

**STATE BOARD OF EDUCATION
ADMINISTRATIVE CODE
COMMENT/RESPONSE FORM**

This comment and response form contains comments from and since the May 3, 2017, meeting of the State Board of Education when the draft regulations were considered at First Discussion Level.

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| Topic: | Regulatory Equivalency and Waiver | Meeting Date: | June 7, 2017 |
| Code Citation: | N.J.A.C. 6A:5 | Level: | Proposal |
| Division: | Commissioner | Completed by: | State Board of Education Office |

Summary of Comments and Agency Responses:

The following is a summary of the comments received from State Board of Education members and the Department's responses. Each commenter is identified at the end of the comment by a letter that corresponds to the following list:

- A. Mark Biedron, President
State Board of Education
- B. Dr. Ronald Butcher, Member
State Board of Education

1. **COMMENT:** The commenter asked for confirmation from legal counsel that appeals of Commissioner decisions under N.J.A.C. 6A:5 are filed with the Appellate Division of the Superior Court, as is the case with all other final agency actions, and not with the State Board since Regulatory Equivalency and Waiver is a unique chapter of Administrative Code. **(B)**

RESPONSE: P.L. 2008, c. 36 deemed all Commissioner decisions to be final agency actions, which are appealed to the Appellate Division of the Superior Court. The law applies to Commissioner decisions under N.J.A.C. 6A:5.

2. **COMMENT:** The commenter suggested the State Board review the readoption with amendments of N.J.A.C. 6A:5 at Proposal Level during the June meeting instead of at Second Discussion. **(A)**

RESPONSE: The Department welcomes the opportunity to proceed directly to Proposal Level.



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DEPARTMENT OF EDUCATION
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

Proposal Level
June 7, 2017

KIMBERLEY HARRINGTON
Acting Commissioner

TO: Members, State Board of Education

FROM: Kimberley Harrington
Acting Commissioner

SUBJECT: N.J.A.C. 6A:5, Regulatory Equivalency and Waiver

AUTHORITY: N.J.S.A. 18A:4-15

REASON
FOR ACTION: Readoption with amendments

SUNSET DATE: October 20, 2017

Summary

The Department of Education (Department) proposes to readopt N.J.A.C. 6A:5, Regulatory Equivalency and Waiver, with amendments. The rules provide regulatory flexibility for school districts and other institutions regulated by Titles 6 and 6A of the Administrative Code. The chapter is scheduled to expire on October 20, 2017.

In the early 1990s, public opinion reflected growing concerns about the number of government regulations in the everyday lives of citizens and their potential costs. Likewise, the education community began expressing concerns about the complexity of administrative mandates, perceived micromanagement of school districts and regulations that focused on process rather than results. The need to address the issues prompted former Governor Whitman, the New Jersey State Board of Education (State Board), the Department, district boards of education, and administrators to focus on ways to promote deregulation and regulatory flexibility for school districts.

As a part of the response to the call for regulatory flexibility, the State Board adopted a new chapter N.J.A.C. 6:3A, Regulatory Equivalency and Waiver, effective July 3, 1995. N.J.A.C. 6:3A was readopted effective June 8, 2000, and then recodified as Chapter 5 of Title 6A of Administrative Code, effective July 3, 2000. N.J.A.C. 6A:5 has been readopted twice, effective July 8, 2005, and October 20, 2010.

The rules govern the equivalency and waiver process and provide the opportunity for regulatory flexibility for school districts and most programs regulated by the Department. An equivalency is permission to meet the requirements of a rule through an alternative means selected by the district board of education. A waiver allows a district board of education to avoid compliance with the specific procedures or substantive requirements of a rule for reasons that are educationally, organizationally, and fiscally sound. The rules require a school district's educational community, including parents, administration, and staff members, to be informed of the proposed equivalency or waiver and provided the opportunity to comment.

The equivalency and waiver process cannot be applied to certification requirements under the purview of the State Board of Examiners or to N.J.A.C. 6A:14, Special Education.

The following summarizes the chapter's provisions and the proposed amendments. Unless otherwise specified, amendments are proposed for style, clarity, or grammatical improvement.

Subchapter 1. General Provisions

N.J.A.C. 6A:5-1.1 Purpose

This section outlines the chapter's purpose and scope. The chapter's purpose is to provide regulatory flexibility via a waiver or equivalency to meet the requirements of a specific rule in the New Jersey Administrative Code Title 6 or Title 6A so school districts can provide effective and efficient educational programs. The section outlines the Commissioner's delegated authority to decide each equivalency and waiver request on a case-by-case basis.

The chapter applies to the following entities: school districts; charter schools; educational services commissions; jointure commissions; regional day schools; Marie Katzenbach School for the Deaf; private schools for the disabled; college-operated programs; and programs operated by the State Departments of Children and Families, Human Services, and Corrections. Agencies and clinics are excluded.

The Department proposes an amendment to N.J.A.C. 6A:5-1.1(a), which states the chapter's purpose is to provide regulatory flexibility for school districts to meet the requirements of the rules contained in the New Jersey Administrative Code Title 6 or Title 6A, to delete "Title 6 or." The last chapter from Title 6 was transferred to Title 6A in September 2013.

The Department proposes amendments to N.J.A.C. 6A:5-1.1(b), which states the entities covered by the chapter, to include renaissance schools, county vocational school districts, and county special services school districts. The Department considers renaissance schools, county vocational school districts, and county special services school districts to be covered by the chapter since they are local education agencies (LEAs) like school districts and charter schools, but is adding the reference for clarity. The Department also proposes to replace "private schools for the disabled" with "approved private schools for students with disabilities" to update the name of Department-approved private schools that provide special education and related services to students with disabilities placed by the district board of education responsible for providing the students' education.

N.J.A.C. 6A:5-1.2 Definitions

This section defines the terms used in the chapter.

N.J.A.C. 6A:5-1.3 Criteria for an equivalency or waiver

This section establishes the required criteria for an equivalency or waiver request to be considered.

The Department proposes an amendment at N.J.A.C. 6A:5-1.3(a)1, which requires an equivalency or waiver to demonstrate the spirit and intent of New Jersey Statutes Title 18A, applicable Federal laws and regulations, and the New Jersey Administrative Code Title 6 and 6A are served by granting the request, to delete the reference to Title 6 since all chapters have been moved to Title 6A.

N.J.A.C. 6A:5-1.4 Equivalency process

This section lists the information that a school district must submit in its equivalency application.

The Department proposes amendments at N.J.A.C. 6A:5-1.4(a), which allows the Commissioner, with authority delegated by the State Board for the purpose of this rule, to approve an equivalency to a specific rule based on a school district's submitted application. The Department proposes to delete "for the purpose of this rule" after "State Board" as it is understood the authority granted to the Commissioner applies to the rule. The Department also proposes to replace "an application" with "a Department-developed application" because the reference to the development of the application is proposed for deletion in the current third sentence.

The Department proposes to recodify the second sentence of N.J.A.C. 6A:5-1.4(a), which states the completed application must be signed by the chief school administrator and approved by the district board of education, as N.J.A.C. 6A:5-1.4(c) to place chief school administrator and district board of education approval in the proper place in the equivalency application process.

The Department proposes to recodify the last sentence of N.J.A.C. 6A:5-1.4(a) and (a)1 through 3 as N.J.A.C. 6A:5-1.4(b) and (b)1 through 3, respectively.

N.J.A.C. 6A:5-1.5 Waiver process

This section lists the information that a school district must submit in its waiver application.

The Department proposes at N.J.A.C. 6A:5-1.5 the same amendments as described for N.J.A.C. 6A:5-1.4.

N.J.A.C. 6A:5-1.6 Review and duration of the equivalency or waiver

This section details the Commissioner's responsibility and authority to review and assess granted equivalencies and waivers and to rescind an equivalency or waiver, if appropriate. The section also requires the Commissioner to report quarterly to the State Board regarding granted equivalencies and waivers and to at least annually review the equivalencies and waivers to Titles 6 and 6A to determine whether amendments to the Administrative Code should be proposed to the State Board. The section also establishes three years as the maximum length of time an equivalency or waiver can be granted.

The Department proposes to delete N.J.A.C. 6A:5-1.6(c), which requires the Commissioner to evaluate the equivalencies and waivers that were granted to Title 6 and propose amendments to the Administrative Code to the State Board as appropriate, because all chapters have been moved to Title 6A.

The Department proposes to recodify current N.J.A.C. 6A:5-1.6(d) through (f) as new N.J.A.C. 6A:5-1.6(c) through (e), respectively.

N.J.A.C. 6A:5-1.7 Appeals

This section states that a Commissioner's determination to grant or deny an equivalency or waiver application can be appealed in accordance with N.J.A.C. 6A:4, Appeals. The section also provides that a district board of education's action involving an equivalency or waiver can be challenged by initiating a contested case before the Commissioner pursuant to N.J.A.C. 6A:3, Controversies and Disputes.

The Department proposes an amendment at N.J.A.C. 6A:5-1.7(a), which states that a Commissioner's determination to grant or deny an equivalency or waiver application can be appealed in accordance with N.J.A.C. 6A:4, to replace "in accordance with N.J.A.C. 6A:4, Appeals" with "to the Appellate Division of the Superior Court as provided by law." The proposed amendment reflects that Commissioner decisions are considered final agency decisions, which are appealable to the Appellate Division and not in accordance with N.J.A.C. 6A:4.

As the Department has provided a 60-day comment period on this notice of proposal, this notice is excepted from the rulemaking calendar requirement, pursuant to N.J.A.C. 1:30-3.3(a)5.

Social Impact

The rules proposed for readoption with amendments apply to all LEAs; Marie Katzenbach School for the Deaf; approved private schools for students with disabilities (APSSDs); college-operated programs; and programs operated by the State Departments of Children and Families, Human Services, and Corrections.

LEAs and other entities that have requested an equivalency or waiver have reported the flexibility is beneficial. The flexibility provided by the rules proposed for readoption with amendments result in the development of new services for underserved populations, an increased ability to redirect resources or add additional programs, and resolution of long-standing problems. LEAs and other entities also report students and parents benefit from improved programs and services. Local taxpayers also benefit as LEAs and other entities have reported cost savings that denote improved, cost-effective management of economic resources. The benefits mean more efficient schools that further the community's needs.

The impact of the proposed amendments is negligible as they mainly clarify the entities governed by the rules and reflect the transfer of all Department rules to Title 6A of the Administrative Code.

Economic Impact

LEAs and other entities choose to submit an application for an equivalency or waiver; therefore, the process does not present a financial burden. LEAs and other entities that choose to apply for an equivalency or waiver have the responsibility of determining whether the request is cost effective. Local taxpayers may benefit because increased regulatory flexibility, creative programs, and better uses of resources can create higher-quality programs and services at a lower cost or without significant additional education expenditures. The proposed amendments will not alter any potential cost savings

Federal Standards Statement

The rules proposed for readoption with amendments will not be inconsistent with or exceed Federal requirements or standards as there are no Federal requirements or standards relating to this chapter.

Jobs Impact

The rules proposed for readoption with amendments are not likely to result in the generation or loss of jobs.

Agriculture Industry Impact

The rules proposed for readoption with amendments will have no impact on the agriculture industry in New Jersey.

Regulatory Flexibility Statement

While the chapter's rules apply to APSSDs that might seek and/or obtain equivalencies and waivers from applicable Department regulations, the rules proposed for readoption with amendments do not impose reporting, recordkeeping, or other compliance requirements on APSSDs, which may be considered small businesses as defined under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. Therefore, a regulatory flexibility analysis is not required.

Housing Affordability Impact

The rules proposed for readoption with amendments will have an insignificant impact on the affordability of housing in New Jersey. There is an extreme unlikelihood the rules proposed for readoption with amendments would evoke a change in the average costs associated with housing because the rules govern LEAs and other entities that request an equivalency to or waiver from specific provisions of Title 6A of the New Jersey Administrative Code.

Smart Growth Development Impact Analysis

The rules proposed for readoption with amendments will have an insignificant impact on smart growth. There is an extreme unlikelihood the rules proposed for readoption with amendments would evoke a change in housing production in Planning Areas 1 or 2, or within designated centers, under the State Development and Redevelopment Plan in New Jersey because the rules govern LEAs and other entities that request an equivalency to or waiver from specific provisions of Title 6A of the New Jersey Administrative Code.

Full text of the proposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

N.J.A.C. 6A:5, REGULATORY EQUIVALENCY AND WAIVER

TABLE OF CONTENTS

SUBCHAPTER 1. EQUIVALENCY AND WAIVER PROCESS

6A:5-1.1 Purpose and scope

6A:5-1.2 Definitions

6A:5-1.3 Criteria for an equivalency or waiver

6A:5-1.4 Equivalency process

6A:5-1.5 Waiver process

6A:5-1.6 Review and duration of the equivalency or waiver

6A:5-1.7 Appeals

CHAPTER 5. REGULATORY EQUIVALENCY AND WAIVER

SUBCHAPTER 1. EQUIVALENCY AND WAIVER PROCESS

6A:5-1.1 Purpose and scope

- (a) [The] **This chapter's** purpose [of this chapter] is to provide regulatory flexibility for school districts to meet the requirements of the rules contained in the New Jersey Administrative Code [Title 6 or] Title 6A. Regulatory flexibility may be granted as a waiver or equivalency to a specific rule so school districts can provide effective and efficient educational programs. The Commissioner, with authority delegated by the New Jersey State Board of Education, may approve on a case-by-case basis a waiver or equivalency to a specific rule.
- (b) Entities covered by the chapter include: school districts; charter schools; **renaissance schools; county vocational school districts; county special services school districts;** educational services commissions; jointure commissions; regional day schools; Marie Katzenbach School for the Deaf; **approved** private schools for [the disabled] **students with disabilities;** college-operated programs; and programs operated by the State Departments of Children and Families, Human Services, and Corrections. Agencies and clinics are excluded.

6A:5-1.2 Definitions

The following words and terms[, as used in this chapter,] shall have the following meanings **when used in this chapter**, unless the context clearly indicates otherwise.

“Equivalency” means approval to achieve the intent of a specific rule through an alternate means that is different from, yet judged to be comparable to or as effective as, those prescribed within the rule.

“Waiver” means approval to avoid compliance either with the specific procedures or the substantive requirements of a specific rule for reasons that are judged educationally, organizationally, and fiscally sound.

6A:5-1.3 Criteria for an equivalency or waiver

- (a) An equivalency or waiver to a specific rule must meet the following criteria:
 - 1. The spirit and intent of New Jersey Statutes Title 18A, applicable Federal laws and regulations, and the New Jersey Administrative Code Title [6 and] 6A are served by granting the equivalency or waiver.
 - i. Certification requirements of N.J.S.A. 18A:26-2 shall not be violated;
 - 2. The provision of a thorough and efficient education to [the] students in the school district is not compromised as a result of the equivalency or waiver; and
 - 3. There will be no risk to student health, safety, or civil rights by granting the equivalency or waiver.

6A:5-1.4 Equivalency process

- (a) The Commissioner, with authority delegated by the State Board [for the purpose of this rule], may approve an equivalency to a specific rule based on [an] **a Department-developed**

application submitted by a school district. [The completed application must be signed by the chief school administrator and approved by the district board of education.]

(b) The application [developed by the Department and] completed by the school district shall describe, at a minimum:

1. How the school district's proposed equivalency meets the spirit and intent of an existing rule;
2. The condition(s) or reason(s) for the proposed equivalency, including reference to the specific rule that necessitates the proposal;
3. The projected measurable results that will provide programs or services at least equal to the [required] current rule; and
4. How the school district's [educational] community, including the district board of education, parents, administration, and staff, has been informed of the proposed equivalency to the specific rule and has been provided the opportunity for public comment.

(c) The completed application shall be signed by the chief school administrator and approved by the district board of education.

6A:5-1.5 Waiver process

(a) The Commissioner, with authority delegated by the State Board [for the purpose of this rule], may approve a waiver to a specific rule based on [an] **a Department-developed** application submitted by a school district. [The completed application must be signed by the chief school administrator and approved by the district board of education.]

(b) The application [developed by the Department and] completed by the school district shall describe, at a minimum:

1. The waiver sought by the district;
2. The conditions or reasons for the proposed waiver, including reference to the specific rule that necessitates the proposal;
3. The projected measurable results that will demonstrate the waiver is educationally, organizationally and fiscally sound; and
4. How the school district's educational community, including the district board of education, parents, administration and staff, has been informed of the proposed waiver to the specific rule and has been provided the opportunity for public comment.

(c) **The completed application shall be signed by the chief school administrator and approved by the district board of education.**

6A:5-1.6 Review and duration of the equivalency or waiver

(a) The school district shall submit reports and documentation of the measurable results for periodic review as required by the Commissioner.

(b) The Commissioner shall present to the State Board quarterly reports of granted equivalencies and waivers.

[(c) The Commissioner shall evaluate the equivalencies and waivers that were granted to Title 6 and propose amendments to the Administrative Code to the State Board as appropriate.]

[(d)] (c) The Commissioner [shall] at least annually **shall** review the equivalencies and waivers granted to Title 6A to determine whether amendments to the Administrative Code should be proposed to the State Board.

[(e)] **(d)** The Commissioner may rescind [the] **an approved** equivalency or waiver [to the rule] if [the] **a** school district does not comply with the **specific rule's** intent [of the specific rule]. The Commissioner shall provide the school district with a reasonable time period to comply with all applicable rules after the equivalency or waiver approval is rescinded.

[(f)] **(e)** An equivalency or waiver shall not be granted for a period of more than three years.

6A:5-1.7 Appeals

(a) Any party aggrieved by a Commissioner's determination to grant or deny an equivalency or waiver pursuant to this chapter may appeal the determination [in accordance with N.J.A.C. 6A:4, Appeals] **to the Appellate Division of the Superior Court as provided by law.**

(b) Any party seeking to challenge an action by a district board of education on the grounds that such action is in violation of school laws shall initiate a contested case pursuant to N.J.A.C. 6A:3, Controversies and Disputes, notwithstanding that the action being challenged may involve the implementation of a waiver or equivalency granted by the Commissioner.