

Substantial Equivalency Implementation Guidance

New York State Education Department

OFFICE OF RELIGIOUS AND INDEPENDENT SCHOOL
SUPPORT

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Introduction

Like many states, New York has a compulsory education law which requires that children aged 6-16 (or 17 in some localities) receive instruction. While most students receive this instruction in public schools, families have a constitutional right to select other options, such as a religious or independent school. Article 65 of the New York State Education law requires that wherever school-aged children receive instruction, that instruction must provide them with the opportunity to acquire the essential basic knowledge and skills necessary to function as citizens and members of society. It places the primary responsibility for confirming that students attending nonpublic schools are receiving such instruction upon local school authorities. Students in nonpublic schools are entitled to receive instruction that is at least substantially equivalent to the instruction provided in the public schools. It need not be identical to what is provided in the public schools.

New York's vibrant religious and independent school sector serves many of the state's students in a wide variety of settings. The New York Board of Regents celebrates the diversity of these schools, which reflects our state's broad diversity and tradition of welcoming newcomers from around the world. Protecting these schools is a core commitment of the Regents' and New York State's commitment to respect students and families of all backgrounds. This understanding is an essential starting point for this work.

With that in mind and given the differences between public and nonpublic school settings, the determination that students are receiving the instruction to which they are legally entitled poses some challenges. Thus, the Board of Regents recently adopted regulations that provide a framework to assist school officials in making these determinations (8 NYCRR 130.1 *et seq.* ["Part 130"]). Substantial equivalency is based upon the provision of instruction in the core subjects required by state law (science, math, social studies, and English language arts). The regulation creates pathways through which religious and independent schools can demonstrate that their instruction meets the requirements. If schools do not choose one of these pathways, the regulation explains how local school authorities conduct a local review of the school's program.

This Substantial Equivalency Implementation Guidance (the "guidance") is intended to further assist local school leaders as they implement Part 130 in a stepwise manner which begins with the choice of whether to have a local school district review the course of instruction at the nonpublic school or to pursue one of the other pathways provided under the regulation. The guidance seeks to address several questions which are likely to arise. How *exactly* can a religious or independent school demonstrate that it provides the instruction in the core subjects as required under the law? How should public school officials conduct reviews for nonpublic schools that choose a pathway? What types of mechanisms are available under the new regulation to demonstrate that students are receiving equivalent instruction? What if there are gaps in the school's instruction? How does an accreditor or assessment gain, as required, the approval of the Commissioner for the accreditation and assessment pathways? The answers to these questions are described below.

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Questions at any time may be directed to the ORISS office at SEsupport@nysed.gov. Those without access to the internet can write to or call:

Office of Religious and Independent School Support (ORISS)
New York State Education Department
Room 1074 EBA
89 Washington Avenue
Albany, NY 12234
Phone: (518) 473-8202

PART I: Terminology

Some questions may arise concerning the terms used in the substantial equivalence regulation and this guidance. This section, as well as the bolded text in each section below, should clarify the Department's interpretation and use of such terminology.

Bilingual program, as it relates to the criteria for a Commissioner's determination enumerated in Education Law § 3204 (2) (ii)-(iii), means that a school regularly delivers a meaningful portion of instruction in two or more languages. Bilingual program includes, but is not limited to, a program provided for English language learners pursuant to Education Law § 3204 (2) and (2-a).

Competent teacher means instructional staff employed by the nonpublic school who demonstrate the appropriate knowledge, skill, and dispositions to provide substantially equivalent instruction in the required subject areas. A competent teacher need not be certified (8 NYCRR 130.1[a]).

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.

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 (8 NYCRR 130.1[d]).

Office of Religious and Independent School Support (ORISS) is the NYSED office that has the primary responsibility for serving the needs of nonpublic schools. ORISS is composed of two units. One provides programmatic support and oversight for religious and independent schools called the State Office of Religious and Independent Schools (SORIS) and the other provides business- and finance-related oversight and support. This includes coordination of the process for schools' recognition by the state, high school registration, implementing certain state and federal grant programs, and for ensuring that religious and independent schools are providing substantially equivalent instruction for their compulsory school aged students. The terms ORISS is used as a modifier by NYSED to refer to a variety of functions and other items related to religious and independent schools, e.g. ORISS code (defined below).

ORISS (Formerly SORIS) Code is a code provided by NYSED that recognizes that nonpublic schools in multiple locations are members of the same school organization and is related to but different from a **BEDS** (Basic Educational Data System) Code which is an

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administrative identification number issued to a nonpublic school and assigned to a specific nonpublic school site to recognize such site by the Department.

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 (8 NYCRR 130.1[b]). Comparable should include consideration of any artifacts that collectively show that age- and grade-appropriate instruction of suitable depth and breadth is implemented in all mandatory subjects and is designed to facilitate students' academic progress from grade to grade. Substantially equivalent does not mean that a religious or independent school must have the same schedule or teach exactly the same content as the public school.

PART II: Substantial Equivalency Pathways

Prior to the promulgation of the regulation, educators in both public and nonpublic schools found the review process unclear. To address these concerns, the new regulation clarifies the subjects to be considered, limiting the required subjects for a substantial equivalency review to the core subject areas required by the state's Education Law, along with other statutorily required subject areas. At the same time, the regulation provides flexibility through the use of six additional pathways, beyond a local review, that can be used to confirm that a nonpublic school is providing substantially equivalent instruction to its students. This guidance will elaborate on the pathways. For those pathways that require components to be approved by the Department, the guidance will describe processes for obtaining such approval.

The pathways established by the regulation are:

- 1) Registered high schools and their affiliated lower grade programs;
- 2) State-approved private special education schools, state-operated, or state-supported schools;
- 3) Accreditation by an approved accreditor;
- 4) Schools with International Baccalaureate programs;
- 5) Federally approved schools;
- 6) Regular use of approved assessments demonstrating academic progress;
- 7) Traditional approach of Local school authority (LSA) reviews with either LSA or Commissioner's determination.

The guidance will address each pathway in turn and, as questions from practitioners arise, the guidance may be supplemented by a frequently asked questions (FAQ) document which, like this guidance, will be posted on the New York State Education Department's website and distributed to school leaders.

Pathway 1: Registered High Schools

Registered high schools are nonpublic schools that are voluntarily registered with the Board of Regents under section 100.2(p) of the Commissioner’s regulations. A school is granted “registered” status when it has undergone a process demonstrating that it provides an academic program which allows students at the commencement level to meet the requirements necessary to earn a Regents Diploma. The registration process is outlined on the NYSED website at:

<http://www.nysed.gov/nonpublic-schools/nonpublic-high-school-registration>

Nonpublic schools which have full registration status, and their related elementary and middle schools, are deemed substantially equivalent under the language of the regulation. Nonpublic schools should notify the LSA of their registered status in advance of the December 1, 2023 deadline for LSA’s to report to the Department in this regard (as discussed below).

We note that registration only applies to a particular high school site. As part of the registration process, Department staff visit each location of a school to ensure that the school is meeting the requirements to issue a Regents’ diploma. Registration status can be confirmed through the Department’s SEDREF database:

[https://portal.nysed.gov/pls/sedrefpublic/SED.sed_inst_qry_vw\\$.startup](https://portal.nysed.gov/pls/sedrefpublic/SED.sed_inst_qry_vw$.startup)

Related elementary and middle schools should meet the following criteria. They have:

- The same general academic program; AND
- The same ORISS code under a single BEDS code; OR
- The same organization with different BEDS codes in same location; OR
- The same ORISS code and leadership but may have physical buildings in different locations.

Related elementary, middle, and high schools may be at the same or different addresses. Some elementary and middle schools are not related but have close relationships. For example, some nonpublic schools tend to send their students to the same nonpublic high school year after year and may even coordinate their programs somewhat, but they are not actually part of the same organization. Since they remain organizationally independent from one another, these elementary/middle schools will need to use another pathway to demonstrate that their instruction is substantially equivalent. Another example where an elementary/middle school is not related to a registered high school for the purposes of substantial equivalency, even if such schools have the same BEDS or ORISS code(s), would be if there is not a high degree of matriculation of elementary/middle school students to that registered high school. For instance, if the students in the elementary and middle schools are precluded from attending if they do not meet the school’s enrollment criteria, that elementary/middle school cannot be deemed related and will need to select another pathway.

Registered High Schools: There is a process governing the registration of high schools that includes site visits and other requirements. That process, including periodic reviews of registration

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status by the Department, can be found on the NYSED website at <https://www.p12.nysed.gov/nonpub/applicationnpssecschreg/>.

Pending Registered: If a nonpublic school elects the registration pathway but is shown on the SEDREF website as “pending” registration status, the LSA and applicant should contact ORISS for further information. High schools with “pending” registration status may use the registration pathway only if they have been recently visited by NYSED staff, have been deemed to be approvable and are merely awaiting a meeting of the Board of Regents so that full registration status can be conferred. Any other high school with pending registration status (for example, those that still need to provide more information to the Department or have recently changed location and need a new site visit) must choose another pathway.

Pathway 2: State-Approved Private Special Education Schools, State-Operated or State-Supported Schools

State-approved private special education schools and state-operated or state-supported schools were established by the State Legislature pursuant to Articles 85, 87 or 88 of the Education Law.

Information about these schools can be found at:

<http://www.nysed.gov/special-education/approved-private-special-act-state-operated-and-state-supported-schools-new-york>

These schools are automatically deemed substantially equivalent. The Board of Regents noted these schools' ongoing relationships with school district Committees on Special Education and NYSED, as they address the educational and other needs of students with disabilities.

The state-approved, state-operated, or state-supported status of a school can be confirmed through the Department's SEDREF database at:

[https://portal.nysed.gov/pls/sedrefpublic/SED.sed_inst_qry_vw\\$.startup](https://portal.nysed.gov/pls/sedrefpublic/SED.sed_inst_qry_vw$.startup)

Pathway 3: Accreditation

Accreditation is a process through which a school demonstrates to an accreditor, through a rigorous and established process, that its educational program and school management meet certain standards. Under the regulation, accreditation by an approved accreditor is an accepted pathway to demonstrating that a nonpublic school provides instruction that is substantially equivalent. Nonpublic schools may choose to become accredited by a variety of accrediting organizations. Each accreditor has its own mission, emphasis, and standards. Each accreditor also chooses how to apply its own priorities in its accreditation process.

NYSED will not interfere with such priorities and processes accrediting organizations have developed to ensure that schools meet their standards. Under this pathway, the regulation does require that to be approved, the accrediting body must:

- 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,
- Accredite based on publicly accessible documented standards,
- Perform a comprehensive onsite visit of any school seeking accreditation while such school is in session,
- Periodically conduct a combination of interim and full accreditation reviews of the nonpublic school which it accredits during at least a ten-year period, and
- Require nonpublic school seeking accreditation to have curriculum that is informed by research, to document individual student progress, and have mechanisms for monitoring, assessing, and providing feedback on student progress.

Approved Accreditors: Once an accrediting organization has been approved, NYSED will list the accreditor, its term of approval, and the expiration date of that approval on the ORISS website. NYSED anticipates releasing its first list of approved accreditors by September 30, 2023. We note that approval as an accreditor pursuant to 8 NYCRR 130.3 (a) (3) is separate and unrelated to an accreditor obtaining a Commissioner’s consent to incorporation or a Board of Regents charter for such activity.

Accredited Nonpublic Schools: The nonpublic school should notify the LSA that it has chosen this pathway to be deemed substantially equivalent when the school has completed the accreditation process with an approved accreditor. Both officials from the LSA and the nonpublic school can confirm that the accreditor has been approved on NYSED’s ORISS website.

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Should a nonpublic school opt to use the accreditation pathway to demonstrate substantial equivalence, it will inform the LSA and provide evidence of its term of accreditation, i.e., start date and expiration date of its accreditation. NYSED may seek that information directly from accreditors, if needed.

Provisional Accreditation or in-process accreditation may precede full accreditation from an accreditor and does not satisfy the accreditation pathway unless, based upon the Department's review, the particular status satisfies the requirements of the regulations overall and provides assurance that the intent of the Compulsory Education Law is fulfilled. In any event, materials prepared as part of the accreditation process should be used in the local review process.

For Accreditors:

Gaining NYSED Approval: If an accrediting organization wishes to gain NYSED approval for its accreditation process, it must provide evidence that demonstrates that the organization's process meets the regulatory criteria as outlined above.

Accreditors seeking approval by NYSED can apply to: SEsupport@nysed.gov.

Accreditors should indicate in the application materials whether they use provisional or in-process statuses and whether they propose that such statuses be accepted by the Department for this pathway.

NYSED staff will review the information provided and may seek additional information, which might include NYSED staff members accompanying teams from that accreditor on accreditation visits in New York State schools.

The Department will indicate on the approved list of accreditors whether the accreditor's provisional accreditation is acceptable.

Any prior recognition of an accrediting organization by the Department or Board of Regents for other purposes may be noted on an application but is not in and of itself determinative for approval under this pathway.

Reapproval Cycle: The accreditation organization will be asked to demonstrate that its process remains consistent with the criteria on a regular cycle, every five years.

Mid-Cycle Reviews: Should concerns arise, NYSED may observe the accreditation process and review documents at any time for accreditors that it has approved for this purpose. Should the organization prefer not to be observed, it may voluntarily withdraw from the approved list.

Removal: NYSED may remove an accreditor from the approved list at any time if NYSED determines that the accreditor no longer meets the requirements for approved accreditors. Notice of such a determination will be provided to the accreditor and to any affected schools in writing. Schools affected by the removal of an approved accreditor will need to elect another pathway.

Pathway 4: International Baccalaureate Programs

If nonpublic schools participate in the International Baccalaureate (IB) Program, they will be considered substantially equivalent by the LSA upon notification and submission of evidence it has fully implemented a successful IB program at the school. The LSA can confirm that a school has approved participation in the IB program by reviewing the IB Program website listing at <https://www.ibo.org/about-the-ib/ib-world-schools-yearbook/>. A link to this information will be posted on NYSED's ORISS website.

Pathway 5: Federally Approved Schools

Any nonpublic schools operating under the auspices of the federal government, such as Department of Defense Education Activity schools located on military bases (the United States Military Academy at West Point), shall be considered substantially equivalent.

NYSED will maintain a list of these schools on its website. Should LSAs have a question regarding one of these schools, or if a new federal program does not yet appear on NYSED's list, please contact ORISS at SESupport@nysed.gov.

Pathway 6: Assessments

Many nonpublic schools, even those that elect not to participate in State assessments, have incorporated standardized assessments of various kinds into their instructional plans. Like their public school counterparts, nonpublic school leaders use these tests to assess students' progress against uniform benchmarks and to identify areas of strength and weakness in instruction. Standardized assessments are those that employ a systematic method of gathering information from objectively scored items that allow the test taker to select one or more of the given options or choices as their response. While NYSED recognizes that no standardized test or group of tests measures all the important aspects of learning, assessments nevertheless provide an objective perspective of teaching and learning. When nonpublic schools use standardized assessments as a pathway, we would expect to see evidence that both functions – evidence of student progress and a tool for improved instruction – are part of the schools' instructional process.

The regulation establishes the following criteria for the use of this pathway:

- Assessments must be approved by the Department for the purpose of demonstrating compliance with the requirements of Part 130,
- The assessments demonstrate students' academic progress as they move from grade to grade,
- The assessments are regularly used by the nonpublic school as part of its instructional program, and
- Nonpublic schools need to demonstrate an overall student participation rate on any approved assessments, regardless of grade level or subject, which is equal or greater to the three-year statewide average most recently available public school participation rate for the State Grade 3-8 Math and ELA assessments. The statewide average State assessment public school participation rate will be available on the NYSED at <https://www.nysed.gov/nonpublic-schools/substantial-equivalency>.

There are a wide range of standardized assessments in use in New York public and nonpublic schools that are used for a variety of purposes. They include the New York State 3-8 English and Math exams, Regents exams, over 30 Advanced Placement exams, exams used for diagnostic purposes, interim measures of growth and progress through unit tests, mid-terms, etc. As explained below, however, only end-of-the-year summative/cumulative assessments are applicable for purposes of this pathway.

Approved by the Department

Approved Tests: While the Department develops a comprehensive list of approved assessments, it should be noted that State administered assessments such as Regents exams, 3-8 Mathematics and ELA assessments, Grades 5 and 8 Elementary and Intermediate-Level Science Tests, NYSAA, and the NYSESLAT assessments may be used to demonstrate compliance. The list of approved assessments will be posted on the NYSED website at <https://www.nysed.gov/nonpublic-schools/substantial-equivalency>. Note that only summative/cumulative assessments will be acceptable for demonstrating compliance with this pathway. Assessments that are only used in the capacity of diagnostic, interim, or formative tests will not be included on the list of those approved.

Approval for new tests: NYSED will post a list of other summative/cumulative assessments which may be approved on its ORISS website. School leaders who wish to request consideration for approval for a summative/cumulative assessment not yet approved may contact the ORISS office at SEsupport@nysed.gov.

Tests will be reviewed by a NYSED team consisting of those with appropriate subject matter expertise to evaluate the design, validity, rigor, and correspondence to the subject matter covered of the test(s). This may require documentation from, and the cooperation of, the test's developers.

Demonstrate Students' Academic Progress as They Move From Grade to Grade: In order to demonstrate academic progress as students move from grade to grade the assessment should contain a measurement of growth that shows students moving toward, or remaining in, proficiency as measured by the assessment.

Cumulative/Summative Assessments: The assessments used must be end-of-the-year cumulative assessments or end-of-the-year summative assessments in order to demonstrate student progress at the end of a grade level to demonstrate grade-to-grade progress.

Note: Other types of assessments do have value. Diagnostic (before instruction to identify skill gaps), interim, and formative assessments are important tools and often inform a school's curriculum, staffing, etc. While they are not applicable for the assessment pathway, they may certainly be considered within the context of traditional LSA review pathway.

At a minimum, the summative/cumulative assessments proposed by a nonpublic school to satisfy this pathway must be validated and designed to demonstrate student academic growth across grade levels over time. They may be culturally sensitive, they need not be in use by the local LSA, and no specific learning standard with a covered subject must be included.

Multiple Tests: Not all standardized assessments or families of assessments address the required subjects at the full range of grade levels, so nonpublic schools may use a combination of approved assessments to meet the requirements of this pathway. This is acceptable as long as each assessment is approved, administration meets the criteria above, and a sufficient number of students participate in the assessment.

Proficiency Rate: The regulations do not specify any minimum proficiency rate, but consistent lack of proficiency over a span of years may inform consideration of whether the tests and analysis of the results are regularly part of the school’s instructional program, as discussed in the next point.

Regularly Used by the Nonpublic School as Part of Its Instructional Program: Consideration of this criteria involves both regularity of use and relationship to instructional program.

Nonpublic schools proposing to use the Assessment Pathway must provide the following information to the LSA:

- Identification of the approved (or approvable) assessments given across multiple grade levels. Some form of end-of-year summative/cumulative assessment(s) should be administered for each grade from 3 through 12 (though different assessments may be used in elementary/middle/high school if necessary). Note: Assessments are not required for kindergarten through grade 2. If a nonpublic school only serves kindergarten through grade 2, another pathway must be used.
- The assessments must cover the core subjects (that is, at least mathematics and English language arts in the elementary grades; and additionally, science in intermediate and secondary school, and social studies in secondary school).
- The assessments should be administered at intervals comparable to, but not necessarily identical to, State assessments and include the core subjects. For example:
 - Elementary- and intermediate-level students: New York State provides the Grades 3-8 English Language Arts and Mathematics Tests, and Grades 5 and 8 Elementary and Intermediate-Level Science Tests;
 - High School Students: New York State provides Regents examinations in ELA, Mathematics, Science, and Social Studies; and
 - English language learners (all grades): New York State provides the New York State English as a Second Language Test (NYSESLAT) which is composed of four sections, speaking, listening, reading, and writing.
- Describe how assessments relate to the school’s curriculum.
- Describe how results are incorporated into the school’s improvement efforts, i.e., how the school addresses evidence of student progress, or the lack thereof, both for individual students and improved grade-level instruction overall.

NOTE: Determining whether the school’s assessment models are regularly used and bear a relationship to the instructional program is the only area in which an LSA should engage in additional investigation.

Participation Rate:

The current three-year statewide average State assessment public school participation rate will be posted at <https://www.nysed.gov/nonpublic-schools/substantial-equivalency>.

Best Practices of Test Security and Assessment:

Assessments must be administered to students in a manner that is consistent with best practices of test security and assessment. While it is presumed there will be regularity in the testing process, use of this pathway grants the Department, or its designee, the right to review the integrity of the testing process. Concerns may be identified through such means as a credible complaint to the Department about a school's use of the tests, through the normal test analysis process conducted by assessment developers, or by the Department. If a complaint is substantiated, the school may be directed by the Department to use another pathway to determine its substantial equivalence.

Pathway 7: Local Reviews

Nonpublic schools may choose to continue to use the traditional local review pathway, which will result in an LSA determination or Commissioner's determination, depending on whether the Commissioner is responsible for making the final determination pursuant to 8 NYCRR 130.2(b). In this section, the Department provides select guidance regarding (1) review criteria and (2) review and determination procedures.

Criteria for Substantial Equivalency Reviews

The goal of the local review process is to confirm that the nonpublic school is providing instruction in the required subject areas for its students of compulsory education age. The expectation is that these interactions will be mutually cordial and respectful of schools and their instructional approaches. As stated in the regulation, reviews must 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.

Important cognitive skills may be developed in these schools in ways that are different from public school models. A nonpublic school may choose whether to integrate required instruction into religious classes either in whole or part for purposes of consideration by the LSA. For example, some schools have intellectually rigorous religious education programs that develop close reading, textual analysis, and other cognitive skills. If the nonpublic school so chooses, these aspects of the school's program may be considered and included in the overall review as demonstrating that instructional requirements are met through the entire curriculum. At the same time, we caution that it is not appropriate for the LSA to review the religious content itself. LSA reviewers, or their representatives, must focus on recognizing the development of skills and knowledge in the nonpublic school's program. The LSA, and/or their subcontractor, 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 (130.10 [d]).

The review process must address the criteria enumerated in 8 NYCRR 130.9 for substantial equivalency reviews, which are contained in the Compulsory Education Law. These include organizational and content requirements as follows:

- Instruction is given by a competent teacher or teachers,
- 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,

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- Instruction is provided in every grade level serving students of compulsory education age in mathematics, social studies, science, and English language arts,
- Instruction is provided in the subjects listed below. These subjects are part of the school’s program, but not all of them need to be addressed each year. Reviewers will seek evidence that the school’s program includes instruction in these subjects, as required by the statutes and regulations cited in section 130.9:
 - 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;
 - New York State history and civics;
 - Physical education and kindred subjects and instruction in health education regarding alcohol, drugs, and tobacco abuse (Note: a student may, consistent with the requirements of public education and public health, be excused from such student of health and hygiene as conflicts with the religion of the student’s parents or guardian; provided that such conflict must be certified by a proper representative of their religion.)¹;
 - Highway safety and traffic regulation;
 - Fire drills and in fire and arson prevention, injury prevention, and life safety education; and
 - Use of an automated external defibrillator and in hands-only cardiopulmonary resuscitation; and
- For nonpublic schools meeting the criteria in Education Law § 3204(2)(ii)-(iii), the additional criteria enumerated in such statute for such schools.

Notes on Specific Review Criteria

Local school officials will need to obtain, and schools being reviewed should provide, evidence that the subjects and content areas enumerated in the regulation are addressed. Below are examples of evidence that may be reviewed and collected in determining whether a nonpublic school’s instructional program meets the requirements of 8 NYCRR 130.9.

¹ A process for seeking a religious exemption to health instruction is codified in Education Law § 3204(5) and Regents Rule 16.2. Through this process, students may be excused from such part of the study in health and hygiene as may conflict with the tenets of their religious group.

Teacher Competence

- School recruitment, hiring policies, and other evidence as to how the nonpublic school implements its policies through staff assignments aimed at providing substantially equivalent instruction in the required subject areas.
- State certification (although nonpublic school teachers need not be certified).
- Professional development or continuing education policies and information on how they are implemented.
- Teacher observation and evaluation methodology, including whether and how the school's teacher evaluation methods measure and take into account teacher effectiveness.
- Observation during the site visit suggesting that the staff possess a mastery of course content and knowledge/skill to provide substantially equivalent instruction in the required subject areas.

Sample Evidence of Instructional Programs Enabling Students to Progress toward English Proficiency

- Students receive more instruction in English over time, which enables them to develop academically while achieving competence in the English language regardless of which specific option for English Language Learners/Multilingual Learners is employed (see <https://www.nysed.gov/bilingual-ed/program-options-english-language-learnersmultilingual-learners>).
- Demonstration that students can read, speak, and write English increasingly well as they progress from grade to grade and that the instructional program is designed to achieve such goals.
- Use of the NYSELAT or a comparable assessment and how scores are used to improve instruction and student performance may be informative.

Sources of Evidence of Required Content

For both the core subjects and the additional required topics, school district reviewers and nonpublic school leaders are encouraged to consider artifacts that collectively show sufficient evidence or observations that age- and grade-appropriate instruction of suitable depth and breadth is offered or otherwise implemented in all mandatory subjects, such as:

- The school's program of instruction documents;
- Lesson plans, course outlines, scopes and sequences, etc.;
- Observation of instruction;
- Student textbooks and workbooks (including evidence that these materials are being used in the classroom);
- The school's class schedule;
- Accreditation materials from the last five years – even when the school is not accredited by an accreditor which is approved by NYSED for use as a pathway – the materials used as part of the accreditation process may be helpful in substantial equivalence reviews;
- Written student work products (tests, completed homework, essays);
- Student performances (speeches, project demonstrations, etc.); and

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- Student grades and/or assessment results (with appropriate privacy protection) or other evidence that the school measures academic progress throughout the year and from grade to grade.

The assembled record should confirm that the curriculum described by the school is comparable to that offered in the public schools and actually delivered to students. The task of the reviewer is to ensure that students of compulsory age are receiving sufficient instruction in the required subject areas to enable them to make progress from grade to grade.

English as the Language of Instruction

Education Law §3204(2)(i) requires that “English shall be the language of instruction, and textbooks used shall be written in English” but the regulation does not exclude content taught in a language other than 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.”

As noted above, we emphasize that for nonpublic schools that serve students who are English language learners, the review must take this into consideration, balancing the need for students to progress in their use of English, as well as their mastery of the required content. Reviewers would expect to see efforts to improve students’ mastery of the English language, with the portion of instruction in core subjects provided in English for students growing over time, consistent with the intent of the Education Law.

Substantial Equivalency Review & Determination Process

For those schools that choose to use the LSA review pathway, the LSA will review the school's program to ensure that the nonpublic school provides substantially equivalent instruction. Following a review, a substantial equivalency determination will be made by the Commissioner (for schools meeting the criteria enumerated in Education Law §3204[ii]-[iii]) or the LSA (all other nonpublic schools).

The regulation sets forth certain procedures and requirements concerning LSA reviews (8 NYCRR 130.5, 130.10), LSA determinations (8 NYCRR 130.6), and Commissioner's determinations (8 NYCRR 130.8). Schools must follow the regulatory requirements. This section of guidance provides further assistance to LSAs and religious and independent schools regarding some aspects of these processes.

Selecting the Local Review Pathway

LSAs will need to contact all nonpublic schools to determine which pathway schools select. For nonpublic schools that choose the Local Review Pathway, LSAs should work with the nonpublic school to determine whether the school qualifies for a Commissioner's determination. 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.

LSA Review of Instruction Provided by Nonpublic School

- The review must include a site visit. We would not expect the site visit to take more than one or two school days. The public school reviewer should provide the nonpublic school with notice of the visit, make it at a time that is as non-disruptive as possible for the nonpublic school, and be cognizant and respectful of the fact that the nonpublic school may have different schedules than the public district.
- The site visit must include observation of instruction. Reviewers will expect to see students at the various grade levels which are serving students of compulsory education age (approximately grades 1-10, with some adjustment for individual school communities' circumstances) at the school receiving instruction in the four core subject areas of math, social studies, science, and English language arts.
- Instruction provided under the equitable services requirement of the Every Student Succeeds Act (ESSA) cannot be considered in determining whether substantially equivalent instruction is provided by a nonpublic school.
- Some of the required subjects of instruction (beyond the four core areas) described in statute may appear at specific times and places in the school's program which may not align with the timing of the review visit. Reviewers should request documentation that this instruction occurs from the nonpublic school leadership. For example, instruction in

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patriotism and citizenship could be demonstrated through a review of the social studies curriculum, or instruction given throughout the year during specific events (e.g., national holidays). Instruction in New York State history could likewise be demonstrated through evidence that students have done work related to important events or participants in the state's history.

- When reviewing a nonpublic school, public school reviewers must remember that there will be learning that occurs in different ways than in a public school, but the goal is to see whether students are making progress and if learning levels are about the same (or better) as in the public school.

LSA Recommendations for Commissioner's Determination Schools

For schools that meet the criteria for a Commissioner's determination, upon completion of a review the LSA must forward a definitive recommendation on whether the nonpublic school is substantially equivalent and all relevant documentation to support its recommendation to the Commissioner for review (8 NYCRR 130.8[a]) via email to Commissioner@nysed.gov and SEsupport@nysed.gov.

Preliminary Negative Substantial Equivalency Findings

When a nonpublic school has not sufficiently demonstrated compliance with the substantial equivalency review criteria, the LSA or Commissioner (as applicable) will make a preliminary determination that the nonpublic school does not appear to be substantially equivalent. Preliminary determinations by an LSA should be provided to the Department via the NYSED Business Portal or another electronic portal as determined by the Department.

The LSA and nonpublic school must collaboratively develop a timeline and plan for the nonpublic school to attain substantial equivalency pursuant to 8 NYCRR 130.6(a)(1)(iii) & 130.8(d)(2). The plan should include more detail than merely repeating the deficiencies found during the review. Rather, the plan should include curative measures to be taken by the nonpublic school to remedy any deficiencies. The LSA may provide support to the nonpublic school such as professional development during the collaborative timeline. The LSA must file the plan with the Department via the NYSED Business Portal or another electronic portal as determined by the Department and should keep ORISS apprised of progress throughout the timeline of the collaborative improvement plan. ORISS will provide technical assistance as needed.

The Commissioner has discretion to extend the deadline for developing a timeline and plan and the timeline itself, upon application of the LSA and/or nonpublic school.

PART III: Timeframes

Regulation Implementation Timeline:

- **By September 1, 2023 (each September 1 thereafter):** LSA will report (1) all the nonpublic schools that serve compulsory age children (from age 6 to 16 in most jurisdictions, age 17 in others) within their geographical boundaries and (2) the date of the last substantial equivalency determination made for each nonpublic school to the Department via the NYSED Business Portal or another electronic portal as determined by the Department. Such report must include all nonpublic schools within the LSA geographic boundaries, even nonpublic schools without basic educational data system (BEDS) codes.
- **By December 1, 2023 (and each December 1 thereafter):** The LSA must inform the Department, via the NYSED Business Portal or another electronic portal as determined by the Department, of the pathway each nonpublic school in its boundaries has selected to use to demonstrate the substantial equivalence of its instruction. The LSA must identify nonpublic schools that will go through a local review and meet the criteria for a Commissioner's determination. The LSA will also identify nonpublic schools that will go through a local review and for which the LSA is responsible for making the final substantial equivalency determination.
- **Between December 1, 2023 and December 1, 2024:** LSAs will consult with those schools that will require review or follow-up to complete the requirements for another pathway. This consultation will assist the LSA in establishing a timeline for the review process.
- **By December 1, 2024 (and each December 1 thereafter):** Via the NYSED Business Portal or another electronic portal as determined by the Department, LSAs must 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.
- **By June 30, 2025:** LSAs shall make required substantial equivalency determinations, and recommendations for schools subject to a Commissioner's determination for all nonpublic schools in their geographic boundaries that were operating as of September 28, 2022, by the end of the 2024-2025 school year and every seven years thereafter. Schools that received a preliminary negative substantial equivalency determination may be in the collaborative improvement process at this time.
- **Within Two Years of a New Nonpublic School's Founding:** The new school must demonstrate that it provides substantially equivalent instruction. The new 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 a pathway enumerated in 8

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NYCRR 130.3, LSAs must complete substantial equivalency determinations (and recommendations for schools subject to a Commissioner's determination) for all new schools within two years of when the nonpublic school commences instruction for students in any grades 1-12 and every seven years thereafter.

PART IV: Safeguards

The regulations provide 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); (2) the complaint procedure outlined in section 130.11; (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; (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. We offer guidance on a few such safeguards here.

Complaints

Pursuant to section 130.11 of the regulation, the Commissioner has the discretion to direct an LSA or Board of Cooperative Educational Services (BOCES) to investigate a nonpublic school if the Commissioner has cause for concern regarding the substantial equivalency of instruction at such nonpublic school, either based on a complaint or some other source of information. This section does not require the Commissioner to direct an investigation based upon the receipt of *any* complaint, rather, it provides discretion to do so. If the Commissioner receives complaints that are not credible or do not relate to substantial equivalency of instruction, the Commissioner need not direct an investigation under section 130.11. The Commissioner may elect to request records for review in connection with his or her inquiry into the validity of a complaint.

The scope of an investigation pursuant to section 130.11 will be tailored to the nature of the Commissioner's concern about the instruction provided at a nonpublic school. For example, if there is reason to believe that a school fails to provide a physical education program, the Commissioner may direct the LSA to investigate the school's physical education program and determine (or make a recommendation as to) whether this aspect of the school's educational program is substantially equivalent.

An LSA or BOCES that receives a complaint about the substantial equivalency of instruction at 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.

Nonpublic schools demonstrating substantial equivalency through any pathway may be the subject of a complaint and an investigation pursuant to this section.

The Department will investigate complaints about registered nonpublic schools. If an LSA receives a complaint about a registered nonpublic school, it should forward such complaint to ORISS for processing.

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A party with a concern that a school's instruction is not substantially equivalent may contact ORISS.

A complaint should include, at a minimum:

- The school's name;
- The school's address;
- The party's affiliation or connection with the school (alumnus, parent, etc.);
- The reason for the complaint; and
- Any evidence or supporting documentation regarding the allegations being made.

Appeals to the Commissioner of Education

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, and the Commissioner may, in their discretion, stay such determination pending a final determination on such appeal pursuant to Education Law §311 and section 276.1. An individual may not maintain an appeal pursuant to Education Law § 310 unless aggrieved in the sense that they have suffered personal damage or injury to their civil, personal, or property rights. While the regulation only expressly requires an LSA to notify schools of their right to appeal at the time of a final substantial equivalency determination, parties may be sufficiently aggrieved at an early stage of the review to permit an appeal.