



Frank Edelblut
Commissioner

Christine M. Brennan
Deputy Commissioner

STATE OF NEW HAMPSHIRE
DEPARTMENT OF EDUCATION
101 Pleasant Street
Concord, N.H. 03301
TEL. (603) 271-3495
FAX (603) 271-1953

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State of New Hampshire
Joint Legislative Committee on Administrative Rules
25 Capitol St.
State House Annex Room 219
Concord, NH 03301

Dear Committee:

Attached please find the State Board of Education's (Board) conditional approval request for Ed 1400, Learn Everywhere Program. Substantive comments received from the Office of Legislative Services (OLS) staff have been addressed as annotated text within the conditional approval request.

Regarding the staff comment on page 11 of the initial proposal dated November 10, 2021, on behalf of the Board, I submit Chairman Drew Cline's objection response letter dated August 8, 2019. OLS staff comments are the same as the final proposal comments and the Board's and the Department of Education's position to these objections has not changed.

Sincerely,

A handwritten signature in cursive script that reads "Amanda Phelps".

Amanda Phelps, Administrative Rules Coordinator
NH Department of Education

CHAPTER Ed 1400 LEARN EVERYWHERE PROGRAM FOR HIGH SCHOOL GRADUATION CREDIT

PART Ed 1401 PURPOSE AND SCOPE

Edit: Do not place requirements in purpose statements.

Ed 1401.01 Purpose. Part Ed 1401 through Part Ed 1407 provide rules of procedure to ensure uniform application of RSA 193-E:2-a, V(b) relative to the approval of alternative programs for granting credit leading to graduation, referred to as learn everywhere programs. The commissioner shall develop and implement this program in conjunction with the state board of education.

Ed 1401.02 Scope.

(a) These rules shall apply to any for-profit or non-profit entity ***applying to offer*** ~~that offers~~ an educational program, consistent with these rules, that meets the minimum standards for approval to grant credit leading to graduation.

(b) These rules shall apply to students, emancipated minors, or students with disabilities in accordance with their individualized education program (IEP) as determined by the IEP team.

(c) Approved learn everywhere programs shall result in certificates that lead to high school graduation credit.

(d) These rules shall apply to all school districts or local education agencies (LEAs).

PART Ed 1402 DEFINITIONS

Ed 1402.01 Definitions.

(a) "Alternative" means a choice of one or more opportunities.

(b) "Alternative program" means a learn everywhere program.

(c) "Commissioner" means the commissioner of the department of education.

(d) "Competency" means state competencies as defined in Ed 1402.01(i).

(e) "Department" means the department of education.

(f) "Individualized education program (IEP)" means "individualized education program" as defined in 34 CFR 300.22 and which meets the requirements in Ed 1109.

(g) "Learn everywhere program" means a state board approved alternative program for granting credit leading to graduation.

(h) "Local education agency (LEA)" means "local education agency" as defined in 34 CFR 300.28.

(i) "Program" means a sequence of instruction over a period of time, which meets the state competencies of a subject or subjects listed in Ed 306.27(v)(t) resulting in a granting of credit leading to high school graduation.

(j) "School" means a New Hampshire public school, public academy, or chartered public school that contains any of the grades 9 through 12.

(k) "State competency" means the expected content, concepts, and skills to be mastered in a course ~~which shall be~~ deemed equivalent to graduation competencies in accordance with Ed 306.02(k) solely for the purpose of granting credit in the areas enumerated in Ed 306.27(v) table 306-2.

(l) "State board" means the New Hampshire state board of education.

Edit: "(k)"

PART Ed 1403 PROGRAM APPROVAL

Ed 1403.01 Initial Application Requirements.

(a) An applicant, as described in Ed 1401.02(a), seeking state board approval for an alternative program shall submit to the department for review an application that includes all of the following elements:

- (1) The sponsoring organization's purpose, mission statement, or both;
- (2) The name and contact information of the individual responsible for oversight and administration of the program for which approval is sought;
- (3) A description of demonstrated qualifications and a statement assuring that the instructor satisfies those qualifications, which shall not be construed to imply that instructors require a New Hampshire educator license; and
- (4) A criminal history records check policy that includes a statement affirming that the sponsoring entity shall not allow instruction or student contact by a person who has been charged pending disposition for, or convicted of, any violation or attempted violation of any of the offenses as outlined in RSA 189:13-a, V pursuant to a criminal history records check conducted by the department of safety as outlined in Saf-C 5703.06 through Saf-C 5703.11.

(b) In addition to the application requirements outlined in 1403.01(a), an applicant shall also submit:

- (1) In the area of instructional program:
 - a. Identification of the education, program, or opportunity from Ed 306.27(v) for which students completing the learn everywhere program shall receive high school credit(s);
 - b. An outline of each program for which approval is sought, which includes goals, competencies, a detailed description of the course of instruction, and a description of expected student outcomes;
 - c. A plan for recording student progress in meeting expected student outcomes;
 - d. A description of assessments of student learning outcomes, including, but not limited to:
 1. Instructor observation of project-based learning, including off-site learning projects;
 2. Competency-based or performance based assessments;
 3. Instructor observations of student performance;
 4. Project evaluation rubrics used to evaluate program proficiencies; and
 5. Other assessment approaches as determined by the learn everywhere program;
 - e. The number of credits the program will fulfill; and

f. A description of the competency-based grading system;

(2) In the area of admission:

a. A description of methods for admission which shall not be designed, intended, or used to discriminate or violate individual civil rights in any manner prohibited by law;

b. A description of how the program will liaison with the local education agency (LEA) for students with an education plan pursuant to section 504 of the Rehabilitation Act;

c. A description of how the program will liaison with the LEA for a student with disabilities, consistent with the student's IEP to include, but not be limited to coordinating:

1. Required special education programs;

2. Support services; and

3. Least restrictive environment; and

d. A statement that the program understands that it has certain responsibilities, pursuant to Section 504 of the Rehabilitation Act, if it receives Federal funds, or the Americans with Disabilities Act, as amended, to provide students with disabilities with equal access and equal opportunities to participate in the learn everywhere program, including by providing the student with reasonable accommodations;

Edit: lowercase

(3) In the area of facilities:

a. A description of facilities to be used for educational instruction and a description of how the facilities will meet the priorities of the program;

b. A statement affirming that the facilities shall comply with all applicable federal and state health and safety laws, rules, and regulations, including, but not limited to the following:

1. Fire safety; and

2. Barrier-free access under Abfd 300, code for barrier-free design, and the Americans with Disabilities Act of 1990(ADA), as amended by the ADA Amendments Act of 2008; and

c. Participation in the learn everywhere program shall not require facility requirements not otherwise required by state or federal law; and

(4) Disclosure of insurance, if any, which would cover the participants in the learn everywhere program.:

Ed 1403.02 Review by Department of Application for State Board Approval.

(a) Upon receipt of an application, the department shall form an ad hoc learn everywhere program approval committee comprised of the following members appointed by the commissioner or designee:

(1) From the department:

a. The administrator of the learn everywhere program, or designee, who shall serve as chair of the committee; ← **Edit: Insert "and"**

b. Department representatives with content area expertise, curriculum competency expertise, or both; ← **Edit: Insert "and"**

(2) Additional members, whose reasonable availability shall not interfere with the timely review of the application pursuant to RSA 541-A:29 including:

a. A representative from the extended learning opportunity network; and

b. No less than 1 ← **Edit: "one"** and no more than 2 New Hampshire state board licensed educators licensed in the content area enumerated on the application, where at least one shall be currently teaching in that content area in a school, as defined in Ed 1402.01(j).

(b) Pursuant to RSA 541-A:29, the department shall review the application submitted for state board approval within 30 business days of receiving the application to verify completeness and:

(1) If the application is incomplete, shall notify the applicant by email of the requirements for completion; and

(2) If the application is complete, shall notify the applicant by email that the application is received and complete.

Edit: Delete to avoid multiple requirements in intro language.

(c) The department shall provide support to the applicant during the application process.

(d) The learn everywhere program approval committee shall convene and shall evaluate the completed application for review by the board using the following criteria:

(1) The purpose or mission statements express a clear and focused purpose for the program that supports student learning;

(2) The description of the facilities includes sufficient detail to indicate that priorities will focus on a facility that is appropriate for the activities and students to be served;

(3) The program outline being proposed aligns with the selected Ed 306.27(v)(t) subject and the subject program as outlined in Ed 306.31 through Ed 306.48;

(4) There are educational goals, competencies, and methods for assessment that will be used to measure student progress toward meeting program goals and competencies;

(5) An adequate description is provided for staff member qualifications;

(6) Verification of a criminal background check policy and an assurance that it will be disclosed to parents upon enrollment; and

(7) A description of how the program will meet individual student needs and to ensure that the program meets the requirements of Ed 1403.01(b)(2)b.

(e) Pursuant to RSA 541-A:29, within 30 days of the notification of a completed application, the department shall notify the applicant in writing of the date and time of the meeting where the application will be discussed and voted on by the state board.

(f) The administrator of the learn everywhere program shall submit the evaluation report to the commissioner who shall submit such report and a recommendation to the state board along with the application materials for review.

Ed 1403.03 State Board Approval.

(a) The review of applications shall be an item on the agenda of a regularly-scheduled state board meeting, not to exceed 60 days after receipt of a completed application.

(b) The state board shall approve, conditionally approve, or deny the application and notify the applicant in writing of its decision.

(c) The state board shall approve the application, after reviewing the application and the department's evaluation under Ed 1403.02, if it determines the application is in compliance with Ed 1403.01.

(d) If the application is not in compliance with the standards referenced in Ed 1403.03(c), the application shall be conditionally approved if the state board determines that the remaining issues can be addressed in a timeframe not to exceed 90 days from notification by the state board, otherwise the application shall be denied.

(e) If the state board conditionally approves an application, the state board shall include in the notification:

- (1) A written explanation of the reasons for conditional approval;
- (2) The conditions the applicant shall meet for final approval;
- (3) The deadline for submission of the conditional approval response; and
- (4) The consequence for failure to comply with the conditional approval requirements.

(f) If the state board denies an application, the state board shall include in the notification:

- (1) A written explanation of the reasons for the denial;
- (2) The areas deemed deficient by the state board; and
- (3) An explanation that the applicant may reapply for approval at any time.

(g) When the state board receives the conditional approval response from the applicant, the state board shall review the response at the next regularly scheduled state board meeting for discussion and vote and shall notify the applicant in writing of either a final approval, conditional approval, or a denial of the application.

(h) The applicant may appeal a denial or conditional approval by the state board in accordance with Ed 213.

Ed 1403.04 Renewal of an Alternative Program for High School Graduation Credit.

(a) Ninety days prior to the expiration of a provisional approval, pursuant to Ed 1404.01(a), or a full approval, pursuant to Ed 1404.01(b), an applicant seeking renewal of a learn everywhere program

approval shall submit an application pursuant to Ed 1403.01(a) to the department along with the following:

- (1) A statement signed by the sponsor entity stating that there have been no changes to any of the programs or documentation required, as outlined in Ed 1403.01, since the previous application period; or
- (2) A statement signed by the sponsor entity stating there have been changes to one or more approved programs, a list of the changes, and supporting documentation as outlined in Ed 1403.01.

(b) Upon receipt of a renewal application, the department shall follow the review procedures as outlined in Ed 1403.02.

(c) The state board shall consider renewal applications following the procedures outlined in Ed 1403.03.

(d) The state board shall not issue a renewal of a one-year provisional approval without reviewing all evaluations received pursuant to 1407.01.

Ed 1403.05 Changes to Application Information. Any changes to any of the information enumerated in Ed 1403.01 shall be submitted in writing to the department for review and shall be submitted to the state board following the procedures enumerated in Ed 1403.03.

PART Ed 1404 PROGRAM APPROVAL, REVOCATION, AND WITHDRAWAL

Ed 1404.01 State Board Approval.

(a) If the state board approves an initial application or a conditional approval of an initial application for establishing an alternative program for high school graduation credit, the state board shall issue a one-year provisional approval, which can be renewed following the procedures outlined in Ed 1403.04.

(b) If the state board approves a renewal application or a conditional approval of a renewal application for an alternative program for high school graduation credit, the state board shall issue a 5-year approval, which may be renewed every 5 years following the procedures outlined in Ed 1403.04.

(c) If the state board conditionally approves a renewal application for a learn everywhere program, the state board shall issue a conditional approval, not to exceed 180 days, with a specific deadline for conditions to be met.

(d) A list of approved learn everywhere programs and their approval status shall be maintained on the department's website.

PART Ed 1405 REPORTING REQUIREMENTS

Ed 1405.01 Alternative Program for High School Graduation Credit Reporting Requirements. Each approved program shall annually, in September, submit to the state board a report which shall include, at a minimum, the following:

- (a) A brief statement explaining how the program is meeting the goals of its mission statement; and
- (b) The number of students enrolled in the program and the number of students awarded certificates leading to high school credits for the previous school year.

PART Ed 1406 STUDENT ENROLLMENT REQUIREMENTS

Ed 1406.01 Responsibility of the LEA.

(a) If a child with an IEP notifies the school of his or her intent to participate in a learn everywhere program, the LEA shall:

- (1) Follow the procedures enumerated in Ed 1109.03(h) and 34 CFR 300.324 to schedule an IEP team meeting; and
- (2) If requested by the child's parent or member of the IEP team, invite a representative from the learn everywhere program to attend the IEP team meeting.

(b) If the IEP team decides to redraft, revise, amend, or modify the IEP, the IEP team shall:

- (1) Determine what, if any, special education, related services, supplementary aids and services, accommodations, and modifications the student needs to participate in the program; and
- (2) Be responsible for providing the student with the special education, related services, supplementary aids and services, accommodations, and modifications the IEP team has determined the student needs pursuant to (1) above.

(c) The IEP team may decide not to redraft, revise, amend, or modify the IEP for reasons including, but not limited to:

- (1) The program would not assist the student in making progress towards one or more of the student's annual goals or appropriate measurable postsecondary goals in the student's IEP, regardless of whether the program will result in the student earning a high school credit;
- (2) The program is not necessary for the student to receive a free appropriate public education (FAPE); or
- (3) The program is not safe for the student, even if the student were provided with special education, related services, accommodations, and other supports and services.

(d) If a student's parent disagrees with the determination of the IEP team regarding the student's placement in a learn everywhere program, the parent may follow the procedures outlined in Ed 1121 through Ed 1123 regarding complaints, alternative resolutions, and due process hearings.

PART Ed 1407 PROGRAM COMPLETION CERTIFICATES AND ISSUING CREDIT

Ed 1407.01 Program Completion Certificates.

(a) Within 30 days of a student's successful completion of a program and submission of a learn everywhere program evaluation, a completion certificate shall be issued to the student.

(b) Certificates shall be signed by the person designated in Ed 1403.01(a)(2) and the instructor(s) of the program.

(c) Certificates shall contain course identification and credit information, including, but not limited to:

- (1) Course title;

(2) Course minimum standard alignment as indicated in Ed 1403.01(b)(3);

(3) Number of credits awarded; and

(4) Either:

a. "Mastery" to indicate completion of the program having met or substantially met all state competencies which results in a granting of credit; or

b. "Participate" to indicate the program was completed without having met or substantially met all state competencies. An IEP team may conclude that participation shows growth toward one or more of a student's annual or appropriate measurable post-secondary goals.

Edit: This appears to be a separate requirement instead of a subdivision of (c). Please move.

(d) Students applying more than the required credit leading to graduation may petition the school to allow that credit to count toward another required subject enumerated in Ed 306.27(v)(t). If that petition is denied, the credit shall be applied to the designated credit area and the student will have accumulated excess credits in that credit area.

Ed 1407.02 Issuing Credit for Graduation.

See Committee staff comment on p. 10 below.

(a) Notwithstanding Ed 306, schools shall accept at least 1/3, and may accept as much as 100 percent if approved by the superintendent, of the total number of credits required for high school graduation, if requested by a student pursuant to (c) below.

(b) Approved New Hampshire schools shall grant students with valid completion certificates from approved learn everywhere programs high school credit leading to graduation in the area enumerated on the certificate. Credits earned from learn everywhere programs shall appear on high school transcripts but shall not negatively affect the student's grade point average.

(c) The student shall submit the completion certificate to the high school where they wish to be granted credit, or they shall not receive credit.

(d) Program completion certificates earned by students while not enrolled in a school, as defined in Ed 1402.01(j), shall only be granted credit if approved by the school superintendent.

PART Ed 1408 DEPARTMENT MONITORING OF APPROVED LEARN EVERYWHERE PROGRAMS

Ed 1408.01 Monitoring.

(a) To determine if all standards are met as specified in the application and approval and as specified in Ed 1403.01 each approved learn everywhere program shall be reviewed and have an on-site monitoring visit conducted by the administrator of the learn everywhere programs as follows:

(1) One on-site visit during the one-year provisional approval; and

(2) At the discretion of the department any time during any approval period.

(b) The administrator of the learn everywhere program shall issue a written report of findings to the monitored program indicating compliance or noncompliance with statutes and rules relative to all programmatic components of the approved learn everywhere program to the commissioner.

(c) The commissioner shall submit the report of findings to the state board no later than 30 days after receiving the report.

(d) If the state board determines from the report that the program is not being implemented as approved, the department shall initiate an investigation as outlined in Ed 1409.

PART Ed 1409 COMPLAINTS, REVOCATION, AND WITHDRAWAL

Ed 1409.01 Complaints and Investigations.

Edit: "identifying, one or more of, but not limited to, the following"

(a) Complaints shall be submitted in writing to the department ~~identifying under circumstances including~~, but not limited to, one or more of the following *circumstances which the complainant alleges*:

- (1) The program ~~committed~~ commits a material violation of any of the conditions, standards, or procedures set forth in its application;
- (2) The program or sponsor organization knowingly ~~violated~~ violates Ed 1403.01(a)(4);
- (3) The program or sponsor organization ~~failed~~ fails to disclose or ~~violated~~ violates its disclosed criminal history records check policy;
- (4) The program or sponsor organization ~~made~~ makes a material misrepresentation in its application;
- (5) The program or sponsor organization ~~became~~ becomes insolvent; or
- (6) The program ~~was found~~ is found to be in violation of any law that undermines the purpose of the program.

Edit: This should read the program "is" in violation or "will be found" in violation.

(b) All complaints shall be investigated, and, upon receipt of the complaint, the department shall notify the program and sponsor organization within 15 days of receipt of the complaint that an investigation has been opened.

(c) After completion of an investigation, the department shall present its findings to the state board of education at the next regularly scheduled state board meeting.

(d) If the board determines that the program or sponsor organization has not met one or more of the circumstances enumerated in Ed 1407.01(a) the program or sponsor organization shall be notified in writing within 10 days of the board's finding.

Edit: "9"

Ed 1409.02 Suspension, Revocation, and Withdrawal.

(a) The department shall immediately suspend a program approval if the department finds that public health, safety, or welfare requires emergency action and incorporates a finding to that effect, pursuant to RSA 541-A:30, III.

(b) The state board shall revoke a program approval prior to the expiration of its term if the board determines that the program meets any of the circumstances outlined in Ed 1409.01(a), and shall notify the program or sponsor organization in writing within 10 days of the board's determination.

(c) A program or sponsor organization may appeal the board's decision pursuant to Ed 213.

Appendix I

Rule	Statute
Ed 1400	RSA 193-E:2-a, V(b)

Legislative Intent/Lack of Authority: Ed 1407.02(a) may be contrary to legislative intent and the Board may lack the authority to promulgate this rule. On October 17, 2019, the JLCAR voted 6-4 to make a final objection to notice number 2019-5 containing Ed 1400. The final objections were as follows:

1. Rule Ed 1407.02(a) in the Preliminary Objection Response is contrary to legislative intent to the extent that the rule violates the specific statute RSA 193-E:2-a, V(a), and the rule violates the more general statutory purpose clause RSA 193-E:1, II, as outlined in Committee staff comments;
2. Rule Ed 1400 in the Preliminary Objection Response is contrary to legislative intent to the extent that the rule violates the overall purpose of the statute RSA 193-E, as outlined in Committee staff comments; and
3. Rule Ed 1407.02(a) in the Preliminary Objection Response is beyond the Board's authority as outlined in Committee staff comments. (See attached JLCAR Meeting Minutes dated October 17, 2019)

See attached JLCAR Staff Comments to Objection Response 2019-5, Ed 1400 dated October 2, 2019.

The JLCAR then voted 6-4 to sponsor a joint resolution on the same grounds as the final objection and that the resolution should:

1. Prohibit the Board from adopting Ed 1400 as contained in Objection Response 2019-5; and
2. Recommend that the General Court clarify that the rulemaking authority of the Board in RSA 193-E:2-a, V(b) does not give the Board authority to require that school districts grant credit for courses or programs when the district did not itself approve the curriculum. In other words, the General Court should clarify that the statute does or does not authorize the Board to force a school district to accept the credit if it chose not to. (See attached JLCAR Meeting Minutes dated October 17, 2019)

During the 2020 legislative session Senate Joint Resolution 1 (SJR 1) was introduced, voted Ought to Pass in the Senate, and then Laid on the Table by the House. SJR 1 died on the table. (See attached Docket SJR 1- 2020 Session and SJR 1Text - 2020 Session). Once the SJR 1 died on the table, the Board was free to adopt the rules over the Committee's final objection. The rules were adopted August 13, 2020 and became effective August 14, 2020 with an active Final Objection. It is unknown by JLCAR staff if these rules have been challenged in any way since they became effective.

The current rules maintain an active Final Objection meaning that if a plaintiff were to sue the Board of Education based on the rule at issue the burden of proof would be on the Board to establish the part objected to is within the authority delegated to the agency and consistent with the intent of the legislature.

The Committee may now vote to issue a preliminary objection, issue a conditional approval if there is specific language the Committee feels is necessary, or approve FP 2021-133 containing Ed 1400. RSA 541-A:13 allows for Committee discretion in issuing approvals and objections. The Committee may issue a preliminary objection based on the issues previously discussed in 2019 or the Committee may approve the rules at this time. If the Committee chooses to approve the FP 2021-133 at this time, doing so would flip the burden of proof off of the Board and place it back onto any potential plaintiff.