





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: March 3, 2022

AUTHORIZATION(S): 

SUMMARY

Issue for Discussion

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 at the March 2022 meeting of the Board of Regents. A copy of the proposed amendment is attached (Attachment A).

Procedural History

A Notice of Proposed Rulemaking will be published in the State Register on March 30, 2022 for a 60-day public comment period. 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 receive 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 has remained 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]). 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 local school authorities (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 found that the guidance 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 §3240, 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 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 schools' 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.
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- 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, 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.

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)

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>)

Recommendation

Not applicable.

Timetable for Implementation

It is anticipated that the proposed amendment will be presented for permanent adoption at the September 2022 Regents meeting after publication of the proposed amendment in the State Register and expiration of the 60-day public comment period required under the State Administrative Procedure Act. If adopted at the 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, 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 acting in lieu of the board of education of such city school district to the extent authorized by Article 52-A of the Education Law and, with respect to community school districts and New York City superintendencies, such term shall mean the community superintendent or other

superintendent of schools acting in lieu of the board of education to the extent authorized by Article 52-A of the Education Law.

(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, 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, the LSA shall render a final determination in accordance with the provisions of subdivision (b) of this section.

(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.

(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, including the nonpublic school's right to appeal to the Commissioner pursuant to Education Law §310 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 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;

(c) whether students who have limited English proficiency have been provided with instructional programs enabling them to make progress toward English language proficiency;

(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 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.

(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 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.