

Formal Opinion of Counsel

The Department has received inquiries as to whether the Board of Regents' recent increase in the number of instructional hours owed in non-school settings necessitates a corresponding increase in the minimum hours of alternative instruction. I believe that it does.

On November 15, 2022, the Board of Regents amended its regulations concerning instruction in home, hospital, or institutional settings. This included a change, effective July 1, 2023, in the minimum number of instructional hours per week from five to ten hours at the elementary level and ten to fifteen hours at the secondary level—*i.e.*, from one to two (elementary) and two to three (secondary) hours per day.¹ In response to a comment submitted by a member of the public, the Department wrote: “It is the Department’s position that the previous minimum of five hours per week for elementary students and ten hours per week for secondary students is inadequate to ensure students have the opportunity to continue to progress at a similar rate to their peers.”²

This same reasoning justifies an increase in the amount of instruction owed to a student who has been suspended. When a student of compulsory school age is suspended, “immediate steps shall be taken for his or her attendance upon instruction elsewhere...”³ “Attendance upon instruction,” as used in the Compulsory Education Law, means a public school program or a program that is “at least substantially equivalent.”⁴

As indicated above, the Board of Regents has determined that two hours at the elementary level and three hours at the secondary level represent the minimum amount necessary “to ensure students have the opportunity to continue to progress at a similar rate to their peers.” There is no reason this policy judgment should not apply to students serving out-of-school suspensions. Thus, to the extent prior decisions of the Commissioner have opined that two hours per day may be sufficient

¹ <https://www.regents.nysed.gov/sites/regents/files/1122brca5.pdf>.

² *Id.* at p. 21.

³ This alternative instruction requirement applies to any period of out-of-school suspension. *Turner v. Kowalski*, 49 AD2d 943 (2d Dept 1975) (rejecting argument that the provision of alternative instruction for five or less days is “impractical and unreasonable”); *see also Waxman v. Roslyn Union Free Sch. Dist.*, US Dist Ct, ED NY, No. 01 civ 7445, Amon, J., 2005 (declining to dismiss action under 42 USC § 1983 against individual defendants based upon sufficient allegations of “material lapses in ... home instruction”).

⁴ Education Law §§ 3204 (2) (i), 3205 (1) (a); *Appeal of C.S.*, 39 Ed Dept Rep 574, Decision No. 14,316; *Matter of Watts*, 23 *id.* 459, Decision No. 11,282).

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for elementary or secondary students, this is not consistent with the regulatory amendment described above.⁵

Ensuring that suspended students make progress in their educational program is essential. Suspensions are disproportionately imposed on certain groups of students and contribute to “lower student academic achievement, higher truancy rates, higher dropout rates, and higher rates of contact with the juvenile and adult justice systems.”⁶ Affording students the opportunity to make progress at a similar rate to their peers helps “ensur[e] that all students have equitable access to interventions that will support their holistic academic and social-emotional development as learners and developing, contributing members of society.”⁷

Thus, while alternative instruction should continue to be determined on a case-to-case basis, this instruction must, at minimum, comply with the amounts deemed necessary for students in home, hospital, or institutional settings.

Dated October xx, 2023

⁵ *Appeal of V.E.*, 43 Ed Dept Rep 244, Decision No. 14,985; *Appeal of A.L., Jr.*, 42 *id.* Decision No. 14,833; *Appeal of Camille S.*, 39 *id.* 574, Decision No. 14,316).

⁶ *Appeal of N.V.D.*, 60 Ed Dept Rep, Decision No. 17,985 (citing New York State Board of Regents, Resolution (January 14, 2019), *available at* https://www.regents.nysed.gov/sites/regents/files/Resolution_0.pdf (last accessed Sept. 23, 2023)).

⁷ *Appeal of B.A.*, 62 Ed Dept Rep, Decision No. 18,209.