

# ALTERNATIVE INSTRUCTION FOR SUSPENDED STUDENTS

*Hodgson Russ Education Alert*  
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On October 10, 2023, the New York State Education Department (“NYSED”) Office of Counsel released a formal opinion (“Formal Opinion No. 243”) on the number of instructional hours owed to students serving out-of-school suspensions. This opinion follows recent regulatory amendments that increased the minimum instructional hours required for students in home, hospital, or institutional settings (“Homebound Instruction”).

While Formal Opinion No. 243 does not have the force and effect of law, it provides school districts with significant insight into how NYSED and the Commissioner of Education will enforce statutory and regulatory requirements and review student discipline appeals regarding the adequacy of alternative instruction, for instance. Therefore, school districts should be aware of their instructional obligations under this new guidance.

## Overview of Homebound Instruction and Regulatory Changes

Homebound instruction is a temporary educational service that school districts must provide to resident students (both public and non-public) who are unable to attend school in person for at least ten days in a three-month period due to physical, mental, or emotional illness or injury. It is typically provided in the form of tutoring and must be provided by an individual with a New York State teaching certificate.

In November 2022, the State amended its education regulations to increase the minimum weekly number of instructional hours required for homebound instruction from five to ten hours per week for elementary level students and from ten to fifteen hours per week for secondary level students. These amendments went into effect July 1, 2023.

According to NYSED, the increased hours were intended to ensure that homebound instructed students have the opportunity to progress in their educational program at a similar rate as their peers.

## NYSED Office of Counsel Opinion

Section 3214 requires school districts to provide a suspended student of compulsory education age with alternative instruction substantially equivalent to that received by the student prior to the suspension. The precise amount of instruction required,

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and the equivalency of that instruction, has historically been determined on a case-by-case basis. Previous Commissioner of Education cases have found that an average of one hour a day for K-6th grade and two hours a day for 7-12th grade of alternative instruction per day is appropriate.

Formal Opinion No. 243 states that the increase in instructional hours for homebound students supports a corresponding increase in the minimum number of hours of alternative instruction for students suspended from school pursuant to New York Education Law § 3214(3)(e).

Formal Opinion No. 243 also states that the minimum number of alternative instruction hours provided to suspended students must meet the minimum number of instructional hours provided to homebound students. This means that suspended elementary level students should receive an average of at least ten hours per week of alternative instruction and secondary level students should receive an average of at least fifteen hours per week.

While Formal Opinion No. 243 does not have the force and effect of law, it provides school districts with significant insight into how NYSED and the Commissioner of Education will attempt to enforce these enhanced alternate instruction obligations. The Formal Opinion will also likely result in additional staffing requirements for school districts. Accordingly, please review existing policies and procedures and convene relevant stakeholders to develop a plan to address this change.

If you have any questions about Formal Opinion No. 243 or any other matter, please contact [Lindsay A. Menasco](#) (716.848.1214), [Ryan L. Everhart](#) (716.848.1718), [Andrew J. Freedman](#) (716.848.1332), or any other member of the [Hodgson Russ Education Practice](#).

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