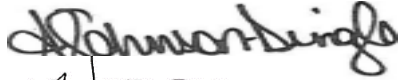
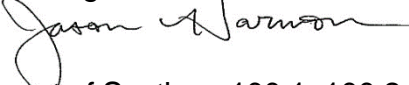





**TO:** The Honorable Members of the Board of Regents

**FROM:** Angelique Johnson-Dingle   
Jason Harmon 

**SUBJECT:** Proposed Amendment of Sections 100.1, 100.2, and 100.5  
of the Regulations of the Commissioner of Education  
Relating to Virtual Instruction

**DATE:** April 4, 2024

**AUTHORIZATION(S):** 

### SUMMARY

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

Should the Board of Regents adopt the proposed amendment of sections 100.1, 100.2, and 100.5 of the Regulations of the Commissioner of Education relating to virtual instruction?

#### **Reason for Consideration**

Review of Policy.

#### **Proposed Handling**

The proposed amendment is submitted to the Full Board for adoption as a permanent rule at the April 2024 meeting of the Board of Regents. A copy of the proposed amendment (Attachment A) is attached.

#### **Procedural History**

The proposed amendment was presented to the P-12 Education Committee for discussion at the December 2023 meeting of the Board of Regents. A Notice of Proposed Rule Making was published in the State Register on December 27, 2023, for a 60-day public comment period. Following publication in the State Register, the Department received comments on the proposed amendment. An Assessment of Public Comment (Attachment B) is attached. In response to public comment, non-substantial revisions to the proposed amendment have been made as described below. If adopted at the April 2024 meeting, a Notice of Adoption will be published in the State Register on May 1, 2024. Supporting materials are available upon request to the Secretary of the Board of Regents.

## **Background Information**

Virtual instruction has been part of the educational landscape in New York for decades. Schools, districts, and boards of cooperative educational services (BOCES) across the State have offered learning experiences, courses, and programs through digital technologies that have met the needs of students and increased equitable access to courses, including advanced courses. The utilization of virtual instruction increased exponentially in the years of the COVID-19 pandemic. The experiences during that period have subsequently led to significant growth in the utilization of virtual instruction in New York.

Currently, there are regulations pertaining to: (1) credit for online and blended courses (8 NYCRR 100.5(d)(10)); (2) remote instruction due to emergency conditions and plans for the provisions of such instruction (8 NYCRR 175.5(e), 155.17, 200.7); and (3) remote instruction provided to students in a home, hospital, or institutional setting other than a school (8 NYCRR 100.22(e)).

However, there are no regulations that define the parameters of virtual instruction generally. For example, the online and blended course regulations are relevant to diploma requirements and are, therefore, only applicable to students enrolled in courses eligible for diploma credit (typically students in grades 9-12). Additionally, the regulation authorizing remote instruction under emergency conditions adopted at the September 2022 Regents meeting only applies in limited circumstances.

Therefore, the Department proposes to amend the Commissioner's regulations to define the parameters under which a school district, BOCES, charter school, registered nonpublic school, school-age approved special education program (including approved private school for the education of students with disabilities, state-supported school, or state-operated school)<sup>1</sup> or educational program administered or supervised by a state agency pursuant to Education Law §§112 and 3202(f) may provide virtual instruction.

## **Proposed Amendment**

### **Definitions:**

While the Board of Regents adopted a definition for the term "remote instruction"<sup>2</sup> within the context of the emergency conditions regulation, there is no general definition of "virtual instruction." These terms have different definitions; remote instruction is instruction that occurs due to limitations on access to a brick-and-mortar classroom while virtual instruction is an intentional learning course or program conducted through digital means. Additionally, the definition of remote instruction in Commissioner's regulations encompasses non-digital and audio-based instruction while virtual instruction requires student access via a digital device with adequate internet service.

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<sup>1</sup> Special Act School Districts also operate approved special education programs and will be authorized to provide virtual instruction pursuant to the regulations applicable to school districts.

<sup>2</sup> Definitions for the terms "non-digital and/or audio-based instruction," "asynchronous instruction," and "synchronous instruction" were also adopted.

Therefore, the Department proposes to add a new subdivision (y) to section 100.1 of the Commissioner's regulations that defines "virtual instruction" as synchronous or a combination of synchronous/asynchronous instruction designed for delivery in a virtual learning environment where there is regular and substantive interaction between the student and teacher.

The Department also proposes to add a new subdivision (z) to section 100.1 of the Commissioner's regulations defining "blended instruction" as instruction that is partially delivered as synchronous instruction in an in-person learning environment and partially as synchronous or a combination of synchronous/asynchronous instruction in a virtual learning environment where there is regular and substantive interaction between the student and teacher.

Additionally, the Department proposes to add a new subdivision (aa) to section 100.1 of the Commissioner's regulations defining "virtual learning environment" as an instructional and learning environment facilitated through digital video-based technology and/or an online learning management system where teacher-to-student, student-to-student, and/or student-to-content interactions occur solely through digital, internet-connected technology.

### **Virtual Instruction and Blended Instruction:**

The proposed rule also adds a new subdivision (u) to section 100.2 of the Commissioner's regulations to define the conditions under which virtual instruction and blended instruction may be delivered. This provision provides that parents or persons in parental relation<sup>3</sup> may voluntarily elect that their children receive virtual and/or blended instruction if offered by a school district, BOCES, charter school, registered nonpublic school, educational program, or school-age approved special education program.

Districts, BOCES, schools, and programs that offer virtual and/or blended instruction must ensure that students enrolled in such instruction have access to the digital, internet-connected technology and internet access necessary to receive and participate in instruction. Districts, BOCES, schools, and programs must also ensure that virtual and blended instruction: (1) align with the applicable New York State learning standards as prescribed in section 100.1(t); (2) results in documentation of student mastery of the learning outcomes; (3) are provided in a manner consistent with their definitions in section 100.1(y) and (z), as applicable; (4) satisfy the unit of study and unit of credit requirements in section 100.1(a) and (b), as applicable; and (5) are provided in accordance with enrolled students' individualized education programs to ensure the continued provision of a free appropriate public education, as applicable.<sup>4</sup>

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<sup>3</sup> Or a student, where the student is 18 years or older or an emancipated minor, except where such student is a student with a disability.

<sup>4</sup> The new rule ensures that requirements related to a free appropriate public education equally apply to students with disabilities receiving virtual instruction and/or blended instruction.

This provision also prescribes who may provide virtual and/or blended instruction. Such instruction must be provided by one of the following:

- an appropriately certified teacher from the school district in which the student is enrolled;
- an appropriately certified teacher from a BOCES that has contracted with the school district to provide instruction in the subject area where authorized pursuant to Education Law section 1950;
- an appropriately certified teacher from a school district who provides instruction in the subject area under a shared service agreement;
- in the case of a registered nonpublic school, a teacher of the subject area from the registered nonpublic school;
- in the case of a charter school, a teacher of the subject area from the charter school; or
- in the case of an educational program administered by a state agency, or a school-age approved special education program, a teacher of the subject area from such program.

The new rule defines an “appropriately certified teacher” providing virtual instruction and blended instruction as a “teacher who holds a New York State teaching certificate in the subject area in which instruction is provided.”<sup>5</sup>

#### **Technical Corresponding Amendments:**

The proposed rule repeals the online and blended coursework provision in section 100.5(d)(10) as that provision is only applicable to students enrolled in courses eligible for diploma credit. It is no longer needed with the newly added online and blended instruction provision in section 100.2(u) discussed above.

Additionally, the proposed rule amends section 100.5(d)(5) regarding the awarding of transfer credit for students awarded credit while attending an educational program administered or supervised by a state agency. References to section 100.5(d)(10) were removed, and a reference to coursework provided through virtual and/or blended instruction in accordance with section 100.2(u) was added.

#### **Non-substantial Revision to the Proposed Amendment:**

In response to public comment the Department proposes to move the effective date of the proposed rule to September 1, 2024, to correspond with the beginning of the 2024-25 school year, as to not interrupt current virtual and blended instruction courses and programs provided in the 2023-24 school year.

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<sup>5</sup> The new rule’s definition of an “appropriately certified teacher” conforms with the definition of an appropriately certified teacher in the area of providing online and blended courses for diploma credit [8 NYCRR 100.5(d)(10)]. As explained further in this Regents item, section 100.5(d)(10) will be repealed as unnecessary with the adoption of the new rule.

## **Related Regents Items**

December 2023: [Proposed Amendment of Sections 100.1, 100.2, and 100.5 of the Regulations of the Commissioner of Education Relating to Virtual Instruction](https://www.regents.nysed.gov/sites/regents/files/1223p12d2revised.pdf)  
(<https://www.regents.nysed.gov/sites/regents/files/1223p12d2revised.pdf>)

January 2023: [Proposed Amendment of Sections 200.7, 200.16, and 200.20 of the Regulations of the Commissioner of Education Relating to Remote Instruction and its Delivery Under Emergency Conditions and Length of School Day for Approved School-Age and Preschool Programs Serving Students with Disabilities](https://www.regents.nysed.gov/sites/regents/files/123brca12.pdf)  
(<https://www.regents.nysed.gov/sites/regents/files/123brca12.pdf>)

January 2023: [Proposed Addition of Section 100.22 and Amendment of Section 200.6 of the Regulations of the Commissioner of Education Relating to Instruction Provided to Students in a Home, Hospital, or Institutional Setting Other Than a School \(Homebound Instruction\)](https://www.regents.nysed.gov/sites/regents/files/123brca7.pdf)  
(<https://www.regents.nysed.gov/sites/regents/files/123brca7.pdf>)

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

June 2011: [Proposed addition of Section 100.5\(d\)\(10\) of the Regulations of the Commissioner of Education, relating to Credit for Online and Blended Coursework](https://www.regents.nysed.gov/sites/regents/files/documents/meetings/2011Meetings/June2011/611p12a5.pdf)  
(<https://www.regents.nysed.gov/sites/regents/files/documents/meetings/2011Meetings/June2011/611p12a5.pdf>)

## **Recommendation**

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

VOTED: That section sections 100.1, 100.2, and 100.5 of the Regulations of the Commissioner of Education be amended, as submitted, effective September 1, 2024.

## **Timetable for Implementation**

If adopted at the April 2024 meeting, the proposed amendment will become effective as a permanent rule on September 1, 2024.

AMENDMENT OF THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to sections 101, 207, 208, 305, 308, 309, and 3204 of the Education Law.

1. Section 100.1 of the Regulations of the Commissioner of Education is amended by adding subdivisions (y), (z), and (aa) to read as follows:

(y) Virtual instruction means synchronous, or synchronous and asynchronous, instruction provided by a teacher as prescribed in section 100.2(u)(3) that is designed for delivery in a virtual learning environment where there is regular and substantive interaction between the student and teacher.

(z) Blended instruction means instruction provided by a teacher as prescribed in section 100.2(u)(3) that is designed for delivery part of the time as synchronous instruction in an in-person learning environment, and part of the time as synchronous, or synchronous and asynchronous, instruction in a virtual learning environment where there is regular and substantive interaction between the student and teacher.

(aa) Virtual learning environment means an instructional and learning environment facilitated through digital video-based technology and/or a combination of an online learning management system and video-conferencing technology, where teacher-to-student, student-to-student, and/or student-to-content interactions occur solely through digital, internet-connected technology.

2. Section 100.2 of the Regulations of the Commissioner of Education is amended by adding a new subdivision (u) to read as follows:

(u) Virtual instruction and blended instruction.

(1) Parents, or persons in parental relation of a student, or a student that is 18 years or older, other than a student with a disability as defined in section 200.1(zz) of this Chapter, or a student who is an emancipated minor, who is enrolled in a school district, a board of cooperative educational services (BOCES), charter school, registered nonpublic school, or educational program operated by a state-operated or state-supported school pursuant to Articles 85, 87 and 88 of the Education Law, private residential or non-residential school for the education of students with disabilities approved pursuant to Article 89 of the Education Law or operating under Article 81 of the Education Law, or educational program administered or supervised by a state agency pursuant to Education Law §§112 and 3202(f) and Parts 116 and 118 of this Title may opt-in to receive virtual instruction and/or blended instruction if such instruction is offered.

(2) A school district, BOCES, registered nonpublic school, charter school, or educational program operated by a state-operated, state-supported, or approved private school for the education of students with disabilities, or administered or supervised by a state agency, that offers virtual instruction and/or blended instruction shall ensure that students enrolled in such instruction have the digital, internet-connected technology and internet access necessary to receive and participate in such instruction.

(3) The school district, BOCES, registered nonpublic school, charter school, or the chief administrator of an educational program operated by a state-operated, state-supported, or approved private school for the education of students with disabilities, or administered or supervised by a state agency shall ensure that virtual instruction and blended instruction:

(i) align with the applicable New York State learning standards as prescribed in subdivision (t) of section 100.1 of this Part;

(ii) are provided in accordance with enrolled students' individualized education programs to ensure the continued provision of a free appropriate public education;

(iii) provide for documentation of student mastery of the learning outcomes;

(iv) are provided in a manner consistent with the definitions of such terms pursuant to subdivisions (y) and (z) of section of this Part, as applicable; and

(v) satisfy the unit of study and unit of credit requirements in subdivisions (a) and (b) of section 100.1 of this Part, as applicable.

(4) (i) Virtual instruction and blended instruction must be provided by:

(a) an appropriately certified teacher from the school district in which the student is enrolled;

(b) an appropriately certified teacher from a BOCES that has contracted with the school district to provide instruction in the subject area where authorized pursuant to Education Law section 1950;

(c) an appropriately certified teacher from a school district who provides instruction in the subject area under a shared service agreement;

(d) in the case of a registered nonpublic school, a teacher of the subject area from a registered nonpublic school;

(e) in the case of a charter school, a teacher of the subject area from a charter school;

(f) in the case of an educational program administered by a state agency, a teacher of the subject area from such program; or

(g) in the case of an approved private school for school-age students with disabilities, state-supported or state-operated school, a teacher of the subject area from such school.



(ii) For purposes of this paragraph, appropriately certified teacher means a teacher who holds a New York State teaching certificate in the subject area in which instruction is provided.

(5) A student with a disability as defined in section 200.1(zz) of this Chapter who is receiving virtual instruction and/or blended instruction shall continue to receive educational services so as to enable the student to receive a free appropriate public education.

3. Item (ii) of subclause (2) of clause (b) of subparagraph (i) of paragraph (5) of subdivision (d) of section 100.5 of the Regulations of the Commissioner of Education shall be amended to read as follows:

(ii) A principal shall award transfer credit to any student for credit awarded while the student attended an educational program administered or supervised by a State agency pursuant to Education Law sections 112 and 3202 (7) and Parts 116 or 118 of this Title, upon the attestation of the chief administrator of such program, in a format prescribed by the commissioner, of the following:

(A) the student:

(I) ...

(II) ...

(III) ...

(IV) has met the requirements for the award of credit for independent study pursuant paragraph (9) of this subdivision; and[/or

(V) has met the requirements for the award of credit for online and/or blended courses pursuant to paragraph (10) of this subdivision; and]

(B) the student was provided instruction by a teacher certified pursuant to Part 80 of this Title or, where the coursework was for make-up credit[ or in online and/or

blended courses], the student was provided instruction in accordance with the requirements of [paragraphs] paragraph (8) [and (10), respectively, ]of this subdivision or where the coursework was provided through virtual instruction and/ or blended instruction in accordance with the requirements of subdivision (u) of section 100.2 of this Part.

4. Paragraph (10) of subdivision (d) of section 100.5 of the Regulations of the Commissioner of Education is REPEALED and RESERVED.

ASSESSMENT OF PUBLIC COMMENT

Following publication of the Notice of Proposed Rule Making in the State Register on December 27, 2023, the State Education Department (“the Department”) received the following comments on the proposed amendment:

1. COMMENT: A commenter indicated that the proposed changes will negatively impact the district’s ability to provide remote learning options for home, hospital, and institutional instruction. The commenter stated that they “had a difficult time getting any kind of certified teacher to instruct students either at home or alternate locations since the hourly requirement increased dramatically starting this year.”

DEPARTMENT RESPONSE: The intent of the proposed amendment is to define the parameters under which schools, boards of cooperative educational services (BOCES), and programs may deliver planned virtual and blended instructional courses and programs. The proposed amendment does not impact the use of remote instruction for students in home, hospital, and institutional instructional settings. At its January 2023 meeting, the Board of Regents adopted home, hospital, and institutional instruction regulations (8 NYCRR 100.22) to increase the amount of instructional time required for students receiving such instruction *because*, among other things, remote instruction is an allowable method of such instruction ([January 2023 Home, Hospital, and Institutional Instruction](#)). Therefore, no change to the proposed rule is needed.

2. COMMENT: Many of the comments are opposed to the proposed definition of “virtual instruction.” Specifically, commenters feel that the omission of fully asynchronous models of instruction (i.e., models with no synchronous interaction between teachers and students) from the definition will result in harm to specific programs that rely on fully asynchronous instruction. Many of the commenters asserted

that fully asynchronous models of instruction provide flexible schedules, expanded course offerings, and improving overall equity. This explanation was supported by testimonials and citations to research. Some commenters indicated that decisions about whether fully asynchronous instruction is the best method of instruction for a student should be made by the district or LEA.

DEPARTMENT RESPONSE: The Department has considered these comments and agrees that asynchronous instruction can be an essential *component* of virtual instruction. However, the Department does not support the addition of fully asynchronous models for K-12 students to the regulatory definition for “virtual instruction” because:

- Commissioner’s regulations continue to require “regular and substantive” interaction between teacher and student. School districts are responsible for determining if courses meet this interaction requirement.
- School districts retain the ability to offer flexible schedules, expand course offerings, and improve equitable access to learning experiences under the proposed rule.

While no change is needed, the Department will provide further guidance upon adoption of this rule to specifically address this comment.

3. COMMENT: A commenter recommends that NYSED modify the proposed definition for virtual learning environment to state: “through digital video-based technology, an online learning management system, and/or a combination of an online learning management system and video-conferencing technology.”

DEPARTMENT RESPONSE: The Department does not support the use of virtual learning environments where there is no synchronous contact between teacher and student. The inclusion of “online learning management systems” into the definition of a

virtual learning environment would allow teachers to communicate with students through email and online chat only. While SED supports written communication as an important *component* of virtual instruction, communicating solely with students via email or chat is not permitted by the proposed rule and is inconsistent with the Department's goal of ensuring that students receive meaningful instruction through virtual learning. Therefore, no changes to the proposed rule are necessary.

4. COMMENT: Many commenters are concerned that the proposed definition of virtual instruction will disallow them from providing a program that primarily uses asynchronous instruction as the learning modality.

DEPARTMENT RESPONSE: The proposed amendment does not prohibit asynchronous instruction; rather, it permits a blend of asynchronous and synchronous modalities. Virtual instruction may continue to be provided through learning management systems and include self-paced components, provided that synchronous instruction is also a component of the virtual instruction. While no change is needed, the Department intends to provide further guidance upon adoption of this rule to specifically address this comment. See also the Department's response to comment number two.

5. COMMENT: Some commenters requested clarification about the phrase "parents...may opt-in to receive virtual instruction and/or blended instruction if such instruction is offered."

DEPARTMENT RESPONSE: The proposed rule does not require that districts, schools, BOCES, or programs provide virtual or blended instruction opportunities for students, but merely identifies parameters for those districts, schools, BOCES, or programs elect to do so. A student cannot be required to participate in virtual or blended instruction without consent from the student's parent, person in parental relation of the student, or the student if they are 18 years or older (other than a student with a

disability). While no change is needed, the Department intends to provide further guidance upon adoption of this rule to specifically address this comment.

6. COMMENT: Some commenters believe that the proposed regulations lack specificity regarding the teacher of record and the ability to approve a teacher to teach outside their content area.

DEPARTMENT RESPONSE: The proposed amendment does not change the requirements for districts and LEAs to report the “teacher of record.” The requirements for incidental teaching, or “teaching outside the content area,” are prescribed in section 80-5.3 of the Commissioner’s regulations. No changes to the proposed rule are necessary.

7. COMMENT: Many commenters expressed concern over the timeline of these proposed amendments. The commenters allege that, if the amendments are adopted, districts and LEAs may have to change their programs with only a few weeks left in the 2023-24 school year. Many commenters requested an extension of the implementation date.

DEPARTMENT RESPONSE: The Department agrees that the proposed timeline could negatively impact the students attending established virtual and blended instruction programs for the 2023-24 school year. In response, the Department proposes to make a non-substantial revision to the proposed rule to make the effective date September 1, 2024, rather than May 1, 2024. Therefore, the proposed rule will become effective at the beginning of the 2024-25 school year.

8. COMMENT: A commenter wrote in support of the proposed change to the rule, arguing that it will formalize virtual instruction. The commenter specifically supported the portion of the regulation regarding teacher requirements.

DEPARTMENT RESPONSE: The Department appreciates the comment of support. No change is needed.

9. COMMENT: One commenter requested that the Department retain the phrase “or under the direction and/or supervision of” from 100.5(d)(10) that was removed in the proposed rule. The commenter expressed that, without this language, the proposed rule places additional pressure on districts and LEAs struggling with teacher shortages.

DEPARTMENT RESPONSE: The Department omitted this phrase in the proposed rule as it is ambiguous. The proposed rule seeks to rectify this ambiguity and promote common understanding regarding virtual and blended instruction. While no change to the proposed rule is needed, the Department intends to provide further guidance upon adoption of this rule to address this comment.