

BY ELECTRONIC MAIL to seregcomments@nysed.gov

May 31, 2022

Christina Coughlin
Assistant Commissioner
New York State Education Department
State Office of Religious and Independent Schools
89 Washington Avenue, Room 1078 EBA
Albany, NY 12234

Re: Substantially Equivalent Instruction for Nonpublic School Students, I.D.
No. EDU-13-22-00025-P

Dear Assistant Commissioner Coughlin:

The New York Civil Liberties Union (“NYCLU”) writes to offer comments in response to the New York State Education Department’s (“NYSED” or the “Department”) notice of proposed rulemaking regarding “Substantially Equivalent Instruction for Nonpublic School Students” published in the New York State Register on March 30, 2022.¹ These comments expound upon the NYCLU’s previous comments regarding substantial equivalency submitted in October 2018 and August 2019.² This is a critical issue for New York students—nonpublic schools, most of which receive some public dollars, must be held accountable for delivering on the right to an education and preparing young people to succeed.

The current version of the Proposed Regulations incorporates many of the NYCLU’s past comments, but areas for improvement remain which we describe in detail below. The NYCLU appreciates that NYSED now will require the Local School Authorities (“LSA”) to conduct an actual site visit for each school being reviewed (§130.3(3)) but we encourage you to require that site visit to include the observation of instruction. The NYCLU commends NYSED for requiring accurate recordkeeping identifying all the nonpublic schools listed within the LSA’s geographic boundaries, the date of the last substantial equivalency determination (§130.7(a)), the review category into which each school falls (§130.7(b)), and whether a substantial equivalency determination has been made (§130.7(c)) and for requiring that this reporting happen on an annual basis. Additionally, we support Section 130.13’s requirement that the LSA provide the “records and/or documentation the LSA used to make its final determination on substantial equivalency of instruction” to the Commissioner.

In general, our concerns with the Proposed Regulations focus on exceptions to the substantial equivalency review process (§130.3), the proposed timeframes (§130.4), the requirement of school board votes in some circumstances (§130.6 and §130.8), and the complaint process (§130.11).

¹ Substantially Equivalent Instruction for Nonpublic School Students, New York State Register, March 30, 2022, <https://dos.ny.gov/system/files/documents/2022/03/033022.pdf> (the “Proposed Regulations”).

² See October 4, 2018 and August 30, 2019 Comments, attached as Exhibit A and Exhibit B, respectively.



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a. Constructive Feedback on Proposed Regulations

1. *Section 130.3 Nonpublic Schools Deemed Substantially Equivalent*

Section 130.3 describes circumstances under which a nonpublic school could be deemed substantially equivalent without a formal review by an LSA or the Commissioner. These circumstances include a nonpublic school that is registered (§130.3(a)(1)), one that “is accredited by an accrediting body approved by the Department for purposes of demonstrating compliance with the requirements of this part” (§130.3(a)(3)), and one “that uses assessments approved by the Department for purposes of demonstrating compliance with the requirements of this Part” (§130.3(a)(6)).

The NYCLU previously cautioned NYSED about allowing accreditation to substitute for the substantial equivalency review process because it may “open the door to additional entities seeking to become accrediting bodies to bypass the substantial equivalency review process.” We reiterate that concern and again urge NYSED to “uphold rigorous standards for becoming an accrediting body in order to preserve the integrity of the accreditation system and prevent an end-run around the substantial equivalence review process” (*see* August 30, 2019 NYCLU Letter, attached as Exhibit B).

We are also concerned that it appears that an accredited school pursuant to §130.3(a)(3) would only be reviewed once every ten years. This could mean that a student spends more than half of their education in a nonpublic school that has never been reviewed for substantial equivalency. We believe that each nonpublic school should be reviewed by an accrediting organization or an LSA at least once every three years. We do, however, support the addition of Section 130.3(b), which allows the Commissioner to request the evidence submitted to the LSA from the nonpublic school and encourage the Commissioner to use this power frequently to ensure compliance and fidelity to the review process. This information should also be available to the public.

2. *Section 130.4 Timeframes*

Section 130.4 provides the timeframes for substantial equivalency reviews for both new and existing nonpublic schools. We support the review of new nonpublic schools within two years of commencing instruction (§130.4(a)) but are concerned with the seven-year interval for review thereafter. This could mean that a student would spend nine years in a nonpublic school that has only been reviewed once. The seven-year timeline should be reduced for both new and existing schools.

The NYCLU strongly supports Section 130.4(c) which gives the Commissioner power to penalize any LSA that has not made “sufficient progress” toward reviewing nonpublic schools. There has unfortunately been a history of inaction by LSAs on this issue and it is critical for the Commissioner to ensure that all LSAs are reviewing the nonpublic schools in their geographic areas in accordance with the Proposed Regulations.



3. *Section 130.6 LSA Determinations and Section 130.8 Commissioner's Determination*

Section 130.6 describes the procedures for LSAs to make substantial equivalency determinations for “nonpublic schools where the LSA is responsible for making the final determination.” For these LSAs, the Proposed Regulations require that the superintendent’s determination be put to a vote by the school board (§130.6(b)(1)(iv)). We are concerned the requirement of the school board vote may unnecessarily introduce political influence into an otherwise apolitical decision. As you are aware, recent school board elections across the state have become increasingly politicized, with candidates affiliating explicitly with political parties.³ There are also school districts across New York State with documented histories of governance issues, including the East Ramapo Central School District.⁴ The requirement of a school board vote to affirm a superintendent’s reasoned determination⁵ could allow for undue influence to unnecessarily complicate a process intended to ensure that all students have access to a substantially equivalent education.



Additionally, based on the Proposed Regulations, it is unclear which process, if any, LSAs must undertake to formulate a recommendation to the Commissioner regarding substantial equivalency for nonpublic schools for which the Commissioner is required to make the final determination. Section 130.8 does not outline any process at all which an LSA must follow to formulate a recommendation, beyond a reference to the criteria in §130.9⁶:

For nonpublic schools for which the Commissioner is required to make the final determination ... 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. (emphasis added).

It is unclear whether any of the process requirements of §130.6 apply to the formulation of the LSA recommendation under §130.8, including the school board vote. As stated above, we are concerned about the requirement of the school board vote. It is imperative that NYSED clarify which procedures an LSA must follow to make a recommendation pursuant to §130.8 and we recommend excluding the school board vote requirement.

³ Bill Mahoney, *Conservative school board campaigns flop throughout New York, early results suggest*, Politico, May 18, 2022.

⁴ NYCLU, *Private Privilege, Public Pain: The Rise of 21st Century Jim Crow Education in East Ramapo Schools*, September 14, 2021, <https://www.nyclu.org/en/publications/private-privilege-public-pain-2021>.

⁵ Pursuant to Education Law § 2508, superintendents of schools have the power and duties “to enforce all provisions of law and all rules and regulations relating to the management of the schools and other educational, social and recreational activities under the direction of the board of education.” N.Y. Educ. Law § 2508 (2). These powers extend to enforcement of Education Law § 3204 and its implementing regulations.

⁶ Section 130.9 does not provide a process but rather mandates the consideration of certain criteria for review including, for example, whether English is the language of instruction (§130.9(b)).

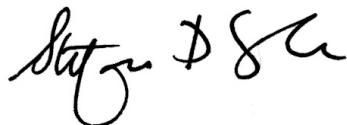
4. Section 130.11 Complaints

Section 130.11 describes the process by which the Commissioner may direct an LSA to investigate a nonpublic school. This section should clarify that it describes an investigative process separate from and in addition to the regular substantial equivalency reviews detailed elsewhere in the Proposed Regulations. This section should also specify a timeline during which the LSA must conduct the review pursuant to the complaint. Finally, the language of §130.11(a) is permissive, but should be mandatory in the instance that the Commissioner has a concern regarding the substantial equivalency of instruction. We recommend the following change in language (suggested additions in bold):

- (a) The Commissioner, or his or her designee, may direct an LSA to investigate a nonpublic school if the Commissioner receives a **credible** complaint regarding the substantial equivalency of instruction at such nonpublic school, **and shall direct an LSA to investigate a nonpublic school, whether or not a complaint has been submitted,** if the Commissioner reasonably believes that the instruction at a nonpublic school is not substantially equivalent to that provided by the public schools.

We thank NYSED for the opportunity to provide comments on these critical regulations. NYSED should revise the Proposed Regulations in line with the recommendations above to provide greater clarity to both nonpublic schools and LSAs in engaging in substantial equivalency reviews to ensure that all New York students in nonpublic schools receive the education that they deserve.

Sincerely,



Stefanie D. Coyle
Deputy Director
Education Policy Center

