaders regarding the content of the guidance and the expectations for the review process. Then, in March 2019, three groups representing nonpublic schools challenged the updated guidance in court. In April 2019, Albany County Supreme Court struck down the guidance, finding that it failed to adhere to the rulemaking process prescribed in the State Administrative Procedure Act ("SAPA").

In June 2019, the Department issued proposed regulations in response to the April 2019 ruling from the Court. Over 140,000 comments were received in response to the draft regulation. These comments were summarized for the Board in February

2020. The Board thereafter directed staff to engage with stakeholders before resubmitting a revised draft.

Despite some inevitable delays caused by the COVID-19 pandemic, the Department continued the stakeholder engagement process. In fall 2020, the Department conducted a series of five online regional stakeholder engagement sessions. These included religious and independent school leaders and advocates, public school officials and their professional associations, scholars, and other advocates, as well as legislators and legislative staff. Another session included private school students, parents, and alumni in breakout rooms. In addition, Department staff conducted in-person conversations with religious communities that do not use the internet. Department staff also engaged in regular conversations on this topic with the Commissioner's Advisory Council for Religious and Independent Schools.

One of the concerns raised by both public and private school communities is the requirement that LSAs make substantial equivalency determinations. However, with the exception of nonpublic schools that fall within the criteria prescribed in the April 2018 amendment to Education Law §3204, this obligation is placed upon LSAs by law. Nevertheless, the proposed regulation balances this responsibility by creating pathways in which nonpublic schools may be deemed substantially equivalent absent a review, thereby alleviating some of this burden.

Many private school stakeholders reported that, although nonpublic schools are not mandated to participate in the state's accountability system, they nevertheless use various measures to monitor student performance. These indicators demonstrate that their students are progressing in core content areas and the broader curricula offered by religious and independent schools. The proposed rule incorporates this feedback by providing a variety of pathways for a nonpublic school to demonstrate that it is providing instruction in core content areas (science, math, social studies, and English/language arts) and to demonstrate that students are making progress in their use of the English language. These externally validated measures will provide evidence that students are making progress in core content areas and provide a streamlined process for many religious and independent schools.

Additionally, private school communities noted that reviewers may lack understanding of the nonpublic culture and expressed concern that substantial equivalency requirements may conflict with religious beliefs. While the proposed rule focuses substantial equivalency reviews on core content areas and instruction specifically required by statute, it also requires that reviews be conducted in a manner that is sensitive and respectful of nonpublic school communities. This includes a focus on opportunities offered to nonpublic school students to acquire core skills and make academic progress. Instructional programs in nonpublic schools need not demonstrate perfect congruence between public and nonpublic school instruction. The Department believes that the proposed rule will enable nonpublic schools to comply with the Compulsory Education Law while also maintaining their unique culture and beliefs in the delivery of instruction.

The proposed rule also contains numerous provisions to ensure compliance, such as ensuring that LSAs and nonpublic schools complete substantial equivalency reviews in a timely manner. Additionally, the proposed rule creates safeguards that substantial equivalency determinations are made in good faith. Determinations may be reviewed upon complaint or via an appeal to the Commissioner pursuant to Education Law §310. The Commissioner may also initiate a review.

The specific regulatory provisions are summarized below.

### **Proposed Amendment**

The proposed amendment adds a new Part 130 to the Commissioner's regulations as follows:

**Section 130.1** defines the terms "competent teacher", "substantial equivalency of instruction," "local school authority," "nonpublic school," "registered school," and "superintendent."

**Section 130.2** requires LSAs to make substantial equivalency determinations for all nonpublic schools within their geographical boundaries, except for nonpublic schools that are deemed substantially equivalent pursuant to section 130.3 or nonpublic schools for which the Commissioner is required to make a substantial equivalency determination pursuant to Education Law §3204(2)(ii)-(iii). For schools that meet the statutory criteria for a Commissioner's determination, LSAs must review such schools for substantial equivalency and forward a recommendation and supporting documentation to the Commissioner for his/her final determination.

**Section 130.3** allows various pathways for a nonpublic school to demonstrate that it provides substantially equivalent instruction. Specifically, it provides that a nonpublic school shall be deemed substantially equivalent if it annually delivers sufficient evidence to its LSA that it:

- Is a state-supported school for the blind and deaf (4201 schools); is a state-operated school; is a state-approved private special education school (853 schools);
- Is registered by the Board of Regents (grades 1 through 8 of a nonpublic school that has a registered high school program will also be deemed substantially equivalent by virtue of the school's high school registration);
- Is accredited by a Department-approved accreditation organization that meets certain prescribed criteria;
- Has instruction approved by the United States government for instruction on a military base or service academy;
- Participates in the international baccalaureate program; and/or
- Regularly uses assessments approved by the Department that demonstrate student academic progress as they move from grade to grade and have a

student participation rate equal or greater to the three-year, statewide average State assessment public school participation rate.

Additionally, such section provides that where a nonpublic school is deemed substantially equivalent pursuant to this section, the Commissioner may request evidence submitted to the LSA. If the Commissioner determines that sufficient evidence has not been submitted, the Commissioner shall direct the LSA to conduct a review in accordance with section 130.6 or submit a recommendation to the Commissioner in accordance with section 130.8, as applicable.

**Section 130.4** of the proposed rule prescribes the timelines for substantial equivalency reviews, recommendations to the Commissioner, and determinations:

- New nonpublic schools that open on or after the effective date of the proposed regulation must be reviewed within the first two years of when the nonpublic school commences instruction and every seven years thereafter; and
- Existing nonpublic schools operating on the proposed regulation's effective date must be reviewed by the end of the 2024-2025 school year and every seven years thereafter.

If the LSA does not make sufficient progress toward reviewing nonpublic schools by the end of the 2023-2024 school year, and thereafter, the Commissioner may withhold public money from the LSA consistent with Education Law §3234.

**Section 130.5** of the proposed rule sets forth procedures for substantial equivalency reviews. Prior to commencing a substantial equivalency review, the LSA, after consulting with the nonpublic school, shall determine whether the Commissioner is responsible for making the final determination pursuant to Education Law §3204(2)(ii) or (iii), or whether the LSA is responsible for making such final determination. The superintendent or his or her designee must review all nonpublic schools in the LSA's geographic boundaries, including nonpublic schools that meet the criteria for a Commissioner's determination, except for nonpublic schools deemed substantially equivalent pursuant to section 130.3. In conducting such reviews, the LSA must use the criteria outlined in the proposed regulation. For schools that meet the criteria for a Commissioner's final determination, the LSA conducts the review using the appropriate criteria and makes a recommendation to the Commissioner for his or her final determination. Additionally, such section requires that all reviews shall include at least one site visit to the nonpublic school by the LSA.

**Section 130.6** of the proposed rule sets forth a procedure for LSAs to render a substantial equivalency determination as follows:

- **Preliminary Determinations:** If following its review, the superintendent or his or her designee determines that the nonpublic school has not sufficiently demonstrated the substantial equivalence of instruction, the LSA must (1) inform the nonpublic school's administrators of the preliminary determination and the reason(s) for the determination; (2) notify the Department; (3) collaboratively

develop, within 60 days, a timeline and plan with the nonpublic school for attaining substantial equivalency in an amount of time that is reasonable given the reasons identified in the review, provided that such timeline may not exceed the end of the next academic year following the year in which the preliminary determination is made; and (4) continue services to the nonpublic school and students during such time period. No later than 60 days after the conclusion of that timeline, the LSA must render a final determination.

- Final Determinations:
  - For school districts (other than the city school district of the City of New York) that have completed a review and preliminary determination, the superintendent or his or her designee must make a recommendation to the board of education (board) that a nonpublic school is deemed to be providing at least substantially equivalent instruction (a “positive” determination) or be deemed to be not providing at least substantially equivalent instruction (a “negative” determination). After notification to the nonpublic school, the LSA must vote on the superintendent’s or designee’s recommendation at a regularly scheduled board meeting. The nonpublic school shall be provided an opportunity to present additional materials and/or a written statement to the board prior to the board’s vote.
  - For the city school district of the City of New York, the Chancellor, after review and preliminary determination, shall render either a positive or negative substantial equivalency determination.
- Procedure After Final Determination:
  - If the board renders a positive substantial equivalency determination, the LSA must provide written notification to the nonpublic school, the superintendent(s) of schools of each of the districts which have resident students enrolled in the nonpublic school, and the Department, which must post such determination on its website.
  - If the board renders a negative substantial equivalence determination:
    - The nonpublic school will no longer be deemed a school that provides compulsory education fulfilling the requirements of Article 65 of the Education Law.
    - The LSA must provide written notification to the nonpublic schools and provide a letter for the nonpublic school to distribute to the parents or persons in parental relationship to the students attending the nonpublic school and the superintendent(s) of schools of each district which has resident students enrolled in the nonpublic school advising them of such determination.
    - The board must provide a reasonable timeframe for parents or persons in parental relationship to enroll their children in a different appropriate educational setting, consistent with Education Law §3204.
    - The LSA must notify the Department of the negative determination and its reasons, therefore.

- Services to the nonpublic school and students (e.g., textbooks, special education, transportation, etc.) must continue until the end of the reasonable timeframe.
- Student records shall be managed consistent with section 104.2 of the Commissioner's regulations.

**Section 130.7** of the proposed rule requires LSAs to report a list of all nonpublic schools within the LSA's geographical boundaries by September 1, 2023 and each September 1 thereafter. Additionally, it requires LSAs to report the following information to the Department by December 1, 2023, and each December 1 thereafter:

- A list of all nonpublic schools in the LSA's boundaries that meet one of the substantial equivalency pathways prescribed in section 130.3;
- A list of all nonpublic schools in the LSA's boundaries that do not meet one of the substantial equivalency pathways prescribed in section 130.3 and are subject to a Commissioner's final determination; and
- A list of the remaining nonpublic schools in the LSA's boundaries for which the LSA is responsible for making the final substantial equivalency determination.

This section also requires that by December 1, 2024, and each December 1 thereafter, LSAs attest to whether they have or have not yet made final substantial equivalency determinations and recommendations for each nonpublic school in their geographical area and the date on which such determination or recommendation was made or is anticipated to be made.

**Section 130.8** of the proposed rule includes procedures for the Commissioner's determination of substantial equivalency. For nonpublic schools for which the Commissioner is required to make a final determination, the LSA must conduct a review in accordance with the regulation and forward its recommendation regarding substantial equivalency and all relevant documentation to support its recommendation to the Commissioner. The Commissioner will review the materials and recommendation submitted by the LSA. The Commissioner will provide the nonpublic school with an opportunity to present additional relevant materials and/or a written statement prior to rendering a determination. The proposed regulation sets forth procedures for when a school subject to a Commissioner's determination appears not to be substantially equivalent and for when the Commissioner renders a positive or negative substantial equivalency determination. Such procedures are similar to those described above for LSAs to follow when making a final determination.

**Section 130.9** of the proposed rule provides that, when reviewing a nonpublic school for substantial equivalency, an LSA and the Commissioner, when he or she is responsible for making the final determination, must consider the following criteria:

- Instruction is given only by a competent teacher;
- English is the language of instruction for common branch subjects;
- Students who have limited English proficiency are provided with instructional programs enabling them to make progress toward English language proficiency;



- Accreditation materials from the last five years;
- The instructional program in the nonpublic school as a whole incorporates instruction in mathematics, science, English language arts, and social studies that is substantially equivalent to such instruction required to be provided in public schools pursuant to Education Law §3204(3);
- Similar courses of instruction to the course of instruction required by law in public schools in: patriotism and citizenship; history, meaning, significance and effect of the provisions of the Constitution of the United States and the amendments thereto, the Declaration of Independence, the Constitution of the State of New York and the amendments thereto; instruction in New York State history and civics; instruction in physical education and kindred subjects; instruction in health education regarding alcohol, drugs, and tobacco abuse; instruction in highway safety and traffic regulation; instruction in fire drills and in fire and arson prevention, injury prevention, and life safety education; and instruction in hands-only cardiopulmonary resuscitation and the use of an automated external defibrillator; and
- For nonpublic schools meeting the criteria for Commissioner's final substantial equivalency determinations in Education Law §3204(2)(ii)-(iii), the criteria enumerated in such statute.

**Section 130.10** of the proposed rule provides that reviews of nonpublic schools shall be: conducted in a manner that is respectful to the diversity of the nonpublic school community; based on objective criteria focused on whether students in the nonpublic school receive instruction that is at least substantially equivalent to instruction provided in public schools; cognizant of the rights of parents or persons in a parental relationship to choose among religious and independent schools; informed by and respectful of the cultural and religious beliefs and educational philosophy that may drive the curriculum in nonpublic schools and be integrated with academic content in the delivery of instruction.

**Section 130.11** of the proposed rule prescribes complaint procedures. Such section provides that the Commissioner, or his or her designee, may direct an LSA to investigate a nonpublic school if the Commissioner receives a complaint regarding the substantial equivalency of instruction at such nonpublic school, or if the Commissioner otherwise has reasonable suspicion to doubt the substantial equivalency of instruction at a nonpublic school. If an LSA does not investigate and decide such complaint, the Commissioner may withhold public money from such LSA consistent with Education Law §3234 and section 130.14(b).

**Section 130.12** of the proposed rule provides that persons considering themselves aggrieved by an LSA's substantial equivalency determination may file an appeal to the Commissioner within 30 days of the LSA's decision pursuant to Education Law §310 and section 275.16 of the Commissioner's regulations. The Commissioner may stay such determination pending a final determination of such appeal pursuant to Education Law §311 and section 276.1 of the Commissioner's regulations.

**Section 130.13** of the proposed rule provides that the Commissioner may request the records and/or documentation an LSA used to make a final substantial equivalency determination, and the LSA must provide them to the Commissioner within 10 days of any such request. With respect to any nonpublic school against which a penalty pursuant to section 130.14(c) is being considered, the Commissioner may request that the LSA provide records and/or documentation that a nonpublic school has intentionally prohibited an LSA from conducting a review and records and/or documentation of the LSA's good faith efforts to review such nonpublic school. The LSA must provide such records and/or documentation to the Commissioner within 10 days of such request.

If the Commissioner's review of such records and/or documentation give rise to a substantial question as to whether the LSA's positive or negative substantial equivalency determination is or is not supported, or whether a penalty under section 130.14(c) is warranted, the Commissioner may initiate a review of whether the procedures in this Part were followed, whether the criteria in section 130.9 have or have not been satisfied, or whether a penalty against such non-public school pursuant to section 130.14 is warranted. This section (130.13) prescribes procedures for such reviews and requires a written decision on the issues under review.

**Section 130.14** of the proposed rule prescribes penalties and enforcement for noncompliance, which include the penalties prescribed in Education Law §§3233 and 3234. Additionally, subdivision (c) of section 130.14 provides that if, after review, the Commissioner determines that a nonpublic school has intentionally prohibited an LSA from conducting a substantial equivalency review, the Commissioner may issue a written decision making a negative substantial equivalency determination in accordance with section 130.13.

**Section 130.15** of the proposed rule includes a severability provision.

### **Public Comment**

The Department received over 350,000 on the proposed regulation during the public comment period. Many comments were supportive of the proposed rule, noting that the regulation is necessary to ensure children receive the instruction to which they are entitled to under the law. Commenters also acknowledged and appreciated the different pathways to demonstrate substantial equivalency outlined in the proposed rule. Additionally, some commenters supported the proposed rule but had suggestions for how to revise certain provisions.

However, the vast majority of comments expressed philosophical opposition to State regulation of non-public schools. As indicated above, this obligation is imposed by statute and has been upheld by numerous federal and State courts. See, e.g., *Blackwelder v. Safnauer*, 689 F Supp 106, 143 [ND NY 1988] ["New York's compulsory education law serves the important state interests of preserving our basic political and economic institutions as well as assuring that our children are intellectually and socially

prepared to become self-reliant members of society. These are clearly legitimate secular purposes. Moreover, there is no evidence in the history of New York's compulsory education law that any other non-secular purpose was meant to be advanced in its original enactment or subsequent evolution"] [internal quotations omitted]; see also *People v. Donner*, 199 Misc 643 [N.Y. Dom. Rel. Ct. 1950])

A full summary of all public comment received during the public comment period and the Department's response is included below in Attachment B.

### **Non-substantial Revision**

In response to public comment and to provide clarification, the Department proposes the following non-substantial revisions to the proposed rule:

- Section 130.1(c) is revised to clarify the definition of Local School Authority for the City School District of the City of New York.
- Section 130.3(b) is revised to clarify that when an LSA deems a nonpublic school to be substantially equivalent pursuant to a pathway, the LSA must notify the nonpublic school of this determination.
- Sections 130.6(a) and 130.8(d) are revised to clarify that the Commissioner may, in his or her discretion, extend the timelines outlined in these provisions upon a showing of good faith progress toward development of a timeline and/or implementation of the plan.
- Section 130.8(d)(7)(ii) is revised to remove the language that references §310 appeals to the Commissioner regarding final substantial equivalency of instruction determinations made by the Commissioner. This revision is necessary to clarify that an appeal does not lie with the Commissioner from his or her own determination a party.
- Section 130.9(b) and (c) are revised to clarify references to the Education Law.
- Section 130.11 is revised to clarify that the Commissioner may direct another authority, other than an LSA, to investigate a complaint. Additionally, such section is revised to clarify that the Commissioner is not obligated to direct an investigation of a nonpublic school where the Commissioner determines, in his or her discretion, that a complaint does not have merit or that investigation is otherwise not warranted.

### **Related Regents Items**

December 2015: [Overview of Nonpublic schools in NYS](https://www.regents.nysed.gov/common/regents/files/Nonpublic%20Schools%20in%20NYS%20-%20An%20Overview.pdf)  
(<https://www.regents.nysed.gov/common/regents/files/Nonpublic%20Schools%20in%20NYS%20-%20An%20Overview.pdf>)

June 2019: [Proposed Addition of Part 130 of the Regulations of the Commissioner of Education Relating to Substantially Equivalent Instruction for Nonpublic School Students](https://www.regents.nysed.gov/common/regents/files/619p12d2.pdf)  
(<https://www.regents.nysed.gov/common/regents/files/619p12d2.pdf>)

February 2020: [Substantial Equivalency of Instruction for Nonpublic Schools](https://www.regents.nysed.gov/common/regents/files/220p12d1.pdf)  
(<https://www.regents.nysed.gov/common/regents/files/220p12d1.pdf>)

February 2020: [Preliminary Overview of Comments Received on the Proposed Regulation Regarding Substantial Equivalency of Instruction in Nonpublic Schools](https://www.regents.nysed.gov/common/regents/files/P-12%20Preliminary%20Overview%20of%20Comments%20Received%20on%20the%20Proposed%20Regulation%20Regarding%20Substantial%20Equivalency%20of%20Instruction%20in%20Nonpublic%20Schools.pdf)  
(<https://www.regents.nysed.gov/common/regents/files/P-12%20Preliminary%20Overview%20of%20Comments%20Received%20on%20the%20Proposed%20Regulation%20Regarding%20Substantial%20Equivalency%20of%20Instruction%20in%20Nonpublic%20Schools.pdf>)

July 2020: [Substantial Equivalency Update](https://www.regents.nysed.gov/common/regents/files/5.%20Substantial%20Equivalency%20Update.pdf)  
(<https://www.regents.nysed.gov/common/regents/files/5.%20Substantial%20Equivalency%20Update.pdf>)

May 2021: [Determining Substantial Equivalence of Instruction for Nonpublic School Students in New York State: A Summary of Stakeholder Feedback](https://www.regents.nysed.gov/common/regents/files/Subst%20Equiv%20stakeholder%20input%20report%202021-05-06_0.pdf)  
([https://www.regents.nysed.gov/common/regents/files/Subst%20Equiv%20stakeholder%20input%20report%202021-05-06\\_0.pdf](https://www.regents.nysed.gov/common/regents/files/Subst%20Equiv%20stakeholder%20input%20report%202021-05-06_0.pdf))

May 2021: [Report Findings from Stakeholder Engagement Sessions on Substantial Equivalence of Instruction in Nonpublic Schools](https://www.regents.nysed.gov/common/regents/files/DRAFT%20SE%20Stakeholder%20Input%20Report%20Slides%205-6-21%20FINAL.pdf)  
(<https://www.regents.nysed.gov/common/regents/files/DRAFT%20SE%20Stakeholder%20Input%20Report%20Slides%205-6-21%20FINAL.pdf>)

November 2021: [Update on Substantial Equivalence](https://www.regents.nysed.gov/common/regents/files/P-12%20-%20Update%20on%20Substantial%20Equivalence.pdf)  
(<https://www.regents.nysed.gov/common/regents/files/P-12%20-%20Update%20on%20Substantial%20Equivalence.pdf>)

December 2021: [2022-2023 Non-State Aid Budget and Legislative Priorities](https://www.regents.nysed.gov/common/regents/files/1221saa2.pdf)  
(<https://www.regents.nysed.gov/common/regents/files/1221saa2.pdf>)

March 2022: [Proposed Addition of Part 130 of the Regulations of the Commissioner of Education Relating to Substantially Equivalent Instruction for Nonpublic School Students](https://www.regents.nysed.gov/common/regents/files/322p12d1.pdf)  
(<https://www.regents.nysed.gov/common/regents/files/322p12d1.pdf>)

## **Recommendation**

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

VOTED: That Part 130 of the Regulations of the Commissioner of Education be added, as submitted, effective September 28, 2022.

## **Timetable for Implementation**

If adopted at the September 2022 Regents meeting, the proposed rule will become effective on September 28, 2022.

**Attachment A**

AMENDMENT OF THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to Education Law sections 207, 215, 305, 3204, 3205, 3210, 3233 and 3234.

Subchapter F of the Regulations of the Commissioner of Education is amended by adding a new Part 130 to read as follows:

Part 130

Substantial Equivalency Reviews for Students Attending Nonpublic Schools

§130.1 Definitions

As used in this Part:

(a) *Competent teacher* means instructional staff employed by the school who demonstrate the appropriate knowledge, skill, and dispositions to provide substantially equivalent instruction. A competent teacher need not be certified.

(b) *Substantial equivalency of instruction* for a nonpublic school, means an instructional program which is comparable to that offered in the public schools and is designed to facilitate students' academic progress as they move from grade to grade.

(c) *Local school authority (LSA)* means the trustees or board of education of the school district that serves the geographic area in which a nonpublic school is located; provided that in the case of the city school district of the City of New York, such term shall mean the Chancellor of the city school district of New York or, to the extent provided by law, the board of education of the City School District of the City of New York.

(d) Nonpublic school means a religious or independent school located in New York State that provides elementary and/or secondary education (any grades 1 through 12) and such education is intended to fulfill the compulsory education requirements of Article 65 of the Education Law for the students that attend such school.

(e) Registered school means a nonpublic school that is voluntarily registered with the Board of Regents under section 100.2(p) of this Title.

(f) Superintendent means the superintendent of schools or other chief school officer of a school district, and in regard to the city school district of the City of New York, superintendent shall mean the Chancellor of the city school district.

#### §130.2 Types of Substantial Equivalency Reviews and Determinations.

(a) LSA's determination. LSAs shall make substantial equivalency determinations for all nonpublic schools within their geographical boundaries, provided, however, that LSAs shall not make a determination for schools deemed substantially equivalent pursuant to section 130.3 of this Part. For nonpublic schools subject to a Commissioner's substantial equivalency determination ("Commissioner's determination") pursuant to Education Law §3204(2)(ii)-(iii), LSAs must review such schools for substantial equivalency and forward a recommendation and supporting documentation to the Commissioner for his/her final determination. Such reviews must be done consistent with section 130.9 of this Part.

(b) Commissioner's determination. The Commissioner is responsible for making final substantial equivalency determinations for any nonpublic schools which meets the requirements of Education Law §3204(2)(ii)-(iii) after an LSA review and

recommendation as described in subdivision (a) of this section, provided, however, that the Commissioner shall not make a determination for schools deemed substantially equivalent pursuant to section 130.3 of this Part. Such reviews must be done consistent with section 130.9 of this Part.

130.3. Nonpublic Schools Deemed Substantially Equivalent. (a) A nonpublic school shall be deemed substantially equivalent if it annually provides sufficient evidence to the LSA that it is a:

(1) Registered school or nonpublic school serving grades 1 through 8 that has a registered high school;

(2) State-approved private special education school or State-operated or State-supported school established by the State Legislature pursuant to Article 85, 87, or 88 of the Education Law;

(3) Nonpublic school that is accredited by an accrediting body approved by the Department for purposes of demonstrating compliance with the requirements of this Part. Such accrediting body shall use a peer review process that includes evaluation by leaders of similar nonpublic schools, appropriately train all staff and peer reviewers who are involved in the accreditation process, accredit based on publicly accessible documented standards, perform a comprehensive onsite visit of any school seeking accreditation while such school is in session, and periodically conduct a combination of interim and full accreditation reviews of the nonpublic schools which it accredits during at least a ten year period. Additionally, such accrediting body shall require nonpublic schools seeking accreditation to have curriculum that is informed by research,



document individual student progress, and have mechanisms for monitoring, assessing, and providing feedback on student progress.

(4) Nonpublic school that participates in the international baccalaureate program;

(5) Nonpublic school whose instruction is approved by the United States government for instruction on a military base or service academy; or

(6) Nonpublic school that uses assessments approved by the Department for purposes of demonstrating compliance with the requirements of this Part. Such assessments shall demonstrate student academic progress as they move from grade to grade, be regularly used by the nonpublic school as part of its instructional program and have a student participation rate which is equal or greater to the three-year state-wide average State assessment public school participation rate.

(b) Where an LSA deems a nonpublic school substantially equivalent pursuant to this section, it shall notify the nonpublic school of such determination, and the Commissioner may, at any time, request the evidence submitted to the LSA from the nonpublic school to demonstrate that it satisfies subdivision (a) of this section. The LSA must submit such evidence to the Commissioner within 10 days of such request. If, upon review of such evidence, the Commissioner determines that the nonpublic school has not submitted sufficient evidence to the LSA to demonstrate it satisfies subdivision (a) of this section, the Commissioner shall direct the LSA to conduct a review for purposes of making a substantial equivalency determination, or recommendation for schools subject to a final determination by the Commissioner, in accordance with this Part.

§130.4 Timeframes. Substantial equivalency reviews, recommendations, and final determinations made pursuant to this Part shall be completed within the following timeframes:

(a) New nonpublic schools. A new nonpublic school shall notify the LSA of the date on which it intends to commence instruction and how it intends to provide instruction that is substantially equivalent to that of students in the public schools. Except for schools deemed substantially equivalent pursuant to section 130.3 of the Part, LSAs shall complete substantial equivalency determinations, and recommendations for schools subject to a Commissioner's determination pursuant to section 130.2(b) of this Part for all new nonpublic schools that open on or after the effective date of this Part within two years of when the nonpublic school commences instruction for students in any grades 1-12 and every seven years thereafter.

(b) Existing nonpublic schools. Except for schools deemed substantially equivalent pursuant to section 130.3 of this Part, LSAs shall make required substantial equivalency determinations, and recommendations for schools subject to a Commissioner's determination pursuant to section 130.2(b) of this Part, for all nonpublic schools in their geographic boundaries that are operating on the effective date of this Part by the end of the 2024-2025 school year and every seven years thereafter.

(c) Failure to comply. If an LSA does not make sufficient progress, as determined by the Department, toward reviewing nonpublic schools for purposes of making required substantial equivalency determinations by the end of the 2023-2024 school year and every period of review thereafter, the Commissioner may withhold public moneys from such LSA consistent with Education Law §3234.

§130.5 Substantial Equivalency Reviews.

(a) Prior to commencing a substantial equivalency review, the LSA shall determine whether the Commissioner is responsible for making the final determination pursuant to section 130.2(b) of this Part, or whether the LSA is responsible for making such final determination pursuant to section 130.2(a) of this Part. If an LSA determines that the Commissioner is responsible for making the final determination, the LSA shall provide the Commissioner with the school's name, contact information, and evidence that the school meets the criteria for a Commissioner's determination.

(b) Except for schools deemed substantially equivalent pursuant to section 130.3 of this Part, the superintendent or his or her designee, which may include a board of cooperative educational services (BOCES), provided that such designee shall hold either a school building leader or school district leader certificate pursuant to Part 80 of this Title, shall review all nonpublic schools in the LSA's geographic boundaries, including nonpublic schools that meet the criteria for a Commissioner's determination, and, in conducting such reviews, the LSA shall use the criteria outlined in section 130.9 of this Part. For schools that meet the criteria for a final determination by the Commissioner pursuant to section 130.2(b) of this Part, the LSA must conduct the review and make a recommendation on substantial equivalency to the Commissioner for the Commissioner's final determination as set forth in section 130.8 of this Part. All reviews shall include at least one site visit to the nonpublic school by the LSA.

130.6 LSA Determinations. For nonpublic schools where the LSA is responsible for making the final determination pursuant to section 130.2(a) of this Part, following its review, the LSA shall render a substantial equivalency determination in the following manner:

(a) Preliminary determinations.

(1) If, following review, in accordance with section 130.9 of this Part, the superintendent, or his or her designee determines that the nonpublic school has not sufficiently demonstrated the substantial equivalence of instruction, the LSA shall:

(i) inform the nonpublic school's administrators of the preliminary determination and the reason(s) for such preliminary determination;

(ii) notify the Department in a form and manner prescribed by the Commissioner;

(iii) collaboratively develop, within sixty days, a timeline and plan with the nonpublic school for attaining substantial equivalency in an amount of time that is reasonable given the reasons identified in the review, provided that such timeline shall not exceed the end of the next academic year following the year in which the preliminary determination is made; and

(iv) continue services to the nonpublic school and its students during the period covered by the collaboratively developed timeline.

(2) No later than sixty days after the end of the timeline described in paragraph (1) of this subdivision, including any extensions granted pursuant to paragraph (3) of this subdivision, the LSA shall render a final determination in accordance with the provisions of subdivision (b) of this section.

(3) Notwithstanding paragraph (1) of this subdivision, the Commissioner may in his or her discretion, upon written request from the LSA and nonpublic school jointly or from the nonpublic school on notice to the LSA, extend the sixty-day deadline and/or timeline collaboratively developed by the LSA and nonpublic school upon a showing of good faith progress toward development of a timeline and/or implementation of the plan, as applicable.

(b) Final determinations.

(1) Final determinations for school districts, other than the city school district of the City of New York:

(i) After review of the nonpublic school in accordance with section 130.9 of this Part and preliminary determination, the superintendent, or his or her designee, shall make a recommendation in writing to the LSA that a nonpublic school be deemed to provide at least substantially equivalent instruction (a positive substantial equivalency determination), or be deemed to not provide at least substantially equivalent instruction (negative substantial equivalency determination).

(ii) The LSA shall notify the nonpublic school administration of the date of the regularly scheduled board meeting at which the LSA will consider the matter of substantial equivalency at least 15 calendar days prior to such date.

(iii) The nonpublic school shall be provided an opportunity to present additional relevant materials and/or a written statement to the LSA prior to the LSAs' vote at such board meeting.

(iv) The LSA shall then vote on the superintendent's or his or her designee's recommendation at a regularly scheduled public board meeting and render either a

positive or negative substantial equivalency determination as prescribed in subdivision (c) of this section.

(2) Final determinations for the city school district of the City of New York:

(i) After review of the nonpublic school in accordance with section 130.9 of this Part and preliminary determination, the LSA shall render either a positive or negative substantial equivalency determination.

(c) Procedure after final determination.

(1) If the LSA renders a positive substantial equivalency determination, the LSA shall provide written notification within 30 days to the nonpublic school administrator, the superintendent(s) of schools of each of the districts which have resident students enrolled in the nonpublic school, and the Department in a form and manner prescribed by the Commissioner, advising them of such determination, and the Department shall post such determination on its website. Such notification shall include a summary of the basis of the LSA's determination and the reason(s) therefore.

(2) If the LSA renders a negative substantial equivalence determination:

(i) the nonpublic school shall no longer be deemed a school which provides compulsory education fulfilling the requirements of Article 65 of the Education Law.

(ii) The LSA shall provide written notification to the nonpublic school administrator of such determination within 30 days, including the nonpublic school's right to appeal pursuant to Education Law §310 to the Commissioner and section 275.16 of this Title, and provide a letter for the nonpublic school to distribute to the parents or persons in parental relationship to students attending the nonpublic school and the superintendent(s) of schools of each district which has resident students

enrolled in the nonpublic school advising them of such determination. The LSA shall provide a reasonable timeframe for parents or persons in parental relationship to enroll their children in a different appropriate educational setting, consistent with Education Law §3204.

(iii) The LSA shall notify the Department of the negative determination, and reasons therefore, in a form and manner prescribed by the Commissioner. Such notification shall include the justification for the LSA's determination.

(iv) Legally required services to the nonpublic school and students must continue until the end of the reasonable timeframe provided to the parents and persons in parental relationship as described in subparagraph (ii) of this paragraph.

(v) Student records shall be managed consistent with section 104.2 of this Title.

(d) Such LSA determinations shall be accepted by LSAs who have resident students attending a nonpublic school that is not within their geographic boundaries, absent a subsequent substantial equivalency determination by the Commissioner pursuant to an appeal in accordance with Education Law §310 and section 130.12 of this Part or pursuant to a review in accordance with section 130.14 of this Part.

#### 130.7 Reporting Requirement.

(a) By September 1, 2023 and each September 1 thereafter, LSAs shall file a report with the Department, in a form and manner prescribed by the Commissioner, containing a list of all nonpublic schools located within the LSA's geographical boundaries and the date of the last substantial equivalency determination made for each nonpublic school;

(b) By December 1, 2023 and each December 1 thereafter, LSAs shall file a report with the Department, in a form and manner prescribed by the Commissioner containing a list of all the nonpublic schools identified in subdivision (a) of this section that:

(1) are registered schools or nonpublic schools serving grades 1 through 8 that have a registered high school, pursuant to section 130.3(a)(1) of this Part;

(2) are State-approved private special education schools and State-supported or State-operated schools, pursuant to section 130.3(a)(2) of this Part;

(3) are accredited by an approved accreditor, pursuant to section 130.3(a)(3) of this Part;

(4) participate in the international baccalaureate program, pursuant to section 130.3(a)(4) of this Part;

(5) whose instruction is approved by the United States government for instruction on a military base or service academy, pursuant to 130.3(a)(5) of this Part;

(6) use assessments, pursuant to section 130.3(a)(6) of this Part;

(7) are not identified in paragraphs (1)-(6) of this paragraph and are subject to Commissioner's review pursuant to section 130.2(b) of this Part; and

(8) are not identified in subparagraphs (1)-(6) of this paragraph for which the LSA is responsible for making the final substantial equivalency determination.

(c) By December 1, 2024 and each December 1 thereafter, LSAs must submit an attestation that indicates whether they:

(1) have or have not yet made a final substantial equivalency determination for each nonpublic school in their geographic area that is subject to their final determination



as identified in paragraph (8) of subdivision (b) of this section and the date on which such determination was made or is anticipated to be made; and

(2) have or have not yet forwarded a substantial equivalency recommendation to the Commissioner for each nonpublic school in their geographic area that is subject to a final determination by the Commissioner, as identified in paragraph (7) of subdivision (b) of this section and the date on which such recommendation was made or is anticipated to be made.

#### §130.8 Commissioner's Determination.

(a) For nonpublic schools for which the Commissioner is required to make the final determination pursuant to section 130.2(b) of this Part, the LSA must conduct a review in accordance with section 130.9 of this Part and forward its substantial equivalency recommendation and all relevant documentation to support its recommendation to the Commissioner for review.

(b) The Commissioner shall provide the nonpublic school with an opportunity to present additional relevant materials and/or a written statement to the Commissioner prior to rendering a final determination.

(c) If, based on the LSA recommendation and the documentation submitted, the Commissioner determines that the nonpublic school is providing substantially equivalent instruction, the Commissioner shall, within 30 days, send written notification to the nonpublic school and provide a letter for the nonpublic school to distribute notifying the parents or persons in a parental relationship to the students who attend the nonpublic school and the superintendent(s) of schools of each of the districts which have resident

students enrolled in the nonpublic school. The Department shall post such determination on its website.

(d) If, based on the LSA recommendation and the documentation submitted, the Commissioner determines that the nonpublic school has not sufficiently demonstrated compliance with this Part, then:

(1) the Commissioner shall inform the nonpublic school and the LSA of such determination and the reason for such determination;

(2) the Commissioner shall direct the LSA to collaboratively develop, within sixty days, a timeline and plan with the nonpublic school for attaining substantial equivalency in an amount of time that is reasonable given the reasons identified in the review, provided that such timeline shall not exceed the end of the next academic year following the year in which the preliminary determination is made provided, however, that the Commissioner may, in his or her discretion and upon written request from the LSA and nonpublic school jointly or from the nonpublic school on notice to the LSA, extend the sixty-day deadline and/or timeline collaboratively developed by the LSA and nonpublic school upon a showing of good faith progress toward development of a timeline and/or implementation of the plan, as applicable.

(3) the LSA must continue services to the nonpublic school and its students all services during the timeline described in paragraph (2);

(4) if, after the timeline described in paragraph (2) of this subdivision:

(i) the nonpublic school has demonstrated compliance with this Part the LSA shall make a recommendation to the Commissioner for a positive substantial

equivalency determination and provide supporting documentation to the Commissioner for review;

(ii) the nonpublic school has not demonstrated compliance with this Part, the LSA shall notify the Commissioner and provide supporting documentation to the Commissioner for review;

(5) the nonpublic school may present additional relevant materials and/or a written statement to the Commissioner, prior to the Commissioner's rendering of a determination pursuant to paragraphs (6) and (7) of this subdivision.

(6) if the Commissioner makes a positive substantial equivalency determination based on the process described above, the Commissioner will follow the procedures outlined in subdivision (c) of this section;

(7) if the Commissioner makes a determination that the school does not provide substantially equivalent instruction, then:

(i) the nonpublic school shall no longer be deemed a school which provides compulsory education fulfilling the requirements of Article 65 of the Education Law.

(ii) the Commissioner shall provide a letter to the nonpublic school administrator of such determination within 30 days and provide a letter for the nonpublic school to distribute to the parents or persons in parental relationship to students attending the nonpublic school and the superintendent(s) of schools of each district which has resident students enrolled in the school advising them of such determination. The Commissioner shall provide a reasonable timeframe for parents or persons in parental relationship to identify and enroll their children in a different, appropriate educational setting, consistent with Education Law §3204;

(iii) legally required services to the nonpublic school and students must continue during the reasonable timeframe provided to the parents and persons in parental relationship as described in subparagraph (ii) of this paragraph; and

(iv) student records shall be managed consistent with section 104.2 of this Title.

§130.9 Criteria for Substantial Equivalency Reviews. When reviewing a nonpublic school for substantial equivalency, other than schools deemed substantially equivalent pursuant to section 130.3 of this Part, the following must be considered:

(a) whether instruction is given only by a competent teacher or teachers as required by Education Law §3204(2)(i);

(b) whether English is the language of instruction for common branch subjects as required by Education Law §3204(2)(i);

(c) whether students who have limited English proficiency have been provided with instructional programs enabling them to make progress toward English language proficiency as required by Education Law §3204(2-a);

(d) accreditation materials from the last five years;

(e) whether the instructional program in the nonpublic school as a whole incorporates instruction in mathematics, science, English language arts, and social studies that is substantially equivalent to such instruction required to be provided in public schools pursuant to Education Law §3204(3);

(f) whether the nonpublic school meets the following other statutory and regulatory instructional requirements:

(1) instruction in patriotism and citizenship pursuant to Education Law §801(1) and section 100.2(c)(1) of this Title;

(2) instruction in the history, meaning, significance and effect of the provisions of the Constitution of the United States and the amendments thereto, the Declaration of Independence, the Constitution of the State of New York and the amendments thereto, pursuant to Education Law §801(2) and section 100.2(c)(3) of this Title;

(3) instruction in New York State history and civics pursuant to Education Law §3204(3) and section 100.2(c)(7) of this Title;

(4) instruction in physical education and kindred subjects pursuant to Education Law §803(4) and section 135.4(b) of this Title and instruction in health education regarding alcohol, drugs, and tobacco abuse pursuant to Education Law §804 and section 100.2(c)(4) of this Title. Pursuant to Education Law §3204(5), a student may, consistent with the requirements of public education and public health, be excused from such study of health and hygiene as conflicts with the religion of the students' parents or guardian; provided that such conflict must be certified by a proper representative of their religion as defined in Religious Corporations Law §2;

(5) instruction in highway safety and traffic regulation, pursuant to Education Law §806 and section 100.2(c)(5) of this Title;

(6) instruction in fire drills and in fire and arson prevention, injury prevention and life safety education, pursuant to Education Law §§807 and 808, and section 100.2(c)(6) of this Title; and

(7) instruction in hands-only cardiopulmonary resuscitation and the use of an automated external defibrillator pursuant to Education Law §305(52) and section 100.2(c)(11) of this Title; and

(g) For nonpublic schools meeting the criteria in Education Law §3204(2)(ii)-(iii), the criteria enumerated in such statute for such schools.

130.10 Conduct of Reviews. Substantial equivalency reviews conducted pursuant to this Part shall be conducted in the following manner:

(a) Reviews shall be conducted in a manner that is respectful to the diversity of the nonpublic school community. Nonpublic schools being reviewed shall be cognizant and respectful of the responsibilities of the LSA, and their designee(s), to conduct reviews and ensure that nonpublic school students receive substantially equivalent instruction.

(b) Reviews shall be based on objective criteria focused on whether students in the nonpublic school receive instruction that is at least substantially equivalent to instruction provided in public schools. This shall include a focus on opportunities offered to nonpublic school students to acquire core skills and make academic progress. Instructional programs in nonpublic schools need not demonstrate perfect congruence between public and nonpublic school instruction.

(c) Reviews shall be cognizant of the rights of parents or persons in a parental relationship to choose among religious and independent schools that offer instruction that is at least substantially equivalent to instruction provided in public schools for their children.

(d) Reviews shall be informed by, and respectful of, the cultural and religious beliefs and educational philosophy that may drive the curriculum in nonpublic schools and be integrated with academic content in the delivery of instruction.

#### 130.11 Complaints.

(a) The Commissioner, or his or her designee, may direct an LSA, or other authority which may include a BOCES, to investigate a nonpublic school if the Commissioner receives a complaint regarding the substantial equivalency of instruction at such nonpublic school, or if the Commissioner otherwise has concern regarding the substantial equivalency of instruction at a nonpublic school, regardless of whether a complaint has been submitted. The Commissioner will not direct an investigation of a nonpublic school where the Commissioner determines, in his or her discretion, that a complaint does not have merit or that investigation is otherwise not warranted.

(b) If so directed, the LSA shall investigate such complaint and make a positive or negative substantial equivalency determination, or recommendation for schools subject to a final determination by the Commissioner, consistent with this Part.

(c) If an LSA does not investigate and make a determination or recommendation on such complaint, the Commissioner may withhold public moneys from such LSA consistent with Education Law §3234 and section 130.14(b) of this Part.

130.12 Appeal to the Commissioner. Persons considering themselves aggrieved by an LSA's substantial equivalency determination may file an appeal to the Commissioner within 30 days of the LSA's decision pursuant to Education Law §310 and section

275.16 of this Title, and the Commissioner may, in his or her discretion, stay such determination pending a final determination on such appeal pursuant to Education Law §311 and section 276.1 of this Title.

### 130.13 Records Request and Review.

#### (a) Records request.

(1) With respect to nonpublic schools where the LSA is responsible for making the final determination pursuant to section 130.2(a) of this Part, the Commissioner may request records and/or documentation the LSA used to make its final determination on substantial equivalency of instruction. The LSA shall provide such records and/or documentation to the Commissioner within 10 days of the request.

(2) With respect to any nonpublic school against which a penalty pursuant to §130.14(c) of this Part is being considered, the Commissioner may request that the LSA provide records and/or documentation that a nonpublic school has intentionally prohibited an LSA from conducting a review, and records and/or documentation of the LSA's good faith efforts to review such nonpublic school, for purposes of making a substantial equivalency determination, or recommendation for schools subject to a final determination by the Commissioner, in accordance with the provisions of this Part. The LSA shall provide such records and/or documentation to the Commissioner within 10 days of the request.

#### (b) Review.

(1) If the Commissioner's review of such records and/or documentation gives rise to a substantial question as to whether the LSA's positive or negative substantial



equivalency determination is or is not supported, or whether a penalty under §130.14(c) of this Part is warranted, the Commissioner may initiate review of whether the procedures in this Part were followed, whether the criteria in section 130.9 of this Part have or have not been satisfied, or whether a penalty against such non-public school pursuant to section 130.14(c) of this Part is warranted.

(2) Such review shall be commenced by service of a notice of intent to review on the LSA and nonpublic school administrator, by certified mail, return receipt requested, advising them of the issues under consideration. The LSA and nonpublic school administrator may file a written response with the Commissioner, within 30 days of being served with such notice, with proof of service by regular mail on the other party.

(3) The Commissioner may, in his or her discretion, issue a stay of an LSA determination pending a final decision; permit or require the service and filing of affidavits, exhibits and other supporting papers consistent with section 276.5 of this Title; and/or take into consideration any official records or reports on file in the Department consistent with section 276.6 of this Title.

(4) The Commissioner shall render a written decision on the issues under review and follow the notification procedures set forth in section 130.8(c) or (d) of this Part, as applicable.

#### §130.14 Penalties and Enforcement.

(a) Any violation of the compulsory education requirements contained in Article 65 of the Education Law is subject to the penalties prescribed in Education Law §3233.

(b) Pursuant to Education Law §3234, the Commissioner may withhold one-half of all public school moneys from any city or district, which, in the Commissioner's judgment, willfully omits and refuses to enforce the provisions of the compulsory education requirements contained in Article 65 of the Education Law, in accordance with such section.

(c) If, after review as prescribed in section 130.13(b) of this Part, the Commissioner determines that a nonpublic school has intentionally prohibited an LSA from conducting a review for purposes of making a substantial equivalency determination, or recommendation for schools subject to a final determination by the Commissioner, in accordance with the provisions of this Part, the Commissioner may issue a written decision making a negative substantial equivalency determination in accordance with section 130.13 of this Part.

#### 130.15 Severability.

If any provision of this Part or the application thereof to any person or circumstances is adjudged invalid by a court of competent jurisdiction, such judgment shall not affect or impair the validity of the other provisions of this Part or the application thereof to other persons or circumstances.

ASSESSMENT OF PUBLIC COMMENT

Since publication of the Notice of Proposed Rule Making in the State Register on March 30, 2022, the State Education Department (Department) received the following comment on the proposed amendment:

1. COMMENT: The Department received supportive comments stating that the regulation is necessary to ensure that children receive a sound basic education, and that children can receive such instruction while engaging in religious studies. Some commenters who support the proposed regulation complain about the alleged lack of secular education in religious schools, educational neglect of children, nonpublic schools wrongfully taking government money, and nonpublic schools harming children. Commenters complained that it is wrong for schools to take government money and deny children required instruction. Commenters stated that the regulation is necessary because there is no true school choice for parents in certain religious communities except to send their children to religious schools. A commenter stated that the regulation is necessary so that parents can prove the inadequacy of schools for purposes of child custody proceedings. Commenters commended the regulation's transparent system for reporting and processing complaints.

RESPONSE: The Department appreciates these supportive comments. While the Compulsory Education Law protects a child's right to be educated, the State has long recognized the right of parents to choose an alternative to public schools. Churches, temples, mosques, and other organizations are guaranteed the right to provide educational programs in accordance with their religious beliefs and educational

philosophies. Nonpublic schools are an integral part of the total educational system of the State. No changes to the proposed regulation are necessary based on these comments.

2. COMMENT: A commenter who supports the regulation advocated for the Department to strengthen the regulation by defining substantial equivalency as requiring private schools to “demonstrate substantial consistency with public school instruction and achieve similar levels of student achievement.” Others argue that the regulation should contain a more precise definition of substantial equivalency.

RESPONSE: The Department has considered these comments and determined no change is necessary. The definition of substantial equivalency and the criteria to be considered in the proposed rule are consistent with applicable provisions of the Education Law. The Department’s criteria enable nonpublic schools to comply with the Compulsory Education Law while maintaining their unique culture and beliefs in the delivery of instruction.

3. COMMENT: Commenters who generally support the proposed regulation stated that the regulation should be strengthened in several ways. Some commenters stated that LSA review should be increased to every three years (more in line with daycares and restaurants) and that existing schools should be reviewed every year through standardized assessments. Commenters suggested that, following a final determination that a school is not substantially equivalent, punitive measures should be taken against the heads of nonpublic schools who knowingly and intentionally deny children an education. Some commenters suggested that all schools should be required to be accredited through certain bodies, such as Middle States or Tri States. Another

commenter stated that Cognia must be included on the approved list, which the commenter opines is too limited. Other commenters suggested that all nonpublic schools should be required to submit BEDS information annually and/or be given a state report card that is publicly and easily accessible.

RESPONSE: The Department believes that the proposed rule's substantial equivalency review cycles are reasonable. Additionally, the proposed rule provides numerous safeguards to ensure that substantial equivalency determinations are fair and accurate. These safeguards include: (1) the ability for the Commissioner to review evidence submitted to the LSA from the nonpublic school demonstrating that it meets a pathway pursuant to section 130.3(b) of the proposed rule; (2) the complaint procedure outlined in section 130.11 of the proposed rule; (3) the option for those considering themselves aggrieved by an LSA's substantial equivalency determination to file an Education Law § 310 appeal to the Commissioner pursuant to section 130.12 of the proposed rule; (4) the Commissioner's ability to review records and/or documentation that an LSA used to make its substantial equivalency determination; and (5) the Commissioner's ability to initiate review of the determination to determine whether it is supported and issue a decision on such pursuant to section 130.13 of the proposed rule. The Department does not have any statutory authority to (i) take punitive measures against heads of nonpublic schools that do not provide substantially equivalent instruction; (ii) require that all nonpublic schools be accredited through an accrediting body; or (iii) require all nonpublic schools to submit BEDS information annually and/or be given a state report card that is publicly and easily accessible. The Department has

yet to approve accreditors and will use the prescribed objective criteria to do so for such pathway. No changes to the proposed rule are necessary.

4. COMMENT: A commenter stated that the assessment pathway will perpetuate the status quo and will not ensure that all required subjects are taught for sufficient time. The commenter stated that independent proctors and scoring systems should be required to prevent fraud. The commenter advocates that performance standards, which cover all required subjects, should only be a temporary tool (for example, while a school undergoes accreditation). Other commenters expressed that the assessment pathway needs more detail such as objective measures and consequences.

RESPONSE: The Department disagrees with the commenter regarding the assessment pathway and believes that substantial equivalency of instruction may be fairly and accurately demonstrated through its use. Section 130.3(6) of the proposed rule prescribes certain requirements to which nonpublic schools must adhere. While some may see this pathway as focusing on outputs, such outputs are expressly required to demonstrate student academic progress as they move from grade to grade, be regularly used by the nonpublic school as part of its instructional program, and have a student participation rate which is equal to or greater than the three-year state-wide average State assessment public school participation rate. These are longstanding accountability mechanisms. Additionally, it can be reasonably assumed that a student who performs well on an examination has received the requisite instruction thereto—this is, indeed, the supposition underlying all assessments. The Department believes that this is an important flexibility that was supported by many stakeholders during the consultation process. The Department anticipates providing additional guidance and

technical assistance to LSAs and nonpublic schools on how to utilize such assessments. Additionally, the Department will post a list of approved assessments on its website. The Department anticipates approving New York State assessments, as well as other assessments. No changes to the proposed rule are needed.

5. COMMENT: Tens of thousands of individuals commented that the proposed regulation is unnecessary because yeshivas do a good job, have successful graduates, and/or that their religious community has less crime, drugs, suicide, incarceration, and unemployment than other communities. Commenters argue that nothing has changed to warrant the promulgation of a rule and that a small group of disgruntled yeshiva graduates are driving the proposed regulations. Some state that the regulations will have a detrimental effect on their nonpublic schools and may cause trauma to students.

RESPONSE: The Department considered these comments and determined no change is necessary. The proposed regulation is applicable to all nonpublic schools, a universe far broader than a single religious tradition. It is necessary to ensure that all students receive the instruction to which they are entitled under the law and are prepared for their place in society.

6. COMMENT: Commenters argue that the proposed regulation infringes on the free exercise of religion. Commenters stated that religious leaders choose what education children will receive, and nothing can be added or taken away. Their religious communities will not accept any regulation of their education, which is set by religious leaders, a Supreme Deity, and religious texts. Commenters state that high school is reserved exclusively for religious instruction. They stated that preparing students for secular college or career readiness violates their beliefs because of its

irreligious effect. Commenters argued that it is non-negotiable that yeshivas are wholly self-regulating with no outside inspection whatsoever, and that their education is part of their religious practice. Commenters stated that they cannot learn any topic or program that excludes God and that religious and secular instruction cannot be separated. Commenters express that the regulation generally “oversteps boundaries.” One commenter argues that the proposed regulation violates the United States Supreme Court’s decision in *Espinoza v Montana Department of Revenue*.

RESPONSE: The Department respectfully disagrees with those who argue the proposed regulation infringes upon the freedom of religion. The ability of the State to require that all education provided therein meet a minimum threshold is well established; see, for example, the opinions of the United State Supreme Court cited in *People v Donner*, 199 Misc 643, 648 (N.Y. Dom. Rel. Ct. 1950). The proposed regulation respects the right to exercise religion and acknowledges that instructional requirements may be met through the entire curriculum, including religious studies. A nonpublic school may choose whether to integrate required instruction into religious classes (section 130.9[e]: “whether the instructional program in the nonpublic school as a whole incorporates instruction in mathematics, science, English language arts, and social studies that is substantially equivalent to such instruction required to be provided in public schools pursuant to Education Law §3204[3]”). The proposed regulation is in accordance with and fully respects all First Amendment rights and jurisprudence. The proposed regulation has nothing to do with *Espinoza v Montana Department of Revenue*, 591 U. S. \_\_\_\_ (2020), a case concerning a State’s prohibition on the use of scholarship money to enroll children in religious schools.



7. COMMENT: Commenters state that the proposed regulation undermines a parent's right to choose their child's education, including an education that aligns with their values rather than public school. Parents commented that they choose yeshivas because they want their children to receive a religious education steeped in their traditions. A commenter argues that the proposed regulation's requirement that English is the language of instruction for common branch subjects violates a parent's right to direct education. A commenter also argued that the proposed regulation violates *Pierce v Society of Sisters*.

RESPONSE: The Department disagrees that the proposed regulation violates the right of parents to direct the education of their children. The proposed regulation merely sets forth a process for determining equivalency of instruction, which is required by statute. All of the instructional requirements enumerated in section 130.9 of the proposed regulation already exist in law and/or regulation, including the requirement that English be the language of instruction for common branch subjects. The argument that parents have an unfettered right to dictate the degree of education their children receive has been repeatedly rejected by State and federal courts. Indeed, the U.S. Supreme Court decision cited, *Pierce v Society of Sisters*, supports the regulation of all schools within a State (268 U.S. 510, 534 [1925] [“No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.”]).

8. COMMENT: Commenters complain that it is wrong to give anyone the right to appeal an affirmative substantial equivalency determination. Some argue that this gives outsiders undue control over nonpublic schools and parental choice.

RESPONSE: Section 130.12 of the proposed rule provides that “[p]ersons considering themselves aggrieved by an LSA’s substantial equivalency determination may file an appeal to the Commissioner within 30 days of the LSA’s decision pursuant to Education Law §310 and section 275.16 of this Title, and the Commissioner may, in his or her discretion, stay such determination pending a final determination on such appeal pursuant to Education Law §311 and section 276.1 of this Title.” An individual may not maintain an appeal pursuant to Education Law § 310 unless aggrieved in the sense that he or she has suffered personal damage or injury to his or her civil, personal, or property rights (*Appeal of Abitbol*, 57 Ed Dept Rep, Decision No. 17,333; *Appeal of Waechter*, 48 *id.* 261, Decision No. 15,853). Only an individual who is directly affected by an action has standing to commence an appeal therefrom (*Appeal of Abitbol*, 57 Ed Dept Rep, Decision No. 17,333; *Appeal of Waechter*, 48 *id.* 261, Decision No. 15,853). Therefore, only a person or entity with standing—e.g., the parent or guardian of a child who attends the nonpublic school in question—could file such an appeal.

9. COMMENT: Commenters argue that the proposed regulation’s complaint procedure undermines nonpublic schools by giving outside critics the right to challenge a local school board’s approval of a yeshiva. They state that a person should be required to have standing in order to make a complaint. Commenters were concerned about allowing school districts to investigate complaints due to the competition between private schools and the public school. They suggest revising the regulation to state that

it only applies to complaints about equivalent instruction and should include specific criteria defining the required elements of a permissible complaint. They urge that the complaint process should allow nonpublic schools an initial opportunity to address the complaint and act toward resolution. The commenter further states that, if no resolution could be reached, a complaint could be filed with the accreditation agency or the Department, which could direct the State Office of Religious and Independent Schools (SORIS) to investigate. Commenters also suggested requiring the complainant to first go to the school and/or accreditor to have the issue resolved prior to filing a complaint with the Commissioner.

**RESPONSE:** Establishing a complaint process is an important safeguard to ensure compliance with the compulsory education law. Section 130.11 of the proposed rule provides that the Commissioner, or his or her designee, may direct an LSA to investigate a nonpublic school if the Commissioner receives a complaint regarding the substantial equivalency of instruction at such nonpublic school, or if the Commissioner otherwise has reasonable suspicion to doubt the substantial equivalency of instruction at a nonpublic school. Additionally, the proposed rule has been revised to clarify that the Commissioner could direct another authority to investigate a complaint when appropriate and to clarify that the Commissioner is not obligated to direct an LSA to investigate a nonpublic school where the Commissioner determines that a complaint does not have merit or that investigation is otherwise not warranted. Therefore, this provision appropriately gives the Commissioner discretion to determine what complaints have merit or otherwise warrant investigation, and to duly consider any determinations already made, whether based upon satisfaction of a pathway, separate recent

investigation, or other information. The Commissioner may then direct an LSA, or other authority, to investigate those complaints and render a substantial equivalency determination or make a recommendation to the Commissioner, as applicable. Thus, complaints to the Department will be reviewed prior to any inquiry being directed by the Commissioner based on the complaint. Members of the public have an absolute right to contact all branches of local and State government. The Department is a public agency without authority to limit the class(es) of individuals who may write to and/or make complaints to the Department on any issue and will not do so here. Additionally, an LSA or other authority that receives a complaint about the substantial equivalency of instruction in a nonpublic school within its geographical boundaries may use its discretion—subject to contrary direction from the Commissioner—to determine whether the complaint has merit and whether an investigation is warranted. Please also see the Department’s response regarding LSAs’ responsibility to enforce compulsory education requirements for nonpublic schools located within their geographical boundaries. No further changes to the proposed rule are necessary.

10. COMMENT: Commenters state that the regulation will not be enforceable because there is no enforcement mechanism on private schools and the regulation does not go far enough to ensure LSA compliance. Some commenters assert that they will be unable to comply with the regulation and will be compelled to break the law. A few people indicate they are willing to forgo government funding or face prosecution to maintain the status quo of their religious community’s education. A commenter indicated that any change must come from within the school and its own community.

RESPONSE: The Department determined no change is necessary. The substantial equivalency obligation already exists in law; commenters' suggestion that they "are unable to comply" makes little sense as all schools have been subject to the substantially equivalent obligation, explicated in Departmental guidance, for over a century. Previous noncompliance is not a justification or excuse for future noncompliance.

Additionally, the regulation contains adequate enforcement mechanisms that are informed by the Compulsory Education Law. The proposed regulation cites the enforcement provisions of the Compulsory Education Law (Education Law §§ 3233 and 3234) as the basis for the Commissioner withholding public funds from LSAs that fail to comply with the requirements of the proposed regulation. The proposed regulation also explains that any violation of the compulsory education requirements contained in Article 65 of the Education Law is subject to the penalties prescribed in Education Law §3233. The proposed regulation gives the Commissioner the authority to issue a negative substantial equivalency determination for a nonpublic school that intentionally prohibited an LSA from conducting a review (130.14[c]). The regulation also gives the Commissioner the authority to direct an LSA to investigate a nonpublic school if the Commissioner receives a complaint or otherwise has concern regarding the substantial equivalency of instruction at a nonpublic school (130.11[a]). The regulation provides that the Commissioner may request records and/or documentation from an LSA and conduct a review of an LSA's substantial equivalency determination under the circumstances enumerated in section 130.13. Finally, the regulation acknowledges that services to the nonpublic school and students will cease following a reasonable amount

of time for students to be placed elsewhere following a negative substantial equivalency determination, and such nonpublic schools will no longer be deemed a school that provides compulsory education fulfilling the requirements of Article 65 of the Education Law (130.6[c][2]). See also, responses below concerning cessation of funding, truancy and educational neglect.

11. COMMENT: Commenters argue that there are many problems with LSAs overseeing nonpublic schools, such as a misalignment of values between the public school and nonpublic school. Commenters are concerned that public school officials are not qualified to evaluate nonpublic schools. Some assert that there is a conflict of interest between public and nonpublic schools that should prohibit public schools from having an oversight role. Many state that public schools should not be able to tell parents to enroll their children in another school because parents should decide where to send their children. Others complain that public schools should not be given authority to investigate nonpublic schools if there is a complaint. Some argue that nonpublic schools should bear the burden to demonstrate substantial equivalency and leave the public schools out of it. Other commenters complain about public school outcomes and state it is ridiculous to try to make private yeshivas “equivalent” to public schools.

RESPONSE: The Education Law places primary responsibility on the LSA for ensuring substantial equivalency of instruction that occurs elsewhere than a public school. The Commissioner of Education is responsible for enforcing the compulsory education law under Education Law §3234, which provides, “[t]he commissioner of education shall supervise the enforcement of part one of this article.” The obligation of local school authorities (LSAs) to enforce compulsory education requirements dates to

the very beginning of New York’s statutory compulsory education requirements enacted in 1874. Education Law §3204(2) provides that “[i]nstruction given to a minor elsewhere than at a public school shall be at least substantially equivalent to the instruction given to minors of like age and attainments at the public schools of the city or district where the minor resides.” Likewise, Education Law §3210(2) provides that a student who attends “elsewhere than at a public school . . . shall attend for at least as many hours, and within the hours specified therefor.” This provision allows for attendance “for a shorter school day or for a shorter school year or for both,” so long as the “school authorities” deem the instruction provided “as being substantially equivalent in amount and quality to that required by the provisions of [the Compulsory Education Law].” The Education Law defines “school authorities” as the board of education or corresponding officers of a school district. (Education Law §2[12]).

Reading these statutory provisions in conjunction, it has been the Department’s long-standing interpretation that LSAs are responsible for making substantial equivalency determinations. The Department has published guidance on this requirement for decades. The proposed rule is consistent with this interpretation and aims to ensure that LSAs fulfill these responsibilities. Additionally, the regulation defines substantial equivalency in terms of comparability (130.1[a]), which is consistent with statute. It does not require nonpublic schools to become the same as public schools. The regulation requires reviews to be conducted in a manner that is respectful to the diversity of the nonpublic school community (130.10[a]) and includes appropriate checks and balances to ensure fairness in the review process. Reviews are based on objective criteria and instructional programs in nonpublic schools need not demonstrate

perfect congruence between public and nonpublic school instruction (130.10[b]). The Department believes that the proposed rule will enable nonpublic schools to comply with the Compulsory Education Law while maintaining their unique culture and beliefs in the delivery of instruction.

LSA reviews of nonpublic schools are contemplated by statute, as described above; thus, any “conflict of interest” lies with the statutory structure, not the Department’s rulemaking. In any event, the proposed rule provides numerous safeguards to ensure that reviews are fair and accurate as outlined in the Department’s response above, and to ensure that they are conducted in a manner that is respectful to the diversity of nonpublic schools and does not demand perfect congruence between public and nonpublic school instruction. The Department has considered changes to the regulation in this regard and determined that no change is necessary.

12. COMMENT: Commenters state that the regulation inequitably burdens Jewish schools because they are not generally accredited like other nonpublic schools. A commenter also called the regulation discriminatory. Commenters state that the regulation goes against New York’s tolerance and appreciation of multiculturalism.

RESPONSE: The Department strenuously disagrees with these comments. The regulation applies to all nonpublic schools and emphasizes the importance of respect for other cultures. No changes to the proposed rule are necessary.

13. COMMENT: Commenters argue that requiring subjects beyond math, science, social studies, and English (others say the “three R’s”) is unnecessary. One commenter argues that the subject matter requirements will apply only to yeshivas because accreditors of other types of schools do not look at other subjects. One



commenter states that teaching sex education leads to bad behavior in public school students. Another commenter states that the term “kindred subjects” is vague. A commenter suggests that instead of math, science, social studies, etc., schools should teach trades. A commenter states that the criteria ignore outputs and overly focus on inputs. Some commenters state that subjects required by the proposed regulation are against their religious beliefs and cannot be taught (e.g. science, health, drug abuse, technology, sports, and any secular studies for boys in high school are prohibited). A commenter states that it violates their religion to teach certain scientific concepts (e.g., evolution, dinosaurs, global warming, and the big bang).

RESPONSE: The review criteria in the regulation are all based on existing requirements in law and regulation. A nonpublic school is not substantially equivalent if it fails to provide instruction that is guaranteed to nonpublic school students by existing law or regulation. To the extent that a school falls within the ambit of Education Law §3204(2)(ii)-(iii), that subdivision makes it clear that the enumerated criteria therein constitute the minimum rather than the maximum amount of required instruction (“the department shall consider the following, *but not limited to*” [emphasis added]). Accordingly, the Department declines to change its review criteria. Based upon the proscribed criteria in the regulation, accreditors approved by the Department will use criteria at least as stringent as those required in the proposed regulation. Regarding commenters’ assertions that the subject matter requirements in the proposed regulation violates their First Amendment rights, as stated above, the Department disagrees. No changes to the proposed rule are necessary.

14. COMMENT: Many commenters argue that the regulation places no value on religious studies. Commenters state that it is shameful to align religious teaching with secular standards. Many commenters state that the regulation will add unnecessary subjects and displace religious education.

RESPONSE: The Department believes that the proposed rule will enable nonpublic schools to comply with the Compulsory Education Law while also maintaining their unique culture and beliefs in the delivery of instruction. The proposed regulation leaves it open to each nonpublic school to choose whether it will integrate required instruction into religious studies, which may be considered to fulfill requirements (130.9[e]). Such interpretation reflects the requirement in Education Law §3204(2)(ii)-(iii) that, for certain schools, the Commissioner take “into account the entirety of the curriculum.” The Department notes that a religious exemption is available from health instruction pursuant to Education Law §3204(5). See also response above regarding review criteria. No changes to the proposed rule are necessary.

15. COMMENT: Commenters argue that the proposed regulation should recognize critical thinking, life preparation, and other skills outside of common branch subjects that are taught exceptionally well in nonpublic schools. A commenter recommends that the Department create a test in abstract thinking skills to give to both public and private school students.

RESPONSE: The Department acknowledges the value of incorporating such skills into curriculum. However, the proposed regulations hew to the requirements in existing law and regulation while providing several alternative pathways by which nonpublic schools may be deemed substantially equivalent. Also, for those schools that

fall within Education Law §3204(2)(ii)-(iii), the commenters' concerns are addressed by the requirement that the Commissioner consider whether the "curriculum provides academically rigorous instruction that develops critical thinking skills." No changes to the proposed rule are necessary.

16. COMMENT: A commenter is opposed to teaching about drug abuse in private religious schools because it is not aligned with their values to teach about drug abuse, drug abuse is not a problem in their community, and drug abuse is only a problem in public schools.

RESPONSE: This concern relates to a statute that the Department cannot waive or disregard. Instruction in drug and alcohol abuse is required for all students pursuant to Education Law §804 and 8 NYCRR 100.2(c)(4). To be substantially equivalent, nonpublic schools must comply with this requirement. The schools, however, need not demonstrate perfect congruence with public school instruction and may integrate their religious beliefs and educational philosophy with academic content in the delivery of instruction (130.10[b], [d]). No changes to the proposed rule are necessary.

17. COMMENT: A commenter complains that the proposed regulations are contrary to the Culturally Responsive-Sustaining Education Framework because yeshivas meet the framework's goals. According to the commenter, the regulations erase Jewish studies education as an integral component even though the value of such curricula has been demonstrated. The commenter complains that the regulations threaten to charge parents with promoting truancy for the crime of providing their children with a culturally responsive-sustaining education that the Department urges for others.

RESPONSE: The Department disagrees that the proposed regulations are contrary to the Culturally Responsive-Sustaining Education Framework. The Department applauds the efforts of religious and independent schools to achieve culturally responsive-sustaining education and believes that instruction grounded in a cultural view of learning and human development in which multiple expressions of diversity are recognized and regarded as assets for teaching and learning is achievable while complying with the proposed regulations. No changes to the proposed rule are necessary.

18. COMMENT: A commenter states that incentive programs that focus on school improvement would be more successful. Another commenter recommends allowing parochial schools to develop their own process and evaluation methods. A commenter suggested that the Department should focus on assisting parents in strengthening relationships with their children and emphasize the importance of teaching students to think critically. Commenters also argue that it is wrong to threaten parents with truancy charges or prison.

RESPONSE: The Department has reviewed these comments and determined that no change is necessary. The proposed regulation's requirements and processes are based on existing law and guidance. Although the regulation is derived from the Compulsory Education Law, which articulates the concepts of truancy and educational neglect, the Department has no authority to overturn it. No changes to the proposed rule are necessary.

19. COMMENT: Commenters stated that the proposed regulation arbitrarily excludes content taught in a language other than English, guaranteeing results of

limited validity when applied to schools where significant educational content is conveyed through other languages. They also complain that metrics measuring advanced intellectual, interpersonal, and self-regulation skills are omitted.

RESPONSE: The proposed regulation does not exclude content taught in a language other than English. Education Law §3204(2)(i) requires that “English shall be the language of instruction, and text-books used shall be written in English.” The statute also provides an exception: “for a period of three years, which period may be extended by the commissioner with respect to individual pupils, upon application therefor by the appropriate school authorities, to a period not in excess of six years, from the date of enrollment in school, pupils who, by reason of foreign birth or ancestry have limited English proficiency, shall be provided with instructional programs as specified in subdivision two-a of this section and the regulations of the commissioner. The purpose of providing such pupils with instruction shall be to enable them to develop academically while achieving competence in the English language.” The proposed rule is consistent with this statutory provision, therefore, no changes to the proposed rule are necessary.

20. COMMENT: One commenter asked how the regulation will apply to Amish schools.

RESPONSE: The proposed regulation applies to all nonpublic schools, including Amish schools.

21. COMMENT: Commenters are concerned that the proposed regulation constitutes an illegal search under the Fourth Amendment and violates the Establishment Clause to teach evolution.

RESPONSE: The Department disagrees with these comments and has determined that no change is necessary. The argument that Statewide educational requirements constitute an “unreasonable search []” or “seizure []” is unsupported by any legal authority (U.S. Const. Amend. IV). With respect to science instruction, the regulation (130.9(e)) requires an assessment of whether the instructional program in the nonpublic school as a whole incorporates instruction in science that is substantially equivalent to such instruction required to be provided in public schools pursuant to Education Law §3204(3) but does not mandate the teaching of evolution. See also, response above regarding First Amendment arguments.

22. COMMENT: Commenters are concerned that New York State will have the strictest regulation of nonpublic schools in the country and that the proposed regulation will force families out of New York State.

RESPONSE: The Department has determined no change is necessary based on this comment. The proposed regulation’s review criteria are based upon existing law and regulation. They implement the existing statutory and regulatory requirements, as well as the principles derived from the Department’s longstanding guidance. The need for the regulations is apparent from, among other things, the allegations that some schools provide little to no secular education, long outstanding investigations by the New York City Department of Education, and inquiries from both LSAs and nonpublic schools relating to the Department’s prior guidance on substantial equivalence.

23. COMMENT: A commenter posits that the proposed regulation violates Article 5 of the Treaty from the Convention against Discrimination in Education of the United Nations (December 14, 1960), which guarantees parents the right to choose their

children's education and to guide the religious and moral education of their children in conformity with their own convictions.

RESPONSE: As stated above, the Department disagrees that the proposed regulation violates a parent's right to direct the education of their children. The Department further disagrees that parents' "right to choose their children's education" extends to depriving them of an opportunity to become a functioning adult in civil society. Moreover, the United States was not a party to this convention.

24. COMMENT: A commenter recommends that the Department undertake a study of nonpublic schools before enacting the regulation.

RESPONSE: This comment does not advance an alternative proposal, but rather suggests additional work the Department should perform. The Department engaged in significant stakeholder engagement in the development of the proposed rule. In fall 2020, the Department conducted a series of five online regional stakeholder engagement sessions. These included religious and independent school leaders and advocates, public school officials and their professional associations, scholars, and other advocates, as well as legislators and legislative staff. Another session included private school students, parents, and alumni in breakout rooms. In addition, Department staff conducted in-person conversations with religious communities that do not use the internet. Department staff also engaged in regular conversations on this topic with the Commissioner's Advisory Council for Religious and Independent Schools and will continue to do so. No changes to the proposed rule are necessary.

25. COMMENT: A commenter argues that the text in the State Register is so small that it is unreadable and violates the State Administrative Procedure Act.

RESPONSE: The Department does not control publication in the State Register, which is performed by the New York Department of State. No changes to the proposed rule are necessary.

26. COMMENT: The Department received many general comments about nonpublic schools that were unrelated to the proposed rule.

RESPONSE: These comments are outside the scope of the proposed regulation and therefore require no response.

27. COMMENT: Commenters, including numerous education scholars, faculty, researchers, and school reform activists write in support of the proposed regulation, stating that “[s]tudents of Hasidic yeshivas need structured, rigorous instruction in English Language Arts, Mathematics, Science and Social Studies to successfully enter the world of work or enroll in higher education. They also need a challenging immersion in History and Civics instruction to effectively exercise their citizenship rights and responsibilities. We support the efforts by the New York State Board of Regents to regulate the education provided by Hasidic yeshivas as a necessary corrective to the narrow and impoverished schooling which has limited the life-horizons of too many generations of Hasidic yeshiva students.”

RESPONSE: While the supportive intent of this comment is appreciated, the Department reiterates that the proposed regulation pertains to all nonpublic schools. Since the comment is supportive, no changes to the proposed rule are needed.

28. COMMENT: A Rockland County Legislator wrote in opposition to the proposed rule. The commenter stated that they are a proud graduate of a yeshiva. They note that their classmates went on to become “successful, contributing members of



society” and that they “are living proof that the alleged ‘necessity’ for the proposed new guidelines is unfounded.” They note that private schools have operated successfully without the proposed rule and provide an education that not only is equivalent, but far exceeds that offered in public schools. The commenter discusses how the Department proposed regulations in 2019, and more than 140,000 comments were submitted in opposition, and the Department “listened to the people and rejected those guidelines.” The commenter states that the Department has again proposed new “guidelines” “under the false premise that children in the private school system are not receiving an education that is adequate to allow them to get jobs and become productive members of society after graduation.” The commenter describes this as “a complete falsehood.” The commenter continues that it “is troubling that these proposed new guidelines appear not to take into consideration at all the curriculum of the private schools – and that is wrong.” The commenter says that they object to the proposed regulations because they infringe on religious freedoms and the rights of parents to direct the education of their children. The commenter states that the proposed rule would “allow the government to set the educational standards for children who attend private school, not the qualified administrators and educators that parents have every right to choose to entrust with this heavy responsibility.” The commenter notes that if private-school parents wanted the State to be fully in charge of their children’s education, their children would be in public schools.

RESPONSE: This legislator’s comments are addressed already in the Department’s response to other comments, above (see the Department’s responses regarding success of yeshiva education and religious communities, consideration of

curriculum or private schools, infringement on religious freedoms and the right of parents to direct the education of their children, and the state's authority to regulate nonpublic schools).

29. COMMENT: A New York State Member of the Assembly and a graduate of religious schools wrote in opposition to the proposed rule, submitting that they are in a unique position to write the Department regarding the proposed rule. As with many other commenters, the Assembly member notes that yeshivas have provided tens of thousands of students with a well-rounded education, preparing them to live life as productive citizens, who graduate to become teachers, professionals, entrepreneurs, etc. In addition to comments already summarized above, the commenter states that Jewish education is what has sustained the Jewish people for the last 2,000 years and that the growth of their community in America is due almost exclusively to the yeshiva education system. The commenter notes that an entire generation of children, grandchildren and great-grandchildren of Holocaust survivors who have persevered and prospered in America are a testament to the value of the yeshiva education they received. Therefore, the commenter is troubled by the proposed regulations, stating that as a parent, they have a legal and constitutional right to choose the appropriate school for their child in accordance with their personal and religious preference. The commenter states that the yeshiva system "is not monolithic. While virtually all schools offer a dual curriculum, some have a heavier emphasis on Jewish studies than others. While each yeshiva is unique, they all share a commitment to education steeped in the traditions and values of our rich Jewish history and culture." The commenter states that

that is something that no yeshiva parent is willing to forego and they make this choice with their “own pocketbooks, digging deep to pay tuition fees.”

The commenter continues that their colleagues in the Legislature work hard to provide some resources to non-public schools, but it is only a fraction of the true cost of nonpublic school education, and these schools are sustained by hefty tuition fees paid for by parents and generous philanthropic donors who know their continued future depends on the success of these schools. The commenter states that “while your department is quick to regulate and strengthen oversight, unfortunately it’s rare that you’re willing to provide resources to better enhance these schools.” The commenter states that the proposed regulation would allow LSAs to have “unprecedented control over yeshivas and other non-public schools. Parents choose these schools because they trust them to provide the best education for their children, and the government schools have no place regulating them. The success of these schools speaks for itself. Students perform very well academically, while substance abuse and crime rates are virtually zero.” The commenter states that the regulations “give no credence to the Judaic studies department. These studies are a serious academic pursuit, teaching critical thinking and textual analysis...Judaic studies stresses ethics and character building and molds students into upright and upstanding citizens. It is beyond mindboggling that ‘educators’ choose to dismiss the highest level of educational critical thinking.” The commenter states that yeshiva education also places an emphasis on the importance of giving to others. The commenter continues, stating that “This entire attack on Jewish education was started by just a few disgruntled individuals who unfortunately did not have a positive experience. Instead of looking inward, they decided that the

entire system was at fault. Driven by animus, they are looking to do more than improve Jewish education. They are attacking the very essence of the beautiful community that I have the privilege of representing.” The commenter writes that the proposed rule states that any “aggrieved” party can appeal a Substantial Equivalency determination “even when they have no legal standing.” The commenter predicts that “[t]his will just open the door to some malcontents to spend their days and weeks filing complaints. Local School Authorities will then be forced to spend time and resources on frivolous investigations, instead of concentrating on their core mission of making sure the schools in their district are properly educating their children, including their own failing public schools. While there may be individual schools – both public and private – that sometimes fall short of the standards demanded of them, there is no reason to radically overhaul an entire system that has worked well for so many years.” The commenter states that the nonpublic school community has worked well with the Department, including through the convening of the Commissioner’s Advisory Council. The commenter asks why not continue with this system, instead of “implementing the unnecessary upheaval that these regulations would cause?”

RESPONSE: This legislator’s comments are in large part addressed already in response to other comments, (please see the Department’s responses above regarding the success of yeshiva education and religious communities, parents’ right to direct the education of their children, LSAs’ authority, consideration of religious studies, appeals, and religious education values). Regarding the proposed rule being an “attack on Jewish education” the proposed rule applies to all nonpublic schools, provides fair

procedures for enforcement for New York's compulsory education law, and ensures that all children are receiving the education to which they are entitled under the law.

The Department will continue convening the CAC and working with nonpublic school communities to address their needs and provide technical assistance. The commenter's statement regarding the Department's willingness to provide resources to non-public schools is beyond the scope of the proposed rule. Nevertheless, the Department notes that it has no authority over the amount of resources that are directed to nonpublic schools. State money, including money for nonpublic schools through mandated services aid, comes from the State Budget, which is enacted by the Legislature and the Governor. The Department is merely responsible for implementing and administering these programs consistent with such appropriations. No changes to the proposed rule are needed.

30. COMMENT: A New York Assembly member wrote in general support of the proposed regulation, stating that they "fully support the Department's regulatory efforts to establish a process to review and determine compliance with New York's longstanding 'substantial equivalence' standard." The commenter notes that the Department has undertaken significant efforts to seek out feedback from stakeholders through comment periods and virtual stakeholder meetings across the State. The commenter opines that the new proposed regulations are a positive step in ensuring that all students, including those attending nonpublic schools are afforded a substantially equivalent education. The commenter states that "[t]his requirement is imperative as it provides a baseline educational standard for all children in the State by having standards and curriculum that prepares them to participate and compete in our

economic, civic, and social society.” The commenter states that the regulations will provide comprehensive regulatory oversight of the substantial equivalence standard in nonpublic schools and offers improvements from the prior version of regulations, such as a definitive timeline for LSAs to conduct substantial equivalency reviews and penalties for LSA and nonpublic schools for willful non-compliance. The commenter also offers additional suggestions for revisions to the proposed rule. First, the commenter suggests the Department remove the use of approved assessments as a pathway to demonstrate substantial equivalency of instruction, stating that “[a]lthough the use of assessments can be a tool to evaluate student performance it may not accurately identify a schools’ compliance with substantial equivalence. There may be disparity in how a school utilizes an assessment and should not be used to presume compliance with the substantial equivalence requirement.” Additionally, regarding the use of approved accrediting bodies as a pathway for nonpublic schools to demonstrate substantial equivalency of instruction, the commenter recommends that the Department engage in an ongoing audit process to ensure that approved accreditors remain in good standing. The commenter also states that they appreciate the Department’s inclusion of commensurate penalties and other procedures that will ensure compliance by LSAs and nonpublic schools with the substantial equivalence review process. The commenter states that it is important for the Department to ensure that public school students do not suffer the brunt of any penalties that are not related to schools’ non-compliance.

RESPONSE: The Department appreciates the supportive comments, which do not necessitate any changes to the proposed rule. Regarding the commenter’s recommendation to remove the use of approved assessments, see the Department’s

response above regarding the assessment pathway. Regarding the commenter's suggestion of auditing approved accreditors, the Department will, subject to sufficient funding, continuously monitor approved accreditors and their accrediting methods/standards. Should an approved accreditor no longer meet the Department's standards in evaluating substantial equivalency of instruction in nonpublic schools, the Department may revoke its approval at any time. Regarding penalties against LSAs, prior to the issuance of any penalty, the Department will duly consider the impact of any such penalties on public school students as well as ways to mitigate the consequences of non-compliance. The Department also notes that the procedures are designed to provide full and fair opportunities, as well as advance notice, to LSA's and nonpublic schools alike of the consequences of recalcitrance. No changes to the proposed rule are needed.

31. COMMENT: A New York State Assembly member wrote in opposition to the proposed rule, stating that they "strongly urge [us] to halt the impending plans, and to first create a dialogue with non-public school leadership, as well as concerned NYS legislators such as myself to ascertain if any intervention is actually necessary." The commenter states that they are disappointed in the direction the Department has taken and feels that "we are back where we started." They note that the yeshivas in their district have proven to be educational institutions "of the highest caliber, worthy of emulation on many levels. In our great, diverse state of New York, I would hope that guidelines would be designed based upon cultural sensitivity, and fully embrace the delicate balance which yeshivas have effectively demonstrated, rather than on insurgent opinion campaigns. Additionally, I will fight for any parents' constitutional right to send

their children to the school of their choice.” The commenter further states that the Department must effectively communicate and collaborate with representatives of nonpublic schools, to ensure that the students’ best interests and religious privileges are being respected.

DEPARTMENT: Please see the Department’s responses above regarding the right of parents to direct the education of their children, yeshivas’ successful education, designing the proposed rule based on cultural sensitivity, and stakeholder engagement. Additionally, regarding the direction of the Department in the proposed rule, see responses above regarding existing statutory and regulatory requirements. No changes to the proposed rule are needed.

32. COMMENT: An association representing school boards in New York State provided the following comments on the proposed rule:

a. First, the association states that “[e]xisting state law imposes an obligation on school district officials to conduct substantial equivalency reviews and determinations but only in instances where nonpublic school students attend school for shorter school days, school years, or both (Education Law §3210(2)(d)). By statute, school officials are not assigned responsibility for the substantial equivalency process if nonpublic schools offer instructional time equivalent to that provided by district schools. While the Department through nonbinding guidance expanded the role of school districts in the process for decades, nonbinding guidance cannot create a legal obligation that is not authorized by statute.” The association further states that “relevant amendments to the Education Law enacted in 2018 expressly provide that the commissioner of education,



not school districts, shall be the entity that determines whether schools that meet certain criteria comply with the substantial equivalency academic requirements applicable to them. Those amendments do not provide for the delegation of that responsibility. Accordingly, the plain language of the statute negates the ability to adopt regulations that delegate to school districts the responsibility for initial substantial equivalency reviews and recommendations for certain nonpublic schools.” The association states that they appreciate “the Department’s recognition of the burden that would have been placed on school districts under the prior proposed regulations, and that attempts have been made to reduce that burden by establishing multiple pathways under which nonpublic schools may be deemed substantially equivalent without any involvement of school district officials.” The association states that it is their “view that reviewing and assuring the adequacy of instruction in nonpublic schools is a state responsibility.”

RESPONSE: The Department disagrees with the commenter’s suggestion that it is the sole responsibility of the state to assure the adequacy of instruction in nonpublic schools. Please see the Department’s response above regarding LSA responsibility to enforce compulsory education requirements. Regarding the 2018 amendments, in April 2018, the Legislature amended the Education Law relating to the substantial equivalence determination for nonpublic schools that met certain criteria. For these schools, the amendment: (i) shifts ultimate responsibility for making the final substantial equivalence determination to the Commissioner of Education; and (ii) requires the Commissioner to consider, without limitation, additional enumerated factors in making the final substantial equivalence determination (see Education Law §3204[2][ii]-[iii], [v]). The proposed rule does not delegate the responsibility to make final substantially

equivalency determinations for these nonpublic schools to LSAs; rather, it requires LSAs to do initial reviews and make a recommendation to the Commissioner, who then ultimately makes the final determination. The Department notes that only a small percentage of nonpublic schools meet the criteria outlined in the 2018 amendment to the Education Law; thus, LSAs remain responsible for final substantial equivalency determinations for all other nonpublic schools. Additionally, the 2018 amendments were included in the State budget; as a result, there is no evidence of the Legislature's intentions whatsoever, let alone evidence that the Legislature sought to relieve LSAs of their longstanding responsibility to determine substantial equivalence. The Department appreciates the association's acknowledgement of its efforts to reduce the burden to LSAs by, for example, establishing multiple pathways for nonpublic schools to demonstrate substantial equivalency of instruction. The Department also notes that proposed rule permits superintendents to delegate the review of nonpublic schools within the LSA's geographical boundaries to a board of cooperative educational services (BOCES).

b. Next, the association states that section 130.11 of the proposed regulations "provide that if a complaint is received regarding the substantial equivalency of instruction at a nonpublic school or if the Commissioner has concern regarding the same, the Commissioner or his or her designee may direct a school district to investigate and make a positive or negative substantial equivalency determination. Accordingly, under the proposed regulations school district officials could be charged with investigating complaints for nonpublic schools that were deemed substantially equivalent through the alternative pathways set out in the proposed regulations. For

example, a school district could be asked to investigate a nonpublic school that has been deemed substantially equivalent by a Department-approved accrediting body. In essence, school district officials would be put in the untenable position of investigating and second guessing the pathway process and determination. Moreover, such a result would be inconsistent with the purpose behind establishing alternative measures for determining substantial equivalency as a means of preventing onerous burdens that will otherwise befall school districts.” The association continues that they “urge changes to the proposed regulations that would place the responsibility of conducting all complaint investigations with the State Education Department, rather than school district officials.”

RESPONSE: Please see the Department’s response above regarding the complaint process outlined in the proposed rule. Additionally, the Department believes that such a complaint process should be applicable to all nonpublic schools, even those that have been deemed substantially equivalent by satisfying a pathway provided in section 130.3 of the proposed rule. Finally, to relieve an LSA of its obligations to do any complaint reviews, as requested, would be inconsistent with LSAs’ longstanding obligations.

c. The association also states that the “proposed regulations provide that nonpublic schools that are not deemed substantially equivalent through one of the proposed alternative pathways must undergo a substantial equivalency review by a school district every seven years. In contrast, it appears that there are different timeframes for periodic reviews for nonpublic schools that are deemed substantially equivalent through an alternative pathway. For example, under existing regulations, registered nonpublic high schools are reviewed by the Department on a ten-year cycle.

Moreover, nonpublic schools that are accredited through the New York State Association of Independent Schools appear to also have a ten-year cycle of review.” The association recommends that the proposed rule be modified “such that the periodic substantial equivalency review timeframes are consistent across all nonpublic schools.”

RESPONSE: The Department believes that the timelines provided for cycles of substantial equivalency are reasonable. While the commenter is correct that registered high schools and most accreditors review schools on a 10-year cycle, many accreditors do interim reviews within that 10-year period. Additionally, section 130.3(a)(3) of the proposed rule requires that to be an approved accreditor for purpose of deeming a nonpublic school substantially equivalent, the accreditor must periodically conduct a combination of interim and full accreditation reviews of the nonpublic school which it accredits during at least a 10-year period. Thus, interim reviews must be done within any 10-year accreditation period. No changes to the proposed rule are necessary.

33. COMMENT: A vice chair of an association representing independent schools states that they “applaud NYSED for developing regulations that respect different instructional models and establish multiple pathways to demonstrate compliance with substantial equivalence, especially its decision to accept [the] comprehensive, rigorous and well-documented accreditation process to demonstrate compliance.” A director of such association also submitted comment on the proposed rule. They both state that the proposed regulations should be amended with respect to jurisdiction and complaints.

a. Regarding jurisdiction, the commenter states that “[t]he Board of Regents has always had the jurisdiction to grant school charters, accredit registered high schools and

approve statewide exams. LSAs have never been authorized in these ways.

Accordingly, substantial equivalence should not be determined by local school boards; it should be determined by the Board of Regents, in conjunction with SORIS.” The commenter continues that “[i]t is a potential conflict of interest that [a] school could have its substantial equivalence determined by LSAs who are not neutral; they are elected or politically appointed officials who supervise public schools that compete with [non-public] school[s] for students.” Many non-public schools are “governed by a Board of Trustees who should not be subordinated to the vagaries of local school board politics.” The commenter also states that “[i]f LSAs are to be given the responsibility to oversee nonpublic schools except certain nonpublic schools that the legislature deemed only to be evaluated by the NYSED Commissioner, that creates two separate classes of nonpublic schools. It would be more equitable for SORIS to have substantial equivalence responsibility for all nonpublic schools.” The other commenter states that “[t]he Board of Regents must continue to have jurisdiction to accredit registered high schools and to determine substantial equivalence. Local school boards have not historically been authorized in these ways and should not be. LSA jurisdiction would present a conflict of interest as those of us at nonpublic schools compete for students and funds with LSAs.”

RESPONSE: See the Department’s response above regarding LSAs responsibility to make substantial equivalency determinations and LSA reviews being a potential conflict of interest. Regarding the Department having substantial equivalence responsibility for all nonpublic schools, the legislature only amended the Education Law relating to the substantial equivalence determination for nonpublic schools that met

certain criteria as outlined above. Since the Education Law requires that the Commissioner make final substantial equivalency determinations for a limited class of nonpublic schools, LSAs remain responsible for evaluating other nonpublic schools. Regarding the Board of Regents' jurisdiction to accredit registered high schools, nothing in the proposed rule affects this authority.

b. Regarding complaints, one commenter states that “[t]he complaint policy must be strengthened with precise verbiage to avoid baseless complaints from outside a school's community. The way it reads now[,] anyone could register a complaint about a nonpublic school. Instead, the regulations should specify that those who believe they were seriously wronged by a school in terms of substantial equivalency be permitted to file a complaint with the NYSED Commissioner after they have exhausted all avenues of communication at the school and sought resolution via the school's accreditation agency. Once the complainant has exhausted all communication with the school and its accrediting agency, the Commissioner should direct SORIS to investigate complaints and determine outcomes. It is not acceptable for LSAs to investigate private schools and discuss complaints about nonpublic schools in meetings open to the public.” The other commenter reiterates the above comments.

RESPONSE: See the Department's response above regarding complaints. Additionally, this comment assumes that all nonpublic schools are accredited, which is not the case.

No further changes to the proposed rule are necessary.

34. COMMENT: A professor from a law school writes in opposition to the proposed rule. The commenter states that the “responsibility for education of their

children is the prerogative of the parent, not the state. The Chassidic lifestyle rejects much of the current culture. Our views on morality are often diametrically opposed to what has now become standard in society.” The commenter states that “[w]e have done a magnificent job in educating our children. The commenter asserts that the proposed rule “is an assault on the Orthodox and Chassidic communities. You have, to date, rejected the evaluation of our Talmudic studies as ‘equivalent.’ As a law professor for over five decades, I can tell you that the intellectual rigor of Talmudic studies exceeds by far the standard fare in public education. Our children are taught how to read text critically and are schooled in the Socratic method. They enter the world of commerce with the skills to be problem solvers and their successes are notable.” The commenter continues stating, “I would think that before undertaking such a serious assault on our communities, you would take the trouble to truly understand our educational system. That has not happened. No one has reviewed the outstanding accomplishments of our students. They far exceed that of students in the public schools.”

RESPONSE: See the Department’s response above which addresses the right of parents to direct the education of their children, the success of nonpublic schools, consideration of religious studies, and stakeholder engagement. No changes to the proposed rule are needed.

35. COMMENT: A non-profit organization writes that they support the principle that all students should receive a substantially equivalent education while acknowledging private and religious schools’ autonomy and respecting their ability to fulfill their mission as independent schools. They recognize NYSED’s addition of alternative pathways for nonpublic schools to demonstrate their provision of

substantially equivalent education with “minimal oversight.” The commenter states that “[i]t remains necessary to ensure that a nonpublic school offering a substantially equivalent education does not receive a negative determination of substantial equivalency due to ambiguity in the proposed regulations around pathways or LSA reviews. We also wish to ensure that any school seeking improvement is fully supported and offered the possibility of growth and development that honors their tradition while embracing change.” The commenter specifically requests the following amendments:

- a. Regarding section 130.1(a) of the proposed rule defining the term “competent teacher” the commenter states that “NYSED must provide objective and measurable definitions of appropriate knowledge, skill, and dispositions to provide clarity for the determination of a competent teacher.”
- b. Regarding section 130.1(b) of the proposed rule defining the term “substantial equivalency of instruction for a nonpublic school” the commenter states “[t]he current definition of substantial equivalency (which has been removed from the NYSED website) is, “...instruction elsewhere than at a public school, such instruction shall be at least substantially equivalent to the instruction given to children of like age at the public school of the city or district in which such child resides.” This definition makes a clear comparison to the local public school. NYSED maintains that the LSA has the legal obligation for determination of substantial equivalency. Therefore, when the LSA is evaluating a local nonpublic school, the more reasonable comparison for the LSA to make would be to the local public school and not to public schools at large.”



- c. Regarding section 130.3(a) of the proposed rule, the commenter states “[t]he opening paragraph for §130.3 establishes the possibility that a nonpublic school need not be reviewed by the LSA to determine substantial equivalency if the nonpublic school can show annual evidence of substantial equivalency via an alternative pathway. The pathways must all be described in clear and objective terms including NYSED defining sufficient evidence required for each pathway. It is especially necessary that all documentation processes be simple to complete as these pathways require presentation of annual evidence, unlike a substantial equivalence review which is to be done every seven years. Further, we believe that a nonpublic school should be able to provide such evidence annually to NYSED. The LSA may then annually confirm with NYSED the substantial equivalency status of such nonpublic schools.”
- d. Regarding section 130.3(a)(6) of the proposed rule, the commenter states: “[w]e acknowledge the opportunity this pathway offers nonpublic schools to minimize government entanglement in their day-to-day operations by documenting their substantially equivalent instruction via student outcomes as demonstrated through assessments. NYSED must provide clarity around assessment intervals, subject assessments, and a measurable definition of progress and student participation rates like the clear and measurable definitions for public schools as outlined in the NYSED ESSA Consolidated Application. These clarifications will create a pathway that is transparent and objective.”
- e. Regarding section 130.5(b) of the proposed rule, the commenter states “NYSED is offering BOCES services to aid LSAs in their new responsibilities around

determining substantial equivalency of nonpublic schools. NYSED will fund a portion of this new work for the LSA through a CoSer [cooperative services] agreement with BOCES. We request that NYSED offer the nonpublic schools financial assistance for this new mandate. This new administrative requirement for nonpublic schools should be reimbursed through mandated services aid.”

- f. Regarding sections 130.6(a)(1)(iii), 130.8(d)(2), and 130.6(a)(2) of the proposed rule, the commenter states that “[i]f a nonpublic school is found not to provide a substantially equivalent education, the goal should be to assist the school in remediation of its instruction and student growth. NYSED has a multi-year, intensely nuanced and supportive approach toward improvement and accountability for public schools identified in need of improvement. We request a similar process for nonpublic schools that is substantially equivalent to NYSED’s public school improvement process.”
- g. Regarding section 130.9(e)-(f) of the proposed rule, the commenter states that “[t]he sole focus of an LSA’s substantial equivalency review should be ensuring adequate instruction in the core curriculum, as listed in §130.9(e). A nonpublic school should have adequate time in the school day to engage in instruction of subjects requested by parents to educate children according to their own beliefs and values.”
- h. Regarding section 130.12 of the proposed rule, the commenter states that “[t]he appeal process should only be available to individuals who can document themselves as an aggrieved party to a substantial equivalency determination.

The Commissioner should determine the individual's standing with respect to the appeal. All other appeals should be disqualified."

RESPONSE:

- a. The Department believes that the definition of "competent teacher" provided in section 130.1(a) of the proposed rule is sufficiently clear. This definition reflects that a competent teacher need not be certified and may be chosen based upon each school's methods for delivery of substantially equivalent instruction.
- b. Section 130.1(b) of the proposed rule defines the term "substantial equivalence of instruction for a nonpublic school" as "an instructional program which is comparable to that offered in the public schools and is designed to facilitate students' academic progress as they move from grade to grade." The Department agrees that when LSAs review nonpublic schools within their geographical boundaries, they will make comparisons to instruction that the LSA provides to students in their district's schools.
- c. The Department anticipates that LSAs will work with nonpublic schools availing themselves of a pathway to establish means and methods of annually ensuring continued compliance. The Department will consider further guidance and technical assistance as to what constitutes "sufficient evidence" that a nonpublic school continues to meet one of the pathways demonstrating substantial equivalency of instruction pursuant to section 130.3 of the proposed rule, if needed.
- d. The Department will review and approve assessments as needed and believes that the terms in 130.3(6) are sufficiently detailed. Additionally, the Department

anticipates approving New York State assessments, as well as other assessments. As stated above, the Department may provide further guidance and technical assistance on the pathways to demonstrate substantial equivalency of instruction, if needed.

- e. Mandated services aid is authorized by statute. Absent a statutory change, the Department cannot provide mandated services aid to nonpublic schools for ensuring substantial equivalency of instruction. Additionally, the responsibility to provide instruction that is substantially equivalent to that offered in public schools is not a new requirement; as stated above, this requirement has existed in law since the 1890s.
- f. Sections 130.6(a)(1)(iii) and 130.8(d)(2) of the proposed rule require that LSAs “collaboratively develop, within sixty days, a timeline and plan with the nonpublic school for attaining substantial equivalency in an amount of time that is reasonable given the reasons identified in the review, provided that such timeline shall not exceed the end of the next academic year following the year in which the preliminary determination is made.” Additionally, section 130.6(a)(2) requires that no later than sixty days after such timeline, the LSA must render a final determination. Thus, LSAs are required to work collaboratively with nonpublic schools in developing a timeline and plan to attain substantial equivalence. The Department will monitor how this process is implemented in the field and may provide further guidance and technical assistance to districts and nonpublic schools as needed. Additionally, the proposed rule has been revised to clarify that the Commissioner may, upon written request, extend such timelines upon a

showing of good faith progress toward development of a timeline and/or implementation of the plan, as applicable. Further, it is inappropriate to compare the non-public school review process with the public school accountability process and its attendant timeframes given the more direct interventions available to the State with respect to public schools.

- g. See the Department's response above regarding the subjects included in the review criteria. Additionally, the Department believes that nonpublic schools should have adequate time in a regular school day to offer instruction desired by parents concerning their own beliefs and values, religious or otherwise, while still providing statutorily required instruction. The proposed rule defines the term "substantial equivalence of instruction for nonpublic schools" as an instructional program that is comparable to that offered in the public schools and is designed to facilitate students' academic progress as they move from grade to grade." The criteria include assessment of the instructional program in the nonpublic school, as a whole, and whether the nonpublic meets other statutory and regulatory requirements. While an LSA or the Commissioner, as applicable, may consider the amount of time spent on such instruction in making a determination, the nonpublic need not demonstrate perfect congruence between public and nonpublic school instruction.
- h. Regarding standing to bring an appeal, see the Department's response above. No further changes to the proposed rule are needed.

36. COMMENT: A religious leader writes in strong opposition to the proposed rule, stating that the proposed rule "will have the effect of taking control over the

education of our children from the parents and the education system that they have created and replace it with a secular authority...this intrusion threatens the very roots of our religious transmission.” The commenter states that for “the past 70 years thousands upon thousands of children have been educated in these scho[o]ls and gone on to very productive, faithful lives...[t]heir contribution to their communities and to society in general is well known and needs no elaboration.” The commenter states that no changes are needed because “Jewish schools offer a broad and highly practical education at the same time that they nourish all educational skills. The level of teaching is quite demanding and students commit many more hours of the day to their studies than do public school students.” The commenter articulates other examples of the success rate of the Jewish education and community. The commenter states that they “may not permit or submit to the slightest deviation of the traditions taught by our forefathers who founded our congregations and our Yeshivas. We shall bear the burdens and pay the price to uphold our educational independence; that includes independence from arbitrary mandates regarding the nature and structure of our curricula.”

RESPONSE: See Department’s response above regarding parents’ right to direct the education of their children, the success of Jewish schools and communities, and non-compliance with the proposed rule. Regarding deviations from religious instruction, see comments about the entirety of curriculum and about room for existing statutory and regulatory requirements and religious instruction alike. No changes to the proposed rule are needed.

37. COMMENT: Commenter, a religious leader, references 80,000 “petitions” that they delivered in person as comments on the proposed rule. The commenter discusses the success of their education system and community. The commenter states that they “feel targeted and under attack.” The commenter continues that should the Department adopt the proposed rule, this will end up in court costing the State money, and states that even if the Yeshiva community loses, SED has charged local school districts with enforcing these regulations which will cost districts “millions of dollars.” The commenter opines that school districts are “unequipped to evaluate our Yeshiva system as they are totally unfamiliar with the skills and values that our students gain from their Judaic studies.” The commenter also states that the local school district is their competitor and, thus, incapable of evaluating them. The commenter suggests that the “guidelines be set forth as ‘recommendations’” and that “SED should [provide]... incentives to schools [to] upgrade their curriculum.” The commenter questions why SED should be allowed to regulate their education when their schools are not funded by SED.

RESPONSE: Regarding the success of their educational system and community, the State’s authority to regulate nonpublic schools, LSAs being unequipped to evaluate the Yeshiva system and being competitors, see the Department’s responses above. The Department disagrees that the proposed rule “targets” anyone or any group. As stated above, the regulation pertains to all nonpublic schools and emphasizes the importance of respect for other cultures. The comment regarding the potential for litigation and its attendant cost is outside the scope of the proposed rule. Regarding costs to LSAs, the Department acknowledged that the proposed rule may result in costs

to LSAs in the Regulatory Impact Statement published with the Notice of Proposed Rule Making. However, as stated therein, the Department believes that many LSAs will be able to utilize existing staff to fulfill such requirements. Moreover, the Department developed a cooperative services agreement by which an LSA may contract with a board of cooperative co-educational services to conduct substantial equivalency reviews. This may be used to offset some of the costs incurred to fulfill their existing statutory obligations under Education Law §§3204, 3205, and 3210. Moreover, the proposed regulation provides pathways for nonpublic schools to demonstrate that they are providing substantially equivalent instruction without LSA reviews. LSAs do not have to conduct reviews for nonpublic schools that are deemed to be providing equivalent instruction through one of these pathways, substantially reducing any costs incurred by LSAs. Regarding the commenter's suggestion that the Department offer non-binding recommendations or incentives, the Department is responsible for implementing and providing procedures for provisions of the Education Law by promulgating rules. Moreover, non-binding guidance is not an alternative to a regulatory proposal. No changes to the proposed rule are needed.

38. COMMENT: A professor at a State University of New York institution, and trustee of a nonpublic school, writes in general support of the proposed rule, stating that the "proposed non-public regulations assure that all students attending non-public schools receive an education that is, at a minimum, 'substantially equivalent' to that which is provided by public schools. The commenter discusses the nonpublic school to which they are a trustee, and states that "[a]s a school, we support the 'multiple pathways' non-public schools can use to demonstrate their compliance with Education



3204, including the recognition of accreditation...” However, the commenter notes two areas of the proposed regulations to which they “object”: the party assigned to adjudicate complaints and the process for making such complaints. The commenter requests that “the Board of Regents and NYSED remain the agencies entrusted with oversight and also with adjudicating issues of non-compliance.” Second, the commenter “request[s] that the process for making a complaint and the policy for dealing with such complaints be further reviewed. At present, local public school authorities have been given this task, and I believe that process is not adequate or appropriate. A more neutral body, one with greater depth of educational experience and greater impartiality, like NYSED, is preferred...”

RESPONSE: The Department appreciates the supportive comments. Complaints, LSA responsibility to enforce compulsory education requirements, and impartiality of LSAs are addressed in responses above.

39. COMMENT: Commenters, Executive Vice President of a religious organization and law professor, discuss the 1972 Supreme Court case *Wisconsin v Yoder* and state that Orthodox Jewish schools “overwhelmingly” meet the “substantially equivalent” standard through a “dual curriculum – including both Jewish studies and general studies.” The commenters state that these schools have a history of educating their students to become responsible and productive citizens dedicated to family and community. The commenters acknowledge that the government has a responsibility to ensure that all minors receive adequate education so that “they can be full and productive members of democratic society. But in fulfilling this responsibility, the state

needs to make sure that its rules do not overreach. It needs to take adequate account of the distinctive dual-curriculum model of Orthodox Jewish schools and respect the religious way of life that these schools perpetuate. New York's proposed rule fails in this regard, and would undermine the ability of some orthodox Jewish communities to pass down their faith to the next generation." The commenters discuss the 2019 NYSED proposed substantial equivalency regulations and state that the new proposed rule is a "step forward, as they mostly avoid bureaucratic overreach, emphasizing core subjects such as science, math, social studies and language arts." The commenters also acknowledge the multiple pathways for nonpublic schools to demonstrate substantial equivalency of instruction. However, the commenters state that the proposed rule still goes too far in terms of requirements, noting the list of required subjects beyond the "core subjects." The commenters continue that "[w]hile these are all valuable subjects, this list veers from the core requirements that ought to be legally necessary to allow a school to keep its doors open. And it sets a dangerous precedent: If Jewish schools are to embrace government oversight to ensure substantial equivalency, they need guarantees, built into the regulations themselves, that future bureaucrats will not simply continue adding to the list..." The commenters also state that the proposed rule "must not open the floodgates to litigation against nonpublic schools," referencing the proposed rule providing that "persons considering themselves aggrieved" may file an appeal with the commissioner. The commenters continue that "[s]uch broad standing to file a grievance could, if not more narrowly cabined, put nonpublic schools in the position of repeatedly defending the quality of their education even after the government has approved it." Finally, the commenters opine that "NYSED must -- in collaboration

with Jewish schools and other Jewish institutions – ensure that there are accreditors and evaluators sufficiently familiar with the distinctive qualities of Jewish education to properly assess Jewish schools for substantial equivalency. The importance of culturally sensitive assessments derives directly from the central feature of Jewish day schools – their dual curriculum – which includes both Jewish studies...and general studies...”

RESPONSE: See the Department’s response above regarding the subjects required to be considered when reviewing nonpublic schools (including the Department’s inability to ignore statutes) and standing to pursue an appeal to the Commissioner. Regarding the issue of accreditors and evaluators familiar with Jewish education, the regulations permit accreditors familiar with Jewish education so long as they meet the requirements for Department approval. Additionally, section 130.10 of the proposed rule provides that reviews of nonpublic schools shall be: conducted in a manner that is respectful to the diversity of the nonpublic school community; based on objective criteria focused on whether students in the nonpublic school receive instruction that is at least substantially equivalent to instruction provided in public schools; cognizant of the rights of parents or persons in a parental relationship to choose among religious and independent schools; informed by and respectful of the cultural and religious beliefs and educational philosophy that may drive the curriculum in nonpublic schools and be integrated with academic content in the delivery of instruction. The existing statutory and regulatory requirements, along with the proposed rule, allow ample ability to implement a dual curriculum model. The Department disagrees with the legal analogy drawn by the commenter. Therefore, no changes to the proposed rule are needed.

40. COMMENT: A commenter, who is a religious leader and member of a religious organization, writes in opposition to the proposed rule, stating that it is “unnecessary, unwarranted and un-American.” The commenter discusses the Holocaust and their upbringing and community. The commenter states that “[t]here is no instruction more essential for our survival than our yeshiva system...Of course our schools provide secular education and core curriculum in addition to our religious studies...Our yeshiva graduates work in every field imaginable, and have created thriving businesses in just about every sector of the economy...The proposed regulations will undermine our yeshiva system. The mission of the schools and the goals of the parents who choose to send their children there will be replaced by the priorities and values of the State. This is not what our parents want.” The commenter further states that the “proposed regulations have many troubling aspects that would result in forcing us to radically change our education system. Adding insult to injury, it subjects us to a free-for-all complaint system that permits any person with a grievance to instigate an investigation. Orthodox Jews, and Chasidic Jews in particular, unfortunately have people who dislike them, and these regulations would essentially weaponize substantial equivalence as a means of attacking our schools.” The commenter also states that the “core of Jewish education is to teach Jewish subjects, yet the proposed regulations totally disregard the Jewish aspects of Yeshiva education. How can the State place no value on religious studies?” Finally, it would be terribly unfair to have a local school board evaluate Yeshiva curriculum and faculty. The upshot of all of this is that the proposed regulations would require us to alter our yeshivas’ curriculum and schedule, by reducing the number of classes and hours that focus on

the religious texts and mission that yeshiva parents and leaders want and by creating a complaint system that is designed to hurt Yeshivas.”

RESPONSE: Please see the Department’s responses above regarding yeshiva education providing sufficient secular education and core curriculum, the success of yeshiva graduates, parents’ right to choose to direct the education of their children, the complaint process, acknowledgement of religious studies, LSAs responsibility to enforce compulsory education requirements, and time for religious studies. No changes to the proposed rule are needed.

41. COMMENT: A commenter who is a principal of a religious school states that “[t]here does not seem to be an appeal process if a[n] LSA decides it’s in their prerogative to reject even though requirements are met.” The commenter further states: “[w]e need to make sure that they do not have to be the exact same curriculum”; for example, “We are not teaching gender theory, even if they do. The only way I see to secure that is to make sure 130-1.1b is solid. The word ‘comparable’ is vague and I would like to lean on the ‘can be different than’ side of comparable. Synonyms for comparable: equal, equivalent, as good as. With that word, a lawyer could argue that they have to be the same.” Commenter suggests that the word “reasonably” be included before comparable in 130-1.1. Commenter also requests clearer guidelines for how an agency becomes an “approved” accreditation agency and who would be accepted.

RESPONSE: The aggrievement requirement for seeking an appeal of a substantial equivalency determination is addressed in the Department’s response above. Regarding use of the term “comparable” in the definition of “substantial equivalence of instruction for a nonpublic school,” the Department disagrees that the

word “comparable” is vague. The term means capable of or suitable for comparison. It does not mean the same and is consistent with the phrase “substantially equivalent.” The rule expressly recognizes that reviews shall include a focus on opportunities offered to nonpublic school students to acquire core skills and make academic progress; it further clarifies that instructional programs in nonpublic schools need not demonstrate perfect congruence with public school instruction. With respect to the process for becoming an approved accreditor, the Department anticipates providing additional guidance and technical assistance to the field. No changes to the proposed rule are necessary.

42. COMMENT: A religious leader who is the Chief Educational Officer of a religious college writes in opposition to the proposed rule stating that: (1) it is an infringement of the religious rights of those parents who wish to send their children to Yeshiva schools; (2) Yeshivas already provide an equivalent secular education and also “teach our students what should be the vital components of all education.” This is how to “reason logically,” “behave morally”, and how to “respect authority”; (3) the Yeshiva system makes invaluable contributions to society, as schools are virtually free of “violence, drug use and teen-age pregnancies. Its graduates have negligible rates of criminal behavior and high rates of success in the professional, business and academic world”; and (4) the regulations will cause much social disruption stating that “Jews will have no choice, in order to ensure that their children have a full Jewish education, but to either move out of State, or to defy the law.”

RESPONSE: See Department’s responses above regarding parents’ right to direct the education of their children, yeshivas’ claim to be providing substantially

equivalent instruction and the benefits of the yeshiva system, and refusal to comply with the proposed rule. No changes to the proposed rule are necessary.

43. COMMENT: An association comprised of religious school superintendents submitted comments on the proposed school, stating that they recognize and are grateful for the multiple pathways “by which the overwhelming majority of the state’s religious and independent schools are to be considered in compliance with New York’s substantial equivalency (SE) statute, section 3204.”

a. However, the association opposes assigning responsibility to LSAs for making substantial equivalency determinations, stating that the “state’s authority to oversee religious and independent schools rests exclusively with the Board of Regents and SED. Such authority has been long-manifested in statute and Regents’ Regulations, especially § 100.2 (P) and (Z), which set forth, respectively, accountability provisions for registered and non-registered nonpublic schools, as well as the statutory and regulatory provisions governing accountability for public schools, institutions of higher education, and the licensed professions.” The association states that SED’s reading of the law is incorrect and urges the Department to consider a statutory analysis and additional considerations “in rejecting such incorrect interpretation...” The commenter continues by summarizing sections 207, 215, 305(1)-(2), 1501-1917-A, 3204(1)-(3), 3205(1), 3210(2), and 3234 of the Education Law.

RESPONSE: Regarding the assertion that it is the sole responsibility of the state to assure the adequacy of instruction in nonpublic schools, see the Department’s response regarding LSA responsibility to enforce compulsory education requirements.

The commenter's argument is a selective and inaccurate description of the Department's regulation of nonpublic schools and guidance thereto.

b. The association states that “[t]he multiple pathways set forth in the proposed part 130.3 constitute an array of objective, uniform measures by which SED, in effect, is determining the overwhelming majority of religious and independent schools as being substantially equivalent. By subjecting the few remaining schools to a substantial[]equivalency review and determination by LSAs, such schools are being denied the benefit of an equally objective review and determination by SED, thus raising equal protection questions. Rather, the few remaining schools will be subject to the political whims of locally-elected school board members, which will almost certainly result in significant strife in additional communities beyond those already experiencing such conflict. In addition, the educational and political priorities among LSAs are not only disparate, they often change given the local electoral process, thus exacerbating the subjective nature of an LSA-conducted SE review and determination. Moreover[,] sending LSAs to scrutinize religious schools would create excessive governmental entanglement in and an infringement of the exercise of religion.” The commenter also references the funds the Department was granted in the 2022-23 enacted State Budget to support substantial equivalency work, and how the association has consistently advocated for additional funding for the Department for this purpose. The association states that “[b]ased on the foregoing, we urge the Board of Regents to amend the proposed regulation by abandoning the reliance on LSAs for SE reviews of the limited number of schools (1) not falling under part 130.3; and (2) that may be subject to a complaint pursuant to part 130.11. Instead, the Regents should develop an additional



pathway utilizing SED staff, perhaps in conjunction with a BOCES-coordinated team, to carry out such reviews and determinations. This additional pathway would extend the same level of objectivity and uniformity of the review process afforded the majority of schools which fall under part 130.3.” The association continues “that only with SED-led reviews and determinations, equally applied to all schools, can religious schools’ free exercise and equal protection rights embodied in the United States and New York constitutions, as well as federal Department of Education rules concerning equal treatment, be preserved.”

RESPONSE: Regarding issues with LSAs conducting substantial equivalency reviews for schools that do not meet a pathway outlined in the proposed rule and the suggestion that the Regents develop an additional pathway utilizing SED staff to carry out reviews and determinations for schools that do not meet a pathway, see the Department’s response above regarding LSA responsibility to enforce compulsory education requirements. Additionally, as stated above, the Department disagrees that the proposed rule raises equal protection concerns or creates unlawful entanglements. The requirements are imposed by statute and such claims are not properly directed toward the Department. The proposed rule provides many safeguards to ensure that the substantial equivalence of instruction determinations for nonpublic schools are fair and accurate as outlined in the Department’s response above.

c. The association provides a section by section listing of their comments and recommendations as follows:

- (i) § 130.1 (b) Definition of substantial equivalency of instruction: Clarify the definition to ensure that the comparison of instructional programs between public

and nonpublic schools does not include instruction that is explicitly required in statute of public schools but not of nonpublic schools.

- (ii) § 130.2 Types of Substantial Equivalency Reviews and Determinations: Delete provisions relating to LSAs such that all SE reviews and determinations are conducted by the Commissioner.
- (iii) § 130.3 (a) Nonpublic Schools Deemed Substantially Equivalent: Evidence of substantial equivalency should be submitted only to the Commissioner, not the LSA. Add a new paragraph (7) for schools not covered by the preceding paragraphs, to have a substantial equivalency review and determination by the Commissioner. Delete § 130.3 (b).
- (iv) § 130.4 Timeframes: Notifications from new schools should be sent to the Commissioner (not the LSA) and SE reviews and determinations of new schools would be made by the Commissioner.
- (v) §§ 130.5 through 130.8 SE Reviews; LSA Determinations; Reporting Requirements; & Commissioner's Determination: These sections place an inordinate and inappropriate burden on LSAs and nonpublic schools and should be deleted so as to streamline the SE review and determination process within SED.
- (vi) § 130.9 Criteria for Substantial Equivalency Reviews: This section must be amended to ensure that the academic value of religious studies is considered in evaluating the substantial equivalency of instruction in religious schools.
- (vii) § 130.10 Conduct of Reviews: Delete references to the LSA and their designees.

- (viii) § 130.11 Complaints: An earlier version of the proposed regulation allowed for the Commissioner to conduct a review of a school that is the subject of a complaint regarding the substantial equivalency of instruction at such school. The only option in the current version is for the Commissioner to direct an LSA to conduct such a review. The LSA review and determination should be deleted and replaced with an SED-led review, which may include using a BOCES-coordinated team given that District Superintendents of the BOCES also serve as agents of the Commissioner. Furthermore, the regulation should make explicit that the scope of any investigation of a school deemed substantially equivalent under § 130.3(a) shall be limited to whether the school meets the requirements of § 130.3(a).
- (ix) § 130.12 Appeals to the Commissioner: This section would become irrelevant by the elimination of LSA determinations and therefore should be deleted.
- (x) § 130.13 Records Request and Review: This section becomes irrelevant by eliminating LSA reviews and interpretations, except that the regulation should permit requests for records from a nonpublic schools by the Commissioner in order to carry out an SED-led and/or BOCES-conducted SE review and determination.
- (xi) § 130.14 Penalties and Enforcement: Provisions relative to an LSA review should be deleted.

RESPONSE:

- (i) Section 130.9 of the proposed rule prescribes what LSAs must consider in conducting substantial equivalency reviews, and such section prescribes the

specific instruction that must be examined (i.e. mathematics, science, English language arts, social studies, etc.). Thus, the definition of “substantial equivalency of instruction” need not repeat such.

- (ii) See the Department’s response above regarding LSA responsibility to enforce compulsory education for nonpublic schools within their geographical boundaries.
- (iii) See response to (ii) above.
- (iv) See response to (ii) above.
- (v) See response to (ii) above
- (vi) See the Department’s response above regarding consideration of religious studies.
- (vii) See the Department’s response above regarding LSA responsibility to enforce compulsory education for nonpublic schools within their geographical boundaries.
- (viii) Regarding complaints and LSA authority, see the Department’s responses above. Additionally, regarding limiting the scope of an investigation of a school deemed substantially equivalent under a pathway pursuant to section 130.3(a) of the proposed rule to whether the school meets the requirements of 130.3(a), where a school provides sufficient evidence to the investigating LSA that it meets one of the pathways, the LSA is required to deem such school substantially equivalent, but individual complaints may require investigation. If a nonpublic school is unable to provide sufficient evidence as required to meet a pathway, then the investigating LSA may be required to do a review pursuant to section 130.9 of the proposed rule. Additionally, the regulation has been clarified to

indicate that the Commissioner could direct another authority to investigate a complaint when appropriate.

- (ix) See the Department's response above regarding LSA responsibility to enforce compulsory education for nonpublic schools within their geographical boundaries.
- (x) See response to (ix) above.
- (xi) See response to (ix) above.

No changes to the proposed rule are needed.

44. COMMENT: A non-profit civil rights organization submitted comments on the proposed rule. The organization states that the proposed regulation incorporates many of their past comments, but areas for improvement remain.

- a. Onsite visits. The commenter supports using LSAs to conduct onsite visits for all schools being reviewed, including those using a pathway to demonstrate substantial equivalence pursuant to section 130.3 of the purpose rule, but they request that the site visit include the observation of instruction.
- b. Accreditation pathway. The commenter states that they "previously cautioned NYSED about allowing accreditation to substitute for the substantial equivalency review process because it may 'open the door to additional entities seeking to become accrediting bodies to bypass the substantial equivalency review process.'" They are also concerned that an accredited school would only be reviewed once every ten years and believe that each nonpublic school should be reviewed by an accrediting organization or an LSA at least once every three years. They also support section 130.3(b), which allows the Commissioner to request the evidence submitted to the LSA from the nonpublic school and

“encourage the Commissioner to use this power frequently to ensure compliance and fidelity to the review process. This information should also be available to the public.”

- c. Timeframes. The organization supports the review of new nonpublic schools within two years of commencing instruction but is concerned with the seven-year interval thereafter and requests that it be shortened. The organization also supports section 130.4(c) ,which gives the Commissioner power to withhold funds from any LSA that has not made “sufficient progress” toward reviewing nonpublic schools.
- d. LSA and Commissioner Determinations. The organization is concerned with the requirement that, if an LSA is required to make final substantial equivalency determinations, the superintendent’s determination must be put to a vote by the school board. They state they are concerned this may “unnecessarily introduce political influence into an otherwise apolitical decision.” Additionally, the organization states that it is unclear which process, if any, LSAs must undertake to formulate a recommendation to the Commissioner regarding substantial equivalency for nonpublic schools for which the Commissioner is required to make the final determination. Specifically, they state that it is unclear whether any of the process requirements of section 130.6 apply to the formulation of the LSA recommendation under section 130.8, including the school board vote.
- e. Complaints. The organization states that the complaint section should clarify “that it describes an investigative process separate from and in addition to the regular substantial equivalency reviews. This section should also specify a timeline

during which the LSA must conduct the review pursuant to the complaint. Finally, the language of §130.11(a) is permissive but should be mandatory in the instance that the Commissioner has a concern regarding the substantial equivalency of instruction.” The commenter provides specific language as follows (suggested additions in bold):

The Commissioner, or his or her designee, may direct an LSA to investigate a nonpublic school if the Commissioner receives a **credible** complaint regarding

the substantial equivalency of instruction at such nonpublic school, **and shall direct an LSA to investigate a nonpublic school, whether or not a complaint has been submitted**, if the Commissioner **reasonably believes that the**

**instruction at a nonpublic school is not substantially equivalent to that provided by the public schools.**

RESPONSE:

- a. The Department appreciates the supportive comments and intends to provide further guidance to the field regarding best practices for site visits to nonpublic schools.
- b. Section 130.3(a)(3) of the proposed rule requires that the Department approve any accreditor that will be utilized to demonstrate substantial equivalency of instruction. The Department will ensure that all approved accreditors meet the Department’s standard for evaluating a school for substantial equivalency of instruction. This provision also requires that accreditors meet specific criteria

(i.e., use a peer review process, appropriately train all staff and peer reviewers, perform comprehensive onsite visits, etc.). Regarding frequency of reviews for schools that meet the accreditation pathway, section 130.3(a)(3) also requires that the approved accreditor periodically conduct a combination of interim and full accreditation reviews of the nonpublic school that it accredits during at least a ten-year period. Thus, interim reviews must be done within any ten-year accreditation period. The Department appreciates the supportive comment with regard to section 130.3(b) of the proposed rule. With respect to making the evidence received by the LSA from the nonpublic school available to the public, the Department believes the processes for review, complaints, appeals, and reporting are sufficiently transparent, thus rendering the public notice suggested by the commenter unnecessary.

- c. The Department believes that the seven-year interval in conducting subsequent reviews is sufficient because the rule includes other safeguards and mechanisms to ensure that nonpublic schools continually provide substantially equivalent instruction throughout this seven-year period (i.e., the complaint procedure in section 130.11, the option to file an appeal to the Commissioner in section 130.12, and the records request and review provisions in section 130.13). The Department appreciates the supportive comment regarding section 130.4(c) of the proposed rule.
- d. As stated above, it is the Department's interpretation that LSAs are responsible for making substantial equivalency determinations and recommendations, as applicable, and the Education Law defines "school authorities" as the board of



education or corresponding officers of a school district. (Education Law §2[12]). Thus, the board of education must ultimately vote and make the substantial equivalency determination for nonpublic schools in their geographical boundaries for which they are responsible for making the final determination. Regarding schools that meet the criteria for a Commissioner's determination, the proposed rule does not require a school board vote on such recommendation, as the LSA is not responsible for the final determination. Section 130.8(a) of the proposed rule requires that the LSA review the nonpublic school in accordance with section 130.9 and forward its recommendation and all documentation supporting its recommendation to the Commissioner for review. The Department anticipates providing further guidance and technical assistance in this regard.

- e. Please see the Department's response above regarding complaints. Additionally, a Commissioner-directed LSA investigation will be based on the nature of the complaint and the contours of such may be directed in the Commissioner's discretion. For example, if a complaint alleges that, as a whole, a nonpublic school is not providing instruction that is substantially equivalent, an LSA may be directed to investigate all of the nonpublic school's instruction to ensure that it meets the requirements of the proposed rule. But if a complaint only alleges that instruction in a specific subject is not substantially equivalent, the Commissioner may direct that the LSA specifically look at instruction in the specific subject. The Department anticipates provides further guidance and technical assistance in this regard. Regarding a timeline by which the LSA must conduct a review pursuant

to the complaint, the Commissioner has discretion to set a timeline for the LSA to investigate a complaint.

No further changes to the proposed rule are needed.

45. COMMENT: Religious leaders who are members of a religious education non-profit organization submitted comments on the proposed rule as follows:

- a. Jewish Studies. The commenters state the “study of Jewish texts, history and values is at the core of yeshiva education. It is impossible to fairly or accurately evaluate a yeshiva’s education without assessing its Jewish Studies program. We were therefore gratified to hear last week that the Department wants to address the concern that there is no directive that Jewish Studies be included in assessing substantial equivalence.” The commenter states that it is important for such to be contained in the language of the regulation and included a markup of the proposed rule incorporating this revision to sections 130.1(b), 130.6(a)(1), 130.9(f) and 130.10(b). The commenters also state that section 130.9(f)(1)-(7) must also be revised so that its requirements are not so numerous and onerous that yeshivas cannot maintain their emphasis on their Jewish studies classes.
- b. Assessments. The commenters state that “[c]larifying how the assessment pathway operates can help the State avoid the untenable situation where only yeshivas are subject to local school board review. The proposed regulations must therefore be clear that it is the Department and not the LSA that determines whether any particular school satisfies the assessment pathway. It must also clearly state that administering the New York State Grades 3-8 English Language Arts and Mathematics Test biannually and demonstrating Adequate Yearly

Progress qualifies a school for the assessment pathway and avoids an LSA review.”

- c. Accreditation. The commenters state that “[f]or the regulations to be equitable, the Department must commit to approve an accrediting agency that is fully familiar with yeshiva education and curriculum...For this to be a meaningful option for yeshivas, which have not traditionally sought accreditation, section 130.3(3) should be revised to encompass provisionally accredited schools.” The commenter’s mark-up of the regulation reflected this suggestion.
- d. Timelines. The commenters state that “[i]t is unrealistic to expect that schools receiving a preliminary determination of non-equivalence will be able to create a remediation plan in 60 days and fully implement it by the following school year. Public schools are given substantially more time than that for improvement, and there is no reason not to give yeshivas the same consideration...Therefore, section 130.6(a)(iii) should be revised to restore the language that was in the draft regulation. In addition, to allow for these regulations to be phased in appropriately, especially as it relates to accreditation, the timeframes in sections 130.4(b) & (c) should be revised.” The commenter’s markup of the proposed rule includes their suggested revisions. Specifically, the commenters suggest changing the date by which existing nonpublic schools must have substantial equivalency determinations completed in section 130.4(b) of the proposed rule from the end of the 2024-2025 school year to the 2026-2027 school year. The commenters also suggested changing the date regarding LSAs’ sufficient progress towards making substantial equivalency determinations in section

130.4(c) of the proposed rule from the end of the 2023-2024 school year to the end of the 2026-2027 school year. The commenter's markup also removed the timelines outlined in section 130.6 of the proposed rule.

- e. Complaints. The commenters state “[a]s we explained during our meeting, the provisions related to complaints invite the conclusion that these regulations draw a target on the back of the yeshiva community. We were pleased to hear that the Department had no such intention, and that the regulation meant to reflect nothing more than the free speech rights all individuals have. In that case, section 130.11 should be revised so that a complaint can lead to a review by the Commissioner but not the LSA, and section 130.12, which was added only after the draft regulations was shared by the Department in January, should be omitted.” The commenter's markup made edits to section 130.12 of the proposed rule removing the language “persons considering themselves aggrieved by an LSA's substantial equivalency determination and inserted the language “a party with standing” in its place.
- f. Penalties and Enforcement. The commenters' markup also added language to section 130.14 of the proposed rule (penalties and enforcement) to specify that such section applies to any parent or guardian of any public or nonpublic school age child.

**RESPONSE:**

- a. Please see the Department's response above regarding consideration of religious studies and instructional subjects that must be considered in LSA reviews.

- b. Please see the Department's response above regarding responsibility of LSAs to ensure compliance with compulsory education requirements. Regarding the commenter's specific recommendation to reference certain tests and demonstrating Adequate Yearly Progress, the Department will be providing a list of all assessments approved for purposes of the assessment pathway and anticipates that such list will include New York State Assessments as well as other assessments.
- c. Regarding accreditors that are familiar with yeshiva education and curriculum, see the Department's response above. Regarding permitting provisionally accredited nonpublic schools to be deemed substantially equivalent pursuant to section 130.3 of the proposed rule, in approving accreditors, the Department will consider the accreditor's criteria for preliminary or provisional accreditation compared with full accreditation requirements to determine if a particular status satisfies the requirements of 130.3(b) and the intent of regulations overall.
- d. As stated above, the proposed rule has been revised to clarify that the Commissioner may, upon written request, extend such timelines upon a showing of good faith progress toward development of a timeline and/or implementation of the plan, as applicable. Regarding suggestions to the timelines in section 130.4(b) and (c) of the proposed rule, the Department believes that such timelines are appropriate and give LSAs sufficient time to make progress towards and complete substantial equivalency determinations.
- e. See the Department's response above regarding complaints and appeals. Regarding the commenter's suggestion to remove and replace specific language

in the appeals provisions (section 130.12) of the proposed rule, such language is consistent with legal standing requirements in judicial and administrative contexts (including Education Law §310).

- f. No change is necessary to this provision as Education Law §§ 3233 and 3234 do not limit their penalties/enforcement provisions to parents and guardians of public and nonpublic school age children.

46. COMMENT: A nonprofit organization with a stated commitment to improving secular education in certain religious schools submitted comments on the proposed regulation, stating that they support the adoption of the proposed regulations to ensure that students in New York State’s nonpublic schools are receiving “instruction that is at least substantially equivalent” to that offered in public schools. They state that “[f]or years, you have heard and seen legitimate, troubling complaints from countless graduates of ultra-Orthodox Yeshivas across New York. The pattern was clear: many ultra-Orthodox Yeshivas, particularly Hasidic boys’ schools, failed to provide a basic secular education that would meet education law §3204’s standard.” The commenter notes that “[I]t isn’t easy for Hasidic Yeshiva graduates or parents of Yeshiva students to come forward. These are insular communities, and a complaint against a school, which is deeply embedded within the specific set or community families belong to, can result in a multitude of consequences...Despite these fears and consequences, you have heard from hundreds of Yeshiva graduates, parents, and former teachers about what is happening inside the walls of many of these unregulated Yeshivas. An environment of educational neglect has been established by yeshiva leaders in the Hasidic community that is both intentional and systemic...The regulatory proposals put

forward by the NYS Board of Regents could go a long way toward addressing the lack of secular education in these yeshivas, but...substantial modifications are necessary to sufficiently strengthen state oversight of nonpublic schools.” The organization provides the following specific comments:

- a. The organization notes that it has concerns about three of the pathways to demonstrate substantial equivalency of instruction. First, the commenter discusses registered high schools serving lower grades, stating that “[t]o allow lower grades affiliated with a registered high school to automatically be deemed substantially equivalent without further review would leave the vast majority of lower grade ultra-Orthodox yeshiva students without necessary protection. The regulations currently do not require any minimum percentage of students in grades 1-8 to matriculate to the registered high school grades. Therefore, a nonpublic school serving grades 1-12 could easily avoid secular studies in grades 1-8, matriculate the majority of its students from grade 8 into an unregistered high school, and only serve a very small number of students in its registered high school. There must be a rigorous registration process for all grades that eliminates such loopholes. Second, the commenter discusses assessments, stating that the “proposed regulations would allow a nonpublic school to use assessments approved by the State Education Department to demonstrate compliance with substantial equivalency. We are concerned that this system of assessments represents a flawed measure since there is no minimum proficiency assessment benchmark, and no requirement that assessments assess each course of study in each grade. To our knowledge,

current assessments do not assess each legally required course of study.

Additionally, without a requirement that schools employ a system of independent proctoring and scoring of assessments, this pathway leaves students vulnerable to fraud and cheating to bolster a school's testing outcomes. Many yeshiva graduates have attested to such widespread cheating in their schools. We recommend omitting this pathway entirely." Moreover, because a school is registered to administer Regents exams and diplomas doesn't mean that its students are actually performing adequately. The regulations should include a threshold for Regents' passing for schools to retain their registration status."

Third, the commenter discusses accreditation. The commenter states that "[t]he proposed regulations provide that a nonpublic school accredited by an accrediting body would automatically be deemed to be substantially equivalent. To ensure the legitimacy of every accrediting body and the transparency of the accreditation process, the proposed regulations should be modified to require the State Education Department to regularly audit each accrediting body and make public both its findings and the basis for those findings, along with a publicly-available list of approved accrediting bodies." Additionally, the organization provides a markup of the proposed rule incorporating these comments.

- b. The commenter states that "[p]ursuant to the draft regulation, a nonpublic school is presumptively deemed substantially equivalent if it annually provides sufficient evidence to the LSA of having satisfied one of the pathways. However, because it is a presumption, there is no requirement for ... SED or LSA action. In fact, the regulation provides only that the 'LSA deems a nonpublic school substantially



equivalent pursuant to this section'. It appears that there is no official triggering event that makes it a 'determination'. There should be a requirement that the LSA provide the nonpublic school with something in writing that confirms that the nonpublic school has submitted 'sufficient evidence' pursuant to Part 130.3 and that the LSA has therefore determined the nonpublic school to be in compliance with the substantial equivalency regulation. This would constitute a clear final agency action."

- c. The commenter states that the "regulatory proposal leaves most of the responsibility for oversight and determining accountability with the LSA, which leaves enforcement vulnerable to the whims of local politics. As we have repeatedly witnessed, a local school district can choose to do little or nothing to fulfill its legally mandated oversight responsibility. If the local school district chooses not to conduct rigorous reviews of its nonpublic schools, the State Education Department, under this regulatory proposal, can only levy a penalty on the school district by withholding one half of all public monies that flow to the district. This is in effect a nuclear option and it is difficult to imagine that it will regularly be used if it is not mandated. Thus it is likely that a politically motivated school district could well end up in a cycle of repeated reviews of non-compliant nonpublic schools without changing those schools' instructional program. The State Education Department must be authorized to directly undertake a review of a nonpublic school, without working through the local school authority, upon receiving evidence that a school deemed substantially equivalent by the LSA is, in fact, not providing an equivalent education."

- d. The commenter states that “[n]onpublic schools must be required to attest their compliance with the substantial equivalency standard annually and at the beginning of a review period. Such attestation should be under penalty of perjury and with penalties for fraudulently indicating compliance.” Additionally, the organization offers a markup of the proposed rule that reflects such comments
- e. The commenter states that “[n]onpublic school leaders who, after being put on notice of a failure to abide by the substantially equivalent education standard and who willfully thereafter fail to comply, must also be subject to prescribed administrative and civil penalties.” Additionally, the organization reflects such comments in a markup of the proposed rule.
- f. The commenter states that “[i]n addition to “an aggrieved party”, any person who has evidence that demonstrates a school is not providing a substantially equivalent education should be able to file a complaint that triggers an investigation.
- g. The commenter states that “[t]he currently proposed penalty provision should be strengthened to mandate (rather than allow) “the Commissioner to withhold one-half of all public school monies from any city or district, which willfully omits or refuses to enforce” the regulation’s compulsory education requirements.” Additionally, the organization reflects such comments in a markup of the proposed rule.
- h. The commenter states that it is unclear how this regulation would be interpreted and enforced in a school district such as Kiryas Joel, where the district does not operate a single general education public school but has more than a dozen non-

public schools. This could potentially be a serious loophole that should be addressed.

- i. The commenter states that “[f]or secular studies we believe that the “instructor” must be a “teacher” and should be required to have at least a Bachelor of Arts or Science degree.” Additionally, the commenter marked up the proposed regulation to reflect this suggestion.
- j. The commenter states that “[t]here is no discussion of time allocation with regards to secular instruction in the document. While we understand that a prescriptive approach is not undertaken in this draft, we fear that the omission of time as a necessary component of substantial equivalency will lead to insufficient instructional inputs by many nonpublic schools, especially in the ultra-Orthodox yeshiva community.” Additionally, the commenter marks up the definition of “substantial equivalency of instruction for a nonpublic school” to reflect this suggestion.
- k. Regarding the timeframes in the proposed rule, the commenter states that “[s]even years is equivalent to a child’s entire elementary and middle school career. Reviews should be more frequent to ensure that students are not trapped in a failing school for the entirety of their pre-high school career. A three year review cycle is more in line with creating an environment of urgency around a child’s education. Furthermore, all existing schools should receive their initial review by the end of the 2023-2024 school year; non-compliant schools should not be allowed another two full school years to operate at the outset of the

enactment of these regulations.” Additionally, the commenter marks up the proposed rule to reflect these suggestions.

- l. The commenter states, regarding section 130.5 of the proposed rule that “[t]he State Education Department must be authorized to directly undertake a review of a nonpublic school without working through the local school authority. Language must be inserted into this section to outline this process. We recommend that the following language be inserted: Commissioner’s superseding determination. The Commissioner may request, any records or documentation the LSA used to make its determination of substantial equivalency of instruction, and the LSA must provide such documentation within 10 days of the request. Where the Commissioner has reviewed such records and documentation and determines that the LSA’s positive or negative substantial equivalency determination is not supported, the Commissioner, or his or her designee, may re-review the nonpublic school
- m. The commenter states that “[t]he requirement that the timeline and plan be “collaboratively” developed is unnecessary and leaves the regulator in a position of negotiating with the school over compliance. This word should be removed. We are also concerned that this section does not contain an assurance of transparency and therefore there must be a mandate for public notice of said determination and remediation plan. Furthermore, the timeline should not exceed six months or the end of the current academic year, whichever is longer. Allowing more than a full academic year to go by is unnecessary and does not provide the level of urgency that receiving a sound education deserves.” Additionally, the

organization marked up the proposed rule to reflect this comment. Additionally, the organization suggested adding a new subparagraph (v) to section 130.6 of the proposed rule as follows: (v) in the event that a timeline and plan is not forthcoming within the time specified by section 130-1.6(a)(1)(iii) of this Subpart, the LSA shall unilaterally declare an impasse and within 30 days impose its own timeline and plan for the nonpublic school to attain substantial equivalency, to begin under like terms of section 130-1.6(a)(1)(iii) of this Subpart.

- n. The commenter states that “[t]he process for districts outside NYC should be the same for the NYC system where the Chancellor makes the referral. We are concerned that as written this section will politicize the referral with Board input; the Superintendent here is basically deputized by SED to provide investigatory information which is outside the scope of the LSA's board of education's powers and duties. The process for districts outside NYC should thus be that the Superintendent makes a finding which is publicly accessible, collaborates with the nonpublic school on a timeline to achieve equivalency, and then makes a determination, or recommendation in the case of schools requiring a Commissioner’s determination. To do otherwise would allow Boards of Education such as in East Ramapo to void any determination of noncompliance.”
- o. Regarding penalties and enforcement in section 130.14 of the proposed rule the commenter states that “[t]here is no need for this to be left to the discretion of the Commissioner. There should be a clear mandate for a written decision making a negative determination.” Additionally, the commenter suggests adding the following language onto the end of such section “....and shall cause to be

withheld any funding controlled by the state that might otherwise be directed to such school.”

RESPONSE:

- a. Section 130.3(1) of the proposed rule provides that a registered school or a nonpublic school serving grades 1 through 8 that has a registered high school shall be deemed to be providing instruction that is substantially equivalent. The Department disagrees with the commenter’s assertion that this pathway will leave lower grades of nonpublic schools without necessary protections. Where a nonpublic school maintains a registered high school and schools with lower grades, such nonpublic school provides instruction to prepare students in lower grades to attend their Department registered high school. Regarding the assessment pathway, see the Department’s response above. As to both assessment and accreditation pathways, the Department’s review and approval will serve as a safeguard against the concerns expressed.
- b. In addition to the reporting requirements in Section 130.6, section 130.3 has been revised to clarify that the LSA shall notify the nonpublic school that it has been deemed to be providing substantially equivalent instruction pursuant to such section by satisfying one of the pathways.
- c. Regarding the commenter’s concern about LSA reviews, see the Department’s response above regarding safeguards to ensure that substantial equivalence determinations are completed accurately and with fidelity. Regarding the Department’s authority to enforce the proposed regulation with respect to LSAs, withholding public money is not the only avenue of enforcement. While not

specifically stated in the proposed rule, willful violations or neglect of duty may be grounds for removal of board members, certain school officials, and school officers pursuant Education Law §306.

- d. There is no statutory basis for the Department to impose this requirement in regulation.
- e. There is no statutory basis for the Department to impose this in regulation.
- f. As stated above, the complaint provision (section 130.11) does not limit who may file a complaint with the Department.
- g. This suggestion would be inconsistent with the applicable statutory language in section Education Law §3234.
- h. In the unique circumstance where a district does not offer any general education public schools, and the non-public schools do not avail themselves of a pathway, then the Department would provide technical assistance to the district on how to determine whether instruction is being provided consistent with the proposed rule. Such direction may include a designee, such as a board of cooperative educational services. Additionally, the regulation has been clarified to indicate that the Commissioner could direct another authority to investigate a complaint when appropriate.
- i. Education Law §3234 states that “[i]nstruction may be given only by a competent teacher.” Therefore, there is no statutory basis to include these additional requirements as suggested by the commenter. See also the Department’s responses above regarding the qualifications of teachers.

- j. See the Department's response above regarding consideration of time spent on instruction in making substantial equivalency determinations.
- k. As explained above, the Department believes that the seven-year interval in conducting subsequent reviews is sufficient. Additionally, the Department believes the requirement that LSAs complete substantial equivalency reviews for all existing nonpublic schools be completed by the end of the 2024-2025 school year is a reasonable timeframe.
- l. As stated above, section 130.13 of the proposed rule already provides mechanisms for the Commissioner to review an LSA's substantial equivalency determination.
- m. The Department disagrees that collaborative development of the timeline and plan is unwise. The Department believes that this will encourage LSAs and nonpublic schools to work together towards the common goal of providing substantially equivalent instruction. The Department believes the processes for review, complaints, appeals, and reporting are sufficiently transparent; thus, additional public notice as suggested by the commenter is unnecessary. The Department believes the permitted length of time to implement the plan (by the end of the following school year) is reasonable.
- n. The proposed rule recognizes that the Education Law defines "school authorities" as the board of education or corresponding officers of a school district. (Education Law §2[12]). Currently, the City of New York is under mayoral control, who appoints the Chancellor. There is no board of education. All other districts in the state are led by a board of education or board of trustees.



- o. The Department disagrees that the Commissioner should have no discretion with regard to possible penalties, including section 130.14(c) of the proposed rule. Regarding the language suggested by the commenter, the proposed rule already outlines the potential consequences of a school being issued a negative substantial equivalency determination. The nonpublic school would no longer be deemed a school which provides compulsory education fulfilling the requirements of the Compulsory Education Law. Upon the cessation of the reasonable period for parents or person in parental relationship to enroll their children in a difference educational setting, during which legally required services to the nonpublic school and students, the school would no longer be eligible for funding. No changes to the proposed rule are necessary.

47. COMMENT: An association representing public school superintendents submitted comments on the proposed rule. The association states that “while the regulatory proposal is an improvement upon past plans, we remain concerned about the demands which would remain for school district officials and the complications which those duties may create...we believe that oversight of nonpublic schools should be a state agency function. To the extent that any changes in state law would be necessary to establish that responsibility for SED, we will support those amendments. To the extent that the Department requires additional resources to exercise full oversight of nonpublic schools, we will join in advocating for that financial support.” The association provides the following specific comments on the proposed rule:

- a. Statutory Responsibility. “We reject interpretations that school district officials are required by statute to be responsible for substantial equivalency determinations

for all nonpublic schools. Education Law sections 3204 and 3205 establish requirements for compulsory attendance and the essential elements of adequate instruction, but they do not expressly assign responsibilities for nonpublic school oversight to district officials. Section 3210 does assign “school authorities” a duty to determine substantial equivalency of instruction, but only in instances where nonpublic school students attend school for shorter school days, school years, or both, than their district counterparts. If nonpublic schools offer instructional time at least equivalent to that provided by district schools, oversight need not be exercised by public school officials. We also interpret the proposed regulation’s assignment of responsibility to districts for reviews of schools covered by Education Law section 3204(2)(ii)-(iii) as inconsistent with the intent and explicit phrasing of that statute. Paragraph (v) therein plainly states, “The commissioner [of education] shall be the entity that determines whether nonpublic elementary and secondary schools are in compliance with the academic requirements set forth in paragraphs (ii) and (iii) of this subdivision.” We believe at least part of the impetus for enactment of this provision was concern over how the New York City Department of Education exercised oversight, whether or not that concern was in any way merited. District officials cannot be assigned a role through regulations which is foreclosed by statute. Our remaining comments relate to the regulatory structure as proposed, but should not be taken as a concession on our part that assigning responsibility for nonpublic school oversight to district officials is preferable to state oversight.”

b. Nonpublic Schools Deemed Substantially Equivalent. Regarding the accreditation pathway, the commenter states that they “recommend that obligations of nonpublic schools seeking to be deemed as providing adequate instruction via this route be expressly stated. This might be done by adding a new paragraph (7) to read as follows: (7) A nonpublic school seeking to be determined as providing substantially equivalent instruction pursuant to this section shall annually provide notice of its intent to do so to the Department and to the applicable LSA by [date] and shall provide to the LSA all documentation necessary to make such determination by [date] each year. In the event that an LSA requests further documentation or other evidence, the nonpublic school shall respond to such request within 10 days. [We defer to Department staff on the specific dates which should be prescribed]. We do question whether it is necessary to require annual determinations via all the options authorized by this section. Could the time span of the determination be tied to the duration of accreditation, as one example?” Regarding the assessment pathway, the commenter states that they “foresee a need for the Department to provide considerable guidance to nonpublic schools and school districts on how this option would be applied, particularly on the aspect of acceptable student progress. Absent clarity provided by SED, it is conceivable that there could be wide variance in progress levels deemed adequate across otherwise similar nonpublic schools and school districts. In fairness, it might also be advisable to add a sentence to the proposed paragraph to read, ‘Nothing herein shall preclude an LSA from conducting a review pursuant to section 130.6 of this Part

in the event it determines, at its sole discretion, that assessment results may not accurately represent the adequacy of instruction provided by a nonpublic school.’ School disruptions and other unusual circumstances might cause such discrepancies between practice and results. In the same vein, we suggest that the reference to participation rates be amended to clarify that it would be the nonpublic school’s three-year average student participation rate—not a single year rate—which would be compared to the state assessment public school rate. We assume this to be the intent.”

- c. Complaint Reviews. The commenter states that they have general concerns about the workload demands the complaint provision of the proposed rule (section 130.13) will impose upon district officials, and they expect that “future guidance or FAQ documents would elaborate how complaints are to be processed—for example, whether a complaint bears sufficient credibility to warrant a formal investigation. While the proposed regulation presumes a scenario where complaints would be made directly to the Department, we envision that some complaints may be submitted to school districts. Our advice to district officials then would be to forward any and all complaints to the Department for review and a determination of whether an investigation is necessary. We note also that with nonpublic schools deemed to be providing substantially equivalent instruction pursuant to proposed section 130.3, district officials directed to investigate a complaint would be placed in the position of second-guessing determinations made by other authorities. At a minimum, we strongly recommend that, for nonpublic schools registered or approved by the

Department, the Department ... pursue those investigations. We also ask if the regulations could require responsible entities under subdivisions 3, 4, and 5 of this section to commence investigations and report their conclusions, upon determination by the Commissioner that an investigation is needed.”

- d. Reporting Requirement. “Proposed section 130.7 requires districts to annually report lists of nonpublic schools within their boundaries, [the] basis for their substantial equivalency determination, and the status of those determinations. We would like to explore options to streamline these reporting requirements. Some of this information should already be in the possession of the Department (e.g., for schools registered or otherwise approved by the Department). Over the years, a frequent request from superintendents to [the organization’s] staff has been for a list of all state-mandated reporting deadlines. With that in mind, we question requiring two separate reports on different dates every year (i.e., September 1 and December 1).

RESPONSE:

- a. The Department disagrees with the association’s interpretation of the Education Law with respect to the responsibility of school district officials and substantial equivalency determinations. Please see the Department’s response above in this regard
- b. Section 130.3(a) of the proposed rule requires that a nonpublic school shall be deemed substantially equivalent if it annually provides sufficient evidence to the LSA that it meets one of the pathways listed therein. The Department has not prescribed a specific date by which this must be accomplished to provide LSAs

and nonpublic schools flexibility. The Department, however, believes that it is necessary for LSAs to annually confirm that no pathway-qualifying criteria have changed and that substantial equivalency of instruction is being provided.

Regarding guidance on the assessment pathway, as stated above, the Department anticipates providing additional guidance on this pathway, including a list of approved assessments. The Department anticipates approving New York State assessments, as well as other assessments. Regarding the commenter's suggested additional language, the proposed rule provides that sufficient evidence must annually be provided for a nonpublic school to be deemed to be providing substantially equivalent instruction. If a nonpublic school does not provide sufficient evidence to the satisfaction of the LSA, then the LSA must conduct a review pursuant to section 130.9 of the proposed rule. Regarding participation rates, the proposed rule provides that to utilize the assessment pathway the nonpublic school must have "a student participation rate which is equal or greater to the three-year state-wide average State assessment public school participation rate." Therefore, the Department's intent is to require a single year nonpublic school student participation rate that is equal or greater to the three-year state-wide average public school State-assessment participation rate.

- c. Regarding complaints, please see the Department's responses above.
- d. Section 130.7(a) of the proposed rule provides that by September 1, 2023, and each September 1 thereafter, LSAs shall file a report with the Department containing a list of all nonpublic schools located within the LSA's geographical boundaries and the date of the last substantial equivalency determination made

for each nonpublic school. Additionally, section 130.7(b) of the proposed rule provides that by December 1, 2023 and each December 1 thereafter, LSAs must file a report with the Department with a list of all the nonpublic schools identified in subdivision (a) of the section which meet one of the pathways prescribed in section 130.3 and all nonpublic schools which do not meet a pathway and for which the LSA is responsible for making a substantial equivalency determination. While the Department maintains some of this information, as noted by the commenter, the LSA will have this information readily available as it is required to obtain sufficient evidence that a nonpublic school meets one of the pathways prescribed in section 130.3 of the proposed rule. Regarding the separate reporting deadlines, reporting should not be overly cumbersome, especially after initial implementation.

No changes to the proposed rule are necessary.

48. COMMENT: Commenter, a religious leader, generally writes in support of the proposed rule. However, the commenter states that “[o]ne aspect of the new regulations that does give me concern is the notion that assessments can be used to determine compliance with substantial equivalency. The overall notion of substantial equivalency is one of required inputs in education. Assessments can only be a matter of measuring outputs. I fear that measuring performance is just not what the law mandates in this case at all and I encourage you to amend the assessment pathway so that it is somehow paired with requirements which relate to the instruction that must be provided.”

RESPONSE: The Department appreciates the supportive comments. Regarding the assessment pathway, see the Department's response above.

49. COMMENT: A representative of the New York City Department of Education submitted comments on the proposed regulation. The commenter states that “many of the provisions in the proposed regulation go far beyond requirements in the current Guidelines for Determining Substantial Equivalency in Nonpublic Schools but fail to provide clear definitions or definitive standards and processes to guide LSAs in conducting substantial equivalency reviews. Moreover, several of the timelines included in the proposed regulation provide an insufficient amount of time for LSAs to work with nonpublic schools to support them in moving toward substantial equivalency before making a final determination. In addition, the penalty provisions relating to LSAs in the proposed regulation are draconian and misplaced. The Commissioner's ability to impose a penalty on LSAs who willfully omit and refuse to enforce the provisions of the Compulsory Education Law is already codified in the Education Law. What is needed in the proposed regulation is a provision that allows an LSA to penalize a nonpublic school that fails to engage collaboratively with the LSA in the substantial equivalency review by making a negative finding, without having to first seek permission to do so from the Commissioner.” The commenter outlines specific comments and recommendations as follows:

a. Section 130.1 -- Definitions.

- “The definition of ‘substantial equivalency of instruction’ is vague. Use of the word “comparable” to define instruction that is substantially equivalent essentially substitutes one vague term for another. What does comparable



mean in this context? And to what aspects of instruction does comparability apply (e.g., does it include the amount of time devoted to subjects)?”

- “The definition of ‘registered school’ is incomplete. If a school that is registered has multiple sites, are all of these sites considered ‘registered,’ or is only the site that has applied for and been granted registration status considered to be registered?”
- “The definition of ‘superintendent’ is incomplete. In addition to including the superintendent of schools (which in New York City is the Chancellor), the definition should also specify that the term refers to the superintendent of each community school district in New York City.”

b. Section 130.2 -- Types of Substantial Equivalency Reviews and Determinations.

“This section requires that LSAs “shall make substantial equivalency determinations for all nonpublic schools within their geographical boundaries,” except for schools deemed substantially equivalent pursuant to section 130.3 of this Part. The New York State Education Department’s (“SED”) Guidelines for Determining Substantial Equivalency in Nonpublic Schools limited substantial equivalency reviews to new schools and schools for which a complaint alleging lack of substantial equivalency has been made. Requiring these reviews for all schools in a school district as large as New York City, which has more than 900 nonpublic schools, is burdensome and unrealistic. It will require expenditure of resources in cases where there is no need to do so, as many established

nonpublic schools are, and have been for years, providing substantially equivalent instruction.”

c. Section 130.4 -- Timeframes for substantial equivalency reviews, recommendations, and final determinations.

- “This section provides unrealistic timelines for the LSA to conduct substantial equivalency reviews of nonpublic schools. For new nonpublic schools, it requires that the LEA complete a substantial equivalency review within two years of when the nonpublic school commences instruction in any grades 1-12 and seven year thereafter. And for existing public schools that are not deemed substantially equivalent pursuant to section 130.3, the LSA must make substantially equivalency determinations, and recommendations for schools subject to a commissioner’s determination, for ‘all nonpublic schools in their geographic boundaries that are operating on the effective date of this Part by the end of the 2025-2025 school year and every seven years thereafter.’ In a school district the size of NYC, this is an unrealistic timeline. The NYC school district has more than 900 nonpublic schools. This schedule would require that New York City conduct hundreds of substantial equivalency reviews each year. Given budgetary and staffing constraints, this is not possible. The timelines should take into account the size of a district, and the number of nonpublic schools within the district, and should be extended accordingly.”

- “Given the unrealistic timelines discussed above, it is unreasonable to impose monetary sanctions on LEAs for failure ‘to make sufficient progress, as determined by the Department, toward reviewing nonpublic schools for purposes of making required substantial equivalency determinations by the end of the 2023-2024 school year.’ In addition, the penalty provision codified in Education Law Section 3234 is misplaced here. Section 3234 is limited to situations where a city or district “willfully omits and refuses to enforce the provisions of” the Compulsory Education Law. A city or district’s failure ‘to make sufficient progress’ is not necessarily a willful violation; rather, it may be the result of insufficient time to complete reviews despite best efforts to do so. As the Commissioner has recognized in decisions, withholding funds from a school district is a drastic penalty that should be used only in extreme cases” as it ‘operate[s] solely to the detriment of the district’s students and taxpayers.’ (See, e.g., Appeal of Nappi, 57 Ed. Dept. Rep., Decision No. 17387 (May 14, 2018).”
- d. Section 130.5 Substantial Equivalency Reviews. “Determination regarding whether Commissioner or LSA is responsible for making the final determination regarding substantial equivalency (paragraph a): The proposed regulation states that the LSA shall make this determination “prior to commencing a substantial equivalency review.” If this is done prior to the review, then the only evidence that can be considered in making this determination is data from the LSA’s files. However, this may not be sufficient to make this determination. The LSA may need additional information from the nonpublic school concerning whether the

school has a bilingual program and the hours of the educational program. Such information will likely only be available during the course of the substantial equivalency review.”

- e. Section 130.6 -- LSA Determinations. “The timeframes provided in paragraph (a) for preliminary substantial equivalency determinations are problematic. ... There are several problems with this provision. First, it requires that the LSA and nonpublic school ‘collaboratively develop’ a timeline and plan for the nonpublic school to achieve substantial equivalency, but fails to provide a mechanism for the LSA to proceed unilaterally with making a negative substantial equivalency determination if the nonpublic school does not cooperate in the review. NYCDOE recommends that such language be added to the regulation allowing the LSA to make a negative substantial equivalency finding without seeking permission from the Commissioner. Second, the timeframes in this paragraph are problematic. The time period of 60 days to devise a plan with each nonpublic school is insufficient, due to the sheer number of nonpublic schools that NYC will likely be working with at the same time. Third, with respect to the plan for each nonpublic school, if the preliminary determination is made at the end of the year, this may result in a nonpublic school having only one academic year to attain substantial equivalency. This may not be sufficient time for a school that needs to implement significant instructional enhancements and modifications. Therefore, we recommend that these timelines be extended, or, at the very least, that the proposed regulation allow a process for seeking an extension of the timelines

based on the size and needs of the LSA and the level of improvement required for the nonpublic school to attain substantial equivalency.”

- f. Section 130.8 -- Commissioner’s Determination. “The timeframe provided in paragraph (d)(2) is problematic for the reasons provided in response to Section 130.6(a), above. ... If the preliminary determination is made at the end of the year, this may result in a nonpublic school having only one academic year to attain substantial equivalency. This may not be sufficient time for a school that needs to implement significant instructional enhancements and modifications. Therefore, we recommend that these timelines be extended, or, at the very least, that the proposed regulation allow a process for seeking an extension of the timelines based on the needs of the LSA.”
- g. Section 130.9 -- Criteria for Substantial Equivalency Reviews.
- “Paragraph (b) requires that, in reviewing a nonpublic school for substantial equivalency, the reviewing entity must consider ‘whether English is the language of instruction for common branch subjects as required by Education Law Section 3204.’ However, this provision excludes other instructional requirements in Education Law Section 3204(3)(a)(2) ... It is unclear why the requirement that English be the language of instruction does not apply to these courses for middle and high school in the proposed regulation. In addition, it is unclear why the exception to the requirement that English be the language of instruction, provided in Section 3204(2), for pupils with limited English proficiency, is not reflected in the proposed regulation.”

- “Paragraph (e) requires that LSAs consider ‘whether the instructional program in the nonpublic school as a whole incorporates instruction in mathematics, science, English language arts, and social studies that is substantially equivalent to such instruction required to be provided in public schools pursuant to Education Law Section 3204(3).’ What does ‘as a whole’ mean in this context? It is not clear in the regulation what instructional elements or types of courses should be considered in this analysis.”
- “Paragraph (g) requires that LSAs consider ‘for nonpublic schools meeting the criteria in Education Law Section 3204(2)(ii)-(iii), the criteria enumerated in such statute for such schools.’ However, Education Law Section 3204(2)(ii) and (iii) requires that ‘the department (i.e., the NYS Education Department) shall consider the following [skill based factors]’; it does not require the LSA to do so. For that reason, the regulation should provide that the Commissioner, rather than the LSA, should consider these factors in the process of making the final determination on substantial equivalency, as required by Education Law Section 3204(2)(v). We recommend that paragraph (g) be deleted from the regulation.”

h. Section 130.14(b) and(c) -- Penalty Provisions and Enforcement.

- Regarding paragraph (b) of section 130.14, the commenter states that ‘[a]s the Commissioner has recognized in prior issued decisions, withholding public school moneys from a city or district is a drastic remedy that should be used only in the most extreme. circumstances and only

where there is willful misconduct ... This penalty provision has no place in a regulation that is designed to provide guidance to school districts on how to conduct substantial equivalency reviews. The Commissioner's power to impose penalties for willful misconduct is already in the Education Law. It is unnecessary and counterproductive to include it in this regulation. Therefore, we recommend that this provision be removed from the regulation."

- The commenter states that "[p]aragraph (c) of Section 130.14 provides that if the Commissioner determines that a nonpublic school has intentionally prohibited an LSA from conducting a substantial equivalency review, the Commissioner may issue a negative determination in accordance with Section 130.13. Since this regulation requires that nonpublic schools work collaboratively with LSAs to develop a plan and timeline for attaining substantial equivalency (Section 130.6(a)(1)(iii)), the LSA is in the best position to determine whether the nonpublic school is not cooperating in the substantial equivalency review or working collaboratively with the LSA to attain substantial equivalency. Therefore, we recommend that this section be changed to provide that the LSA, rather than the Commissioner, may issue a negative determination in the substantial equivalency review if the LSA determines that the nonpublic school is prohibiting the LSA from conducting the review or fails to work collaboratively with the LSA to develop a plan and timeline for attaining substantial equivalency."

RESPONSE: The commenter's general concerns are addressed in response to other comments herein. As for the specific comments and recommendations:

- a. See the Department's response above regarding the definition of "substantial equivalency of instruction." Regarding the term "registered school," this term means any school that is voluntarily registered with the Board of Regents under section 100.2(p) of the Commissioner's regulations. Thus, only a school that has applied for, and been granted, registration status is considered registered. Regarding the definition of "superintendent", pursuant to Education Law §2590-a, the Chancellor is the superintendent, or district leader, of the New York City school district. As the leader of the city school district of the city of New York, the Chancellor is appropriately defined as the superintendent for the New York City school district. The reason such responsibility lies with the Chancellor is that, under mayoral control, there is no longer a Board of Education of the City School District of the City of New York (*see Nacipucha v City of New York*, 18 Misc.3d 846, 850-51 [Sup Ct, Bronx County 2008, Victor, J.]). Community superintendents report to the Chancellor of the New York City Department of Education. As such, they are not comparable to a board of education.
- b. The Department disagrees that determinations, especially in the City of New York should remain limited to new schools and schools that are the subject of complaints (many of which, the Department notes, have been pending with the New York City Department of Education for years). It is imperative that substantial equivalency determinations be made for all nonpublic schools. The regulations provide appropriate procedures to ensure that all students are



receiving the instruction to which they are entitled under the law while also providing for the flexibility of alternative (and less burdensome) pathways.

- c. As stated above, the Department believes that it is reasonable to require that LSAs complete substantial equivalency reviews for all existing nonpublic schools by the end of the 2024-2025 school year. It is important to ensure that these reviews are completed in a timely manner to ensure that all students are receiving the instruction to which they are entitled under the law. The Department believes it is important to ensure that LSAs are making progress towards reviewing schools for substantial equivalency of instruction. The commenter presumes, but offers no evidence to suggest, that all of the nonpublic schools within its geographical boundaries will request or necessitate LEA review. The penalties are associated with willful insufficient progress and are discretionary.
- d. The LSA is expected to establish reasonable information gathering processes, including asking the nonpublic school for the requisite information, on whether a school meets the criteria for a Commissioner's determination prior to initiating a full review of the nonpublic school.
- e. If a nonpublic school is willfully prohibiting an LSA from conducting a review, pursuant to section 130.14(c) of the proposed rule, the Commissioner may issue a written decision making a negative substantial equivalency determination in accordance with section 130.13 of the proposed rule. The Department disagrees that the LSA needs to independently make a negative substantial equivalency determination without seeking permission from the Commissioner in these situations. Regarding the timeframes in section 130.6 of the proposed rule, as

stated above, the rule has been revised to clarify that the Commissioner may, upon written request, extend such timelines upon a showing of good faith progress toward development of a timeline and/or implementation of the plan, as applicable.

- f. See the Department's response in (e) above.
- g. Education Law §3204(2)(i) states that "[i]n the teaching of the subjects of instruction prescribed by this section, English shall be the language of instruction, and text-books used shall be written in English, except that for a period of three years, which period may be extended by the commissioner with respect to individual pupils, upon application therefor by the appropriate school authorities, to a period not in excess of six years, from the date of enrollment in school, pupils who, by reason of foreign birth or ancestry have limited English proficiency, shall be provided with instructional programs as specified in subdivision two-a of this section and the regulations of the commissioner. The purpose of providing such pupils with instruction shall be to enable them to develop academically while achieving competence in the English language." The requirement in the proposed regulation that nonpublic schools provide instruction in mathematics, science, English, and social studies, is reflective of the subjects required to be taught in public schools pursuant to Education Law §3204(3)(a); for example "American history" is a topic that may be covered in social studies, etc. Additionally, "hygiene" and "physical training" are covered by other provisions of the Education Law, as reflected in the proposed rule. The proposed rule does not state that the requirement that English be the language of

instruction does not apply to these courses for middle and high school, as it generally references all of the instruction in Education Law 3204(3). The Department notes that instruction in “communism and its methods and its destructive effects,” is permissive as Education Law §3204(3)(a)(3) uses the phrase “may provide.” The commenter’s claimed “exception” to the requirement that such instruction be provided in English is not an exception. Education Law §3204(2-a) outlines additional requirements for pupils of limited English proficiency, which is addressed in 8 NYCRR 130.9(c). These requirements state that LSAs must consider “whether students who have limited English proficiency have been provided with instructional programs enabling them to make progress toward English language proficiency.” Regarding the commenter’s query as to the meaning of “as a whole,” the Department will give the term its usual and commonly understood meaning. Thus, LSAs should consider the entirety of a nonpublic school’s instruction. Regarding section 130.9(g) of the proposed rule, as stated in the Department’s response above, the LSA is responsible for making a recommendation to the Commissioner for schools that meet such criteria, and the Commissioner then, consistent with statute, makes the final determination.

- h. Section 130.14(b) of the proposed rule merely reiterates what is provided in Education Law §3234. Regarding section 130.14(c) of the proposed rule, see the Department’s response to above in (e).

No further changes to the proposed rule are needed.

50. COMMENT: An executive vice president of a religious organization submitted comments on the proposed rule.

- a. The commenter discusses all the comments submitted by the Orthodox Jewish community in opposition. The commenter acknowledges that the proposed rule recognizes a variety of alternate pathways toward equivalency; however, the commenter states that “the reality is that many yeshivas would not fit within any of those alternate pathways and would thus be subject to highly intrusive direct LSA oversight – oversight that would likely require changes in those yeshivas’ daily school schedules, would intrude upon their educational and religious autonomy, and would jeopardize their ability to carry out the mission for which they were created. This concern is heightened by the unfettered power the LSA would have under the regulations to inject its own social perspective in reviewing yeshivas that come under its oversight authority. LSA reviewers may insist that certain sensitive subjects be taught the way government wants them taught, through a secular lens rather than through the school’s religious worldview....It is fine and good that the proposed regulations caution that LSA equivalency reviews ‘be informed by, and respectful of, the cultural and religious beliefs’ of the school under review (Section 130.10 (d)), but at the end of the day, when push comes to shove, such information and respect may not be enough to prevent an LSA from imposing its ‘enlightened’ perspective on the religious school. Yeshivas are not the only ones whose rights are threatened by the proposed regulations. Parents who choose such schools for their children, whose fondest dreams and most fervent prayers are that their children grow up to be faithful, knowledgeable, G-d fearing Jews, are in the regulations’ crosshairs as well. In the yeshiva community, parents seek out educational settings for their

children where basic educational decisions— what courses should be taught, by whom, for how many hours, what their content should include or exclude, how to divide the school day between religious and secular studies – are made by religious leaders and other experts in Jewish education, not by checklist bearing government functionaries who have no real understanding of the Jewish faith or of the yeshiva community.”

- b. The commenter notes the “sundry items” an LSA must consider in making a substantial equivalency review in section 130.9 of the proposed regulation. However, the commenter states “[n]owhere, though, is there any reference to consideration of other educational disciplines that may be offered by the school. Those, apparently, count for nothing in evaluating the quality of a school’s overall instructional program. Respectfully, this makes no sense as a matter of sound educational policy. Worse, in practical terms (again, from the perspective of the yeshiva community), it would mean that many outstanding Jewish schools that devote the major part of their school day to Jewish religious studies would likely fall short in a substantial equivalency review unless they make significant changes to their school day schedules.” The commenter requests that “[a]t a minimum, an equivalency evaluator should be prepared to review, and credit, those aspects of a yeshiva’s educational program ... The new regulations should make clear that the reviewer must indeed look for it.”
- c. The commenter discusses revisiting SED’s interpretation of Education Law 3204(2)(ii)-(iii). The commenter references a lawsuit filed against the Department and the holding in such case, and how the Department interpreted such holding

regarding the above referenced statutory provisions, which they refer to as “the 2018 Amendment.” The commenter states “[p]utting aside the problems with the 2018 Amendment – most unfortunately, the unseemly process leading to its enactment – what it was trying to accomplish was laudable. It sought to strike a balance between the two essential interests at play here: the state’s interest in ensuring that all children receive an education that will equip them to be productive members of society, and the right of parents to direct the education of their children in accordance with the dictates of their faith. To strike that balance, the 2018 Amendment posits that children enrolled in yeshivas, where the lengthy school day and bi-lingual programs testify to a rigorous dual academic program of Jewish and secular studies, must receive education throughout the elementary school years in the four core academic areas of ELA, math, history and science, but should also be allowed to devote long hours of the school day to an intensive program of Jewish studies – something that can be accomplished only if they are exempt from the prescribed subjects and hours of the non-core secular studies.”

- d. The commenter discusses section 130.3(a)(1) of the proposed rule, which states that a registered high school, or a nonpublic school serving grades 1 through 8 that has a registered high school shall be deemed substantially equivalent. The commenter states that the “logic behind this safe harbor would appear to be that a high school that has achieved the status of registration is assumed to be a quality school, and that an affiliated elementary school may be assumed to be a quality school as well. While this is a welcome proposal, it does not go far enough. There are many high quality independent nonpublic elementary schools,

not formally affiliated with any high school, whose graduates go on to registered high schools. These independent elementary schools, no less than affiliated elementary schools, demonstrate their high quality through the large percentage of graduates who attend registered high schools. We respectfully suggest that any unaffiliated nonpublic elementary school that can show that at least 75% of its graduates go on to attend registered high schools should also be deemed substantially equivalent.”

- e. The commenter discusses the accreditation pathway in section 130.3 (a) (3) of the proposed rule stating that it “is an attractive option, but unfortunately will not provide much comfort for the yeshiva community, at least not in the short term. That is because there are very few yeshivas in New York State that have pursued accreditation – and in fact very few are accredited. Even if, as a result of this new regulatory safe harbor, yeshivas will now wish to pursue accreditation from an SED-approved accreditation agency that has the capacity to evaluate the religious studies component of the school day, and dozens of yeshivas make hasty application for accreditation, the accreditation process will take [several] years before it is finally concluded. In the meantime, the yeshiva will be subject to LSA oversight – and all of the attendant concerns outlined above. We respectfully suggest that the regulations make clear that the SED must approve at least one accreditation agency that has experience with Jewish schools, and that if a school has taken appropriate steps on the path toward accreditation – as evidenced by provisional accreditation or some other appropriate benchmark – it should be deemed substantially equivalent.”

- f. The commenter references the appeals provision of the proposed rule in section 130.12 and states that “[a] section 310 appeal is nothing to be trifled with; by statute, the Commissioner is “required to examine and decide” any such appeal. This proposed regulation would effectively invite every malcontent who is unhappy with a school’s positive equivalency determination to appeal such determination to the Commissioner. That cannot be, however, as the underlying statute, section 310, allows for appeal only by “any party conceiving himself aggrieved.” We respectfully suggest that Section 310 be revised to make clear that the authority to appeal rests only with an actual party to the proceeding.”

**RESPONSE:**

- a. Please see the Department’s response above regarding LSAs’ responsibility to enforce compulsory education requirements, LSA review concerns, and parents’ right to direct the education of their children.
- b. Regarding the consideration of religious studies in reviewing nonpublic schools for substantial equivalency, see the Department’s response above.
- c. Regarding the subjects that LSAs must consider in conducting substantial equivalency reviews, and time for religious studies, see the Department’s response above.
- d. The Department does not believe that permitting nonpublic elementary schools that are not affiliated with a registered high school to use the registration pathway prescribed in the proposed rule would be appropriate. Without any formal relationship, the Department cannot presume that an independent school provides substantially equivalent instruction based upon the mere fact that some



(the commenter does not specify how many) students go on to attend registered high schools. By contrast, if a nonpublic school has both an elementary school and a registered high school, the nonpublic school's elementary school prepares its students for instruction in the associated registered high school.

- e. See the Department's response above regarding approving an accreditation agency that has experience with Jewish schools.
- f. Regarding appeals, see the Department's response above.

No changes to the proposed rule are necessary.

51. COMMENT: A religious organization submitted comments in opposition to the proposed regulation. The commenter objects to the proposed regulations for two reasons. First, because they “divest too much authority from the NYSED and grant enormous power to local school authorities,” which creates a conflict of interest. The commenter states that the law provides the State with the obligation and authority to ensure compliance with compulsory education, but does not vest power with LSAs to oversee nonpublic schools. Second, because the regulations are vague and “do not sufficiently set forth the grounds upon which a nonpublic school may demonstrate without LSA interference that it satisfies the substantial equivalency ‘pathway option.’” The commenter notes that the proposal does not specify how an accreditation organization shall be reviewed by NYSED or outline the names or types of organizations that may meet the criteria for accreditation. The commenter also states that “nowhere in the regulations is the term “substantial” ever defined, which is problematic because it gives the LSAs extremely significant latitude to determine what

“substantial” would mean, and how “substantial equivalency” is to be quantified. This, the commenter predicts, “will cause undue conflict and confusion.”

RESPONSE: The Department disagrees with the commenter’s assertion that the proposed regulations are inappropriate, overbroad, or vague. Regarding LSA responsibility to enforce compulsory education requirements, see the Department’s response above. Regarding pathways to demonstrate substantial equivalency in section 130.3 of the proposed rule, the proposed rule outlines criteria that will be used for the review and approval of accreditors. Accreditors that meet the requirements of the proposed rule will be approved, and the Department will post the names of these accreditors on its website. Regarding the definition of the word substantial, section 130.1(d) of the proposed rule defines the term “substantial equivalency of instruction.” No changes to the proposed rule are necessary.

52. COMMENT: The elected chair of the Commissioner's Advisory Council for Religious and Independent Schools submitted comments on the proposed rule on behalf of the advisory council. The commenter states that the advisory council is “disappointed” with the resulting proposed regulations. Specifically, they are disappointed that the pathways are not “simple check boxes” for the 95% of religious and independent schools that do offer a substantially equivalent education; rather, they only offer a check box “to those schools that have been able to afford a lengthy and expensive accreditation process or have a registered high school as part of their larger organization. For the rest of the religious and independent schools, the proposed regulations creates new mandated and burdensome procedures with no remuneration from the State.” The commenter also notes that “while the pathways do not offer any

recognition of the rigorous religious education that is offered in so many of our schools, they do include vaguely worded requirements regarding teacher competency and measuring student growth. Since the LSAs are still fully tasked with the evaluation of the religious and independent schools in their neighborhoods, these vague requirements leave the interpretation of these schools' substantial equivalence in the subjective hands of the LSA."

RESPONSE: The Department believes that the proposed rule strikes the correct balance by removing much of the burden of LSA reviews for schools that meet certain criteria demonstrating substantial equivalence of instruction through a pathway prescribed in section 130.3 of the proposed rule. The proposed rule offers six separate pathways to demonstrate substantial equivalency of instruction, not just through accreditation or by being a registered high school as the commenter suggests. Additional guidance on implementation of the pathway options will likely be forthcoming, but in no instance are reviews and determinations limited to box-checking. No changes to the proposed rule are necessary.

53. COMMENT: A religious leader submitted comments on the proposed rule. The commenter references a meeting with Department staff where religious leaders stated that they are not allowed to change anything in the education of their children because it infringes on their religion and explained the well-educated and successful character of their graduates. The commenter discusses the six pathways outlined in the proposed rule and states that "[b]ecause we are anxious to comply without in any way violating our religious scruples, we have begun the process of developing a concrete alternative which will constitute an objective way for you and your colleagues to

determine compliance...we respectfully requested that your draft regulations include a placeholder for a seventh alternative for compliance with state regulations.” The commenter states that they were shocked and frustrated to learn that the Department issued proposed regulations that still ask for a large amount of specific secular studies. The commenter states that there is nothing in the proposed regulation that address the concerns of the Orthodox Jewish community they represent, and no sign of the recommendations that they made at the meeting.

RESPONSE: See the Department’s response above regarding infringement on religion, success of graduates of religious school systems, and the subjects that LSAs must consider in conducting reviews. Regarding the commenter’s recommendation of a forthcoming proposal, the Department is only obligated to consider alternative proposals submitted within the comment period; as such, this comment is outside the scope of the proposed rule. The Department disagrees with the assertion that the Department did not listen to and consider the commenter’s valid concerns. Members of the public, including the Commissioner’s Advisory Council, were afforded ample opportunity to offer suggestions on the proposed regulations. No changes to the proposed rule are necessary.

54. COMMENT: A principal of a nonpublic school submitted comments on the proposed rule. The commenter states that the proposed regulations would “seriously undermine the independence of nonpublic schools statewide and infringe upon parent rights.” The commenter discusses the complaint provision of the proposed rule and states that "anyone can issue a complaint about any school even those that are exempt. There are no protocols or guidelines for this process and leaves every nonpublic school

at the mercy of advocacy groups...Even if a school such as mine could easily demonstrate equivalency, the negative PR of being under investigation could hurt enrollment in the short run.” The commenter then references an accrediting bodies’ guidelines for complaints and provides such guidelines. The commenter discusses section 130.14 of the proposed rule and states that its inclusion is troubling as it “puts parents at risk of incarceration if they send their children to school that does not meet equivalency standards.” The commenter states that there is no provision for the use of religious studies as a means of demonstrating substantial equivalency.

RESPONSE: See the Department’s response above regarding undermining the independence of nonpublic schools, infringement upon parental rights, complaints, and consideration of religious studies. Regarding section 130.14 of the proposed rule, see response to comments on truancy and educational neglect and note that such section references the penalties outlined in Education Law §3233. No changes to the proposed rule are necessary.

55. COMMENT. An association representing religious schools submitted comments on the proposed rule. The commenter states that they agree that every child in New York State is entitled to a high-quality education but they “are not in agreement as to how that is to be regulated.” They state that local public school districts should not be allowed to oversee instruction of religious and independent schools, stating that “[n]ot only is it unnecessary, but it can create a conflict of interest and would be extremely difficult to regulate.” Regarding this purported conflict of interest, the commenter states that “[p]ublic schools are often faced with decreasing budgets, and because they are required by law to provide mandated services to private schools, they

could have a financial incentive to assess private schools unfairly.” The commenter also discusses the success of their graduates, how their schools are accredited and reviewed by various agencies, and that they provide an outstanding education that exceeds “the margins for substantial equivalency.” They state that it is not necessary to spend time and resources on schools that have already undergone a proven review process, and these local school district resources would be better utilized somewhere else. The commenter states that “there are 950 local public school districts throughout New York State. It is unclear how the State could achieve objective, consistent, and accurate assessments of our schools given the scope of this proposal.” The commenter requests to exempt their schools from the proposed regulation because “they have already been proven to be substantially equivalent by accrediting agencies.”

RESPONSE: See the Department’s response above regarding LSA responsibility to enforce compulsory education requirements, LSA reviews being a conflict of interest and unnecessary, success of nonpublic schools and students. The Department does not have the authority to provide exemptions from Compulsory Education Law requirements. Additionally, as discussed above, the proposed rule provides a pathway to be deemed substantially equivalent if a school is accredited by a Department approved accrediting body. The asserted number of public school districts is inflated and inaccurate. No changes to the proposed rule are necessary.