

## **Notice of Adoption for N.J.A.C. 6A:32, School District Operations**

The following is the accessible version of the notice of adoption related to the proposed amendments at N.J.A.C. 6A:32.

**Education**

**State Board of Education**

**School District Operations**

**Readoption with Amendments: N.J.A.C. 6A:32**

**Adopted Repeals and New Rules: N.J.A.C. 6A:32-12**

**Adopted New Rules: N.J.A.C. 6A:32-8.4, 8.5, 8.6, and 13**

Proposed: August 16, 2021, at 53 N.J.R. 1307(a).

Notice of Proposed Substantial Changes Upon Adoption to Proposed Amendments: February 7, 2022, at 54 N.J.R. 223(a).

Adopted: June 1, 2022, by the New Jersey State Board of Education, Angelica Allen-McMillan, Ed.D., Acting Commissioner, Department of Education, and Acting Secretary, State Board of Education.

Filed: June 6, 2022, as R.2022 d.081, **with substantial changes** to proposal after additional notice and public comment, pursuant to N.J.S.A. 52:14B-10.

Authority: N.J.S.A. 18A:4-10 and 15; 18A:6-50; 18A:10-6; 18A:12-21 et seq.; 18A:13-14; 18A:16-1; 18A:17-14 through 14.3, 15, 17, 20, and 32; 18A:22-14 and 19; 18A:24-11; 18A:28-9 and 13; 18A:29-9, 11, and 13 through 16; 18A:38-1; 18A:40-12.1; P.L. 2020, c. 27; and the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act of 2015 (P.L. 115-141).

Effective Dates: June 6, 2022, Readoption;  
July 5, 2022, Amendments, Repeals, and New Rules.

Expiration Date: June 6, 2029.

## Summary of Comments and Agency Responses

The following is a summary of the comments related to (1) comments received during the initial comment period giving rise to substantial changes in the proposal upon adoption (The comments were already presented to the State Board and published in the New Jersey Register on February 7, 2022, at 54 N.J.R. 223(a)); (2) comments received during the initial comment period that did not give rise to changes in the rule proposal; and (3) comments received in response to the notice of proposed substantial changes upon adoption.

The following is a summary of the comments received from the public and the Department of Education's (Department) responses. Each commenter is identified at the end of the comment by a number that corresponds to the following list:

1. Melanie M. Schulz, Director of Government Relations, New Jersey Association of School Administrators
2. Jennie Lamon, Assistant Director of Government Relations, New Jersey Principals and Supervisors Association
3. Elisabeth Ginsburg, Executive Director, Garden State Coalition of Schools
4. Michael Cohan, Director, Professional Development and Instructional Issues, New Jersey Education Association
5. Martha O. DeBlieu, Associate Director, Education Research and Issues Analysis, New Jersey Education Association
6. Jonathon Pushman, Director of Government Relations, New Jersey School Boards Association
7. Vittorio S. LaPira, Attorney, Fogarty and Hara, Counselors at Law
8. Kathleen Fernandez, Executive Director, New Jersey Teachers of English to

Speakers of Other Languages/New Jersey Bilingual Educators

9. Elizabeth Athos, Senior Attorney, Education Law Center
10. Rebecca Spar, New Jersey Special Education Practitioners
11. Lady Jimenez Torres, Policy Director, New Jersey Consortium for Immigrant Children

**1. Comments Received During Initial Comment Period Giving Rise to Substantial Changes in Proposal upon Adoption**

1. Comment: The commenters stated that “auxiliary teacher” at proposed N.J.A.C. 6A:32-12.1(c)1 is not defined and is unclear. The commenters recommend that the term be deleted. (1 through 5)

Response: The Department agreed with the commenters. Therefore, the Department is deleting “auxiliary teacher” at N.J.A.C. 6A:32-12.1(c)1.

**2. Comments Received During Initial Comment Period Not Giving Rise to Changes in the Rule Proposal**

2. Comment: The commenters requested that the Department delay in the adoption of the proposed amendments at N.J.A.C. 6A:32 until further stakeholder engagement occurs. The commenters requested that the State Board readopt N.J.A.C. 6A:32 without amendments to prevent the chapter from expiring and to provide time for the Department to engage stakeholders to discuss the proposed amendments and their potential impact. (1, 2, 3, 5, and 6)

Response: The Department appreciates the request for additional stakeholder engagement; however, the Department has proposed amendments and new rules at N.J.A.C. 6A:32 that are based on existing Federal requirements and State statute that must be codified. The

Department commits to engaging stakeholders through the implementation of the proposed readoption with amendments and new rules, as needed.

3. Comment: The commenters stated that many of the proposed amendments at N.J.A.C. 6A:32 are confusing and not found in the statute. The commenters listed the following as examples: replacing “school day” with “days in session”; instituting “days in membership”; and proposing definitions of “remote learning” and “virtual learning” that do not reflect statute or distinguish between synchronous and asynchronous learning. (1, 3, 4, and 5)

Response: The Department appreciates the level of uncertainty in the field as new terms are being introduced into the lexicon of commonly used terms. However, creating definitions that align to Federal definitions, such as “days in session” and “days in membership,” will allow local education agencies (LEAs) to keep a more accurate accounting of student attendance that aligns to Federal reporting. The Department proposes to codify the definitions of “days in session” and “days in membership” for use in the calculation of a student’s absentee rate and chronic absenteeism rates, which already has been defined in the February 2021 guidance document for LEAs titled [“Guidance for Reporting Student Absences and Calculating Chronic Absenteeism.”](#) Additionally, the terms are currently used in collection for student attendance in NJSMART.

The Department was charged with creating definitions for both “virtual instruction” and “remote instruction” pursuant to P.L. 2020, c. 27. The proposed definitions provide the flexibility to LEAs to design such instruction using both synchronous and asynchronous learning.

4. Comment: The commenters stated that the Commissioner’s memorandum regarding the readoption without amendments at N.J.A.C. 6A:11, Charter Schools, provides precedent to readopt a chapter without amendments and allow for stakeholder engagement. The commenters stated that the disruptions related to COVID-19 that impacted stakeholder engagement relevant to N.J.A.C. 6A:11 also apply to N.J.A.C. 6A:32. (2, 5, and 6)

Response: The Department appreciates the request for additional stakeholder engagement. However, the proposed amendments and new rules at N.J.A.C. 6A:32 are based on existing Federal requirements and State statute that must be codified, regardless of the COVID-19 pandemic limiting stakeholder engagement. The Department commits to engaging stakeholders through the implementation of the proposed amendments and new rules, as needed.

5. Comment: The commenters expressed concern with aspects of the proposed readoption that change regulations to fit Department-developed documents and programs instead of ensuring the documents or programs reflect regulatory language. (3, 4, and 5)

Response: The Department appreciates the commenters’ concerns and agrees that, in some instances, the amendments and new rules are proposed to meet existing Federal requirements and State statute that must be codified. The Department is also aligning the chapter to how school districts and the State must calculate chronic absenteeism per the State’s approved ESSA Plan.

6. Comment: The commenter stated that the proposed amendments inadequately clarify the status of an emancipated minor and whether the individual is considered to be an adult for decision-making purposes. (4)

Response: The Department disagrees with the commenter because “adult student”

encompasses emancipated minors, who are be able to participate in decision-making and are required to be notified of the same matters as an adult student or parent.

7. Comment: The commenter stated that N.J.A.C. 6A:32-2.1 contains several problematic proposals, including the elimination of certain long-used terms and phrases. The commenter also stated that the section, as proposed for amendment, includes invented new terms that are confusing, illogical, and not found in State statutes, regulations, or negotiated agreements. (5)

Response: The commenter did not provide details regarding the specific terms and phrases that are problematic, deleted, or confusing; therefore, the Department cannot respond.

8. Comment: The commenter stated that the proposed terms at N.J.A.C. 6A:32-2.1 do not align with the Federal Every Student Succeeds Act (ESSA) or other Federal or State statutes, despite the Department citing ESSA and equity as the rationale for some of the changes. The commenter also stated that the proposed deletion of the definition for “average daily attendance” is concerning. (4)

Response: The commenter did not provide details regarding the specific terms that do not align with the Federal Every Student Succeeds Act (ESSA) or other Federal or State statutes; therefore, the Department cannot respond. The Department proposes to delete the definition of “average daily attendance” because existing N.J.A.C. 6A:32-8.2(g) will be recodified as N.J.A.C. 6A:32-8.5 with amendments. The amendments specify how to calculate the “average daily attendance,” which is self-explanatory; therefore, a definition at N.J.A.C. 6A:32-2.1 is not required.

9. Comment: The commenter expressed concern with the proposed deletion of “average daily attendance” at N.J.A.C. 6A:32-2.1. The commenter stated that the term is a long-used measure in school operations, monitoring, and school aid formulas. The commenter also stated that the definition for “average daily attendance” at N.J.A.C. 6A:32-8.5 should appear in the definitions section at N.J.A.C. 6A:32-2.1. (5)

Response: The Department disagrees with the commenter that “average daily attendance” should be maintained at N.J.A.C. 6A:32-2.1. The Department proposes to delete the definition of “average daily attendance” because existing N.J.A.C. 6A:32-8.2(g) will be recodified as N.J.A.C. 6A:32-8.5 with amendments. The amendments specify how to calculate the “average daily attendance,” which is self-explanatory; therefore, a definition at N.J.A.C. 6A:32-2.1 is not required.

10. Comment: The commenter stated that the proposed term “days in membership” at N.J.A.C. 6A:32-2.1 is not found in State statute. The commenter also questioned the need for the term and stated it could lead to unnecessary confusion. (2)

Response: The Department appreciates the level of uncertainty in the field as new terms are introduced. However, creating definitions that align to Federal definitions, such as “days in membership,” will allow LEAs to keep a more accurate accounting of student attendance that aligns to Federal reporting requirements. The Department proposes to codify the definition “days in membership” for use in the calculation of a student’s absentee rate and chronic absenteeism rates, which already has been defined in the February 2021 guidance document for LEAs titled “Guidance for Reporting Student Absences and Calculating Chronic Absenteeism.” Additionally, the terms are currently used in collection for student attendance in NJSMART.

11. Comment: The commenter stated that the proposed term “days in membership” is not an appropriate characterization of student enrollment and attendance. The commenter recommended alternative terms, such as “days of student enrollment,” “individual student enrollment,” or “individual student attendance.” The commenter stated that the alternative terms would be readily understood and transparent and would not further confuse the educational community or community-at-large. (5)

Response: The Department’s proposed definition for “days in membership” is part of the calculation to determine a student’s attendance rate and chronic absenteeism rates pursuant to the New Jersey ESSA State Plan. “Days in membership” refers to the number of possible days a student may attend school, and not the actual number of days a student attends school. The Department maintains that the proposed definition will assist LEAs in keeping a more accurate accounting of student attendance that aligns to Federal reporting requirements. Further, the Department’s proposed definition of “days in membership” is currently used in the calculation of a student’s absentee rate and chronic absenteeism rates, as defined in “Guidance for Reporting Student Absences and Calculating Chronic Absenteeism.” These terms are currently used in collection for student attendance in NJSMART.

12. Comment: The commenter questioned why the proposed definition for “personally identifiable information” at N.J.A.C. 6A:32-2.1 limits the applicability to a reasonable person in the school community. The commenter requested that the Department amend the definition to delete “in the school community.” (6)

Response: The Department is proposing to align the definition at N.J.A.C. 6A:32-2.1 with the “personally identifiable information” definition in the Family Educational Rights

and Privacy Act (FERPA). The FERPA definition explicitly states, “a reasonable person in the school community.”

13. Comment: The commenter recommended that the Department consider creating a different class of student records that are accessible with redaction and delineate other student records that are never subject to access by third parties, rather than adopting, at N.J.A.C. 6A:32-2.1, the definition of “personally identifiable information” in FERPA to establish redaction requirements for student records to fulfill Open Public Records Act (OPRA) requests. The commenter stated that the Department should undertake further study, including potentially engaging a task force or focus groups of interested parties, before reissuing the revised regulations. The commenter further stated that the Department’s review should include serious consideration of whether a new category of records would be more appropriate. (7)

Response: The Department disagrees with the commenter and will continue to align the requirements for redaction of student record requirements with FERPA for OPRA requests. A party not identified at N.J.A.C. 6A:32-7.5(a) must request access to student records through OPRA. Once a student record is removed of all personally identifiable information, then it is no longer considered a student record, and is releasable through OPRA. Therefore, a new category of records is not necessary.

14. Comment: The commenter stated that the definition of “personally identifiable information” at N.J.A.C. 6A:32-2.1 would not require redaction of significant amounts of sensitive personal information that should not be disclosed even if the documents are anonymized through redaction of names and other personally identifiable information. The commenter also stated that there are certain types of student records that parents or

adult students would never consent to disclosing to third parties, such as psychiatric evaluations of students, individualized education programs (IEPs), and social history evaluations. The commenter further stated that a third party could request all psychiatric evaluations on file in a school district and released records that are redacted for personally identifiable information still would contain sensitive information that no parent expects to be released. The commenter also stated that there is no basis for a third party to obtain such records, and that students and parents have an expectation of privacy that certain details remain private and confidential even though they do not fall within the definition of “personally identifiable information.”

The commenter stated that public personnel records have greater privacy protections pursuant to N.J.S.A. 47:1A-10 than student records under the proposed rulemaking. The commenter also stated that it is inappropriate for third parties to have access to students’ records containing sensitive information when the law forbids access to similar public employee records.

The commenter further stated that, without clear standards, there will be continued litigation on issues concerning the scope of redactions, or denials of access for what school districts deem targeted requests that meet subsection 10 of the proposed definition of “personally identifiable information.” (7)

Response: The Department disagrees with the commenter. The proposed definition of “personally identifiable information” at N.J.A.C. 6A:32-2.1 contains a list for school districts to use when redacting a student record. The list comes directly from the definition in FERPA. Information that can be released after personally identifiable information has been removed would not be attributable to any student. For example, the

requestor would know that psychiatric examinations are conducted, but not be able to identify which students and, therefore, their privacy is protected. The requirements to remove personally identifiable information may be very similar, resulting in the personnel record no longer considered a personnel record and can be released through OPRA. The proposed definition of “personally identifiable information,” when applied to a student record, will result in the record no longer being considered a student record, which will make it releasable under OPRA.

15. Comment: The commenter stated that the proposed definition of “personally identifiable information” includes information requested by a person who the district board of education “reasonably believes knows the identity of the student to whom the student record relates.” The commenter also stated this provision is effectively meaningless when a requestor submits an anonymous request pursuant to OPRA. The commenter further stated that there is no way for school districts to know whether a requestor might know the identity of the students whose records are being produced. The commenter also stated that a knowledgeable requestor can get information that would otherwise be protected from disclosure simply by making the request anonymously.

The commenter also stated that subsection 10 of the proposed definition does not address anonymous requests, which could be for a particular class, or even a particular school. The commenter further stated that the proposed regulations do not provide school officials with a vehicle for denying such requests and, therefore, fail to adequately protect student privacy interests in this regard. (7)

Response: The Department disagrees. Pursuant to N.J.S.A. 47:1A-1, OPRA requests can be anonymous. School districts must use their discretion and may consult with the district

board of education attorney prior to releasing a redacted student record. Further, the school district is required to remove personally identifiable information, as defined at N.J.A.C. 6A:32-2.1, and any other information that may identify a student prior to releasing the record. The Department disagrees that the proposed rules do not provide school officials with a vehicle for denying anonymous requests and, therefore, fail to adequately protect student privacy interests. Specifically, N.J.A.C. 6A:32-7.5(g)1 states that the district board of education or charter school or renaissance school project board of trustees must make a reasonable decision that a student's identity cannot be determined, whether through single or multiple releases, or when added to other reasonably available information. The regulation allows school districts to deny a request because personally identifiable information cannot be safeguarded.

16. Comment: The commenter recommended revising the definition of "student records" to exempt certain types of records that contain information about a student and allow the public to access those records subject to redaction. The commenter stated that the definition, as proposed for amendment, is inadequate to protect the privacy interests of students. The commenter also stated that student records, such as student health records, counseling notes, IEPs, evaluation reports, progress reports, disciplinary incident reports or HIB reports, or report cards, should never be accessible to third parties, even in redacted form. The commenter further stated that the risk is too great and the privacy interests should outweigh any alleged need to access this information, absent a bona fide researcher.

The commenter also stated that there are other types of student records where the privacy interests are far more remote and their disclosure after redaction would strike an

appropriate balance between transparency about government spending and the privacy rights of students. The commenter cited records that would more commonly be thought of as “business records” that are also “student records,” such as contracts for tuition to out-of-district schools; contracts with service providers (that is, nurses, therapists, etc.) for individual students; and settlement agreements between parents and the district board of education.

The commenter suggested an amendment to the proposed new language in the definition of a “student record” that states “In the absence of any ‘information related to an individual student,’ the document(s) no longer meets the definition of “student record.” The commenter suggested that “the document(s)” be replaced with “student record that is a business record (tuition contracts, contracts with service providers, and settlement agreements).”

The commenter also suggested amendments at new N.J.A.C. 6A:32-7.5(g)1, which, in part, allows LEAs to release under OPRA, without consent, records removed of all personally identifiable information, as such documents do not meet the definition of a student record. The commenter requested that “records removed” be replaced with “those student records that are business records specified in N.J.A.C. 6A:32-1.2 removed.” The commenter also requested that the following be added at the end of the regulation: “In no event, however, shall a district board of education or charter school or renaissance school project board of trustees release records to an anonymous OPRA requestor (whether truly anonymous or using a palpably obvious pseudonym).” (7)

Response: The Department disagrees with the commenter. Revising the definition of “student record” to exempt certain types of records that contain information about a

student and, therefore, allow public access to the records after redaction is not necessary, provided all personally identifiable information is removed. Additionally, a student health record is not part of a “student record,” is protected through the Federal Health Insurance Portability and Accountability Act (HIPAA), and cannot be disclosed pursuant to OPRA.

The Department disagrees with the commenter’s suggested edit to the definition to replace “the document(s)” with “student record that is a business record (tuition contracts, contracts with service providers, and settlement agreements),” because contents of a student record cannot be split among multiple records. The school district is responsible for responding to OPRA requests and for removing all personally identifiable information from responsive records before their release. Further, the Department disagrees with the commenter’s proposed amendment at N.J.A.C. 6A:32-7.5(g)1 to replace “records removed” with “those student records that are business records specified in N.J.A.C. 6A:32-2.1 removed,” and to add “In no event, however, shall a district board of education or charter school or renaissance school project board of trustees release records to an anonymous OPRA requestor (whether truly anonymous or using a palpably obvious pseudonym),” at the end of the regulation. The Department disagrees with creating another record called a “business record” for the reasons stated above and, pursuant to N.J.S.A. 47:1A-1, OPRA requests can be anonymous.

17. Comment: The commenter stated that the proposed definitions for “remote instruction” and “virtual instruction” at N.J.A.C. 6A:32-2.1 do not include safeguards to ensure that school districts do not create programs that are unworkable, unmanageable, educationally unsound, or not offered. (4)

Response: The Department was charged with creating definitions for both “virtual

instruction” and “remote instruction” pursuant to P.L. 2020, c. 27. The proposed definitions provide the flexibility to LEAs to design such instruction using both synchronous and asynchronous learning. As with in-person instruction, LEAs have the flexibility to create lessons to meet the regulatory requirements and the same expectation is made for virtual or remote instruction. The same safeguards are in place to ensure that school districts do not create programs that are unworkable, unmanageable, educationally unsound, or not offered. One safeguard is the monitoring of school districts through the New Jersey Quality Single Accountability Continuum.

18. Comment: The commenter stated that the definitions for “remote instruction” and “virtual instruction” at N.J.A.C. 6A:32-2.1 are nearly identical and asked the Department to describe the difference between the two terms. More specifically, the commenter asked if it is possible to employ “remote instruction” without using “virtual instruction.” (6)

Response: The Department has defined “virtual instruction” as the provision of active instruction when the school building is closed and the student and the instructor are in different locations and instruction is facilitated remotely through the internet and computer technologies. The proposed definition for “remote instruction” does not include that the instruction is facilitated remotely through the Internet or computer technologies when the school building is closed, and the student and the instructor are in different locations. An LEA may employ remote instruction without using virtual instruction.

19. Comment: The commenter stated that the proposed definitions for “remote instruction” and “virtual instruction” at N.J.A.C. 6A:32-2.1 do not represent the way the terms have been used by educators during the past 18 months. (2)

Response: The Department was charged with creating definitions for “virtual instruction”

and “remote instruction” pursuant to P.L. 2020, c. 27. The proposed definitions provide the flexibility to LEAs to design virtual and remote instruction plans using both synchronous and asynchronous learning.

20. Comment: The commenter stated that the proposed definitions for “remote instruction” and “virtual instruction” at N.J.A.C. 6A:32-2.1 do not reflect that the terms are used interchangeably within the education community. The commenter also stated that there should be no distinction in the definition and that remote instruction does not exclude virtual means, whether synchronous or asynchronous. The commenter further stated that the COVID-19 pandemic has shown that virtual/remote/online instruction by fully certified staff may be necessary in an extended emergency to protect staff and students, but teaching and learning in a safe, healthy environment where both staff and students are physically present and without risk to health or safety still works best for preschool through grade 12 students and staff. (5)

Response: The Department is purposefully making a distinction between the definitions for “virtual instruction” and “remote instruction,” as required at P.L. 2020, c. 27. School districts should begin to differentiate between the two modes of instruction when in-person instruction is not available to students. Remote instruction excludes instruction by virtual means, which gives a school district the flexibility to provide instruction to meet the needs of its student population. If the instruction is being facilitated through electronic means, then it is virtual instruction. The Department agrees with the commenter that learning in a safe, healthy environment where both staff and students are physically present and without risk to health or safety still works best for preschool through grade 12 students and staff.

21. Comment: The commenter stated that replacing “provide” with “maintain” at N.J.A.C. 6A:32-3.2(a)3 diminishes school district, charter school, and renaissance school project accountability. The commenter also stated that the statements of assurance should be both submitted, on file, and accessible online within a school district, and available for public review. The commenter further stated that the documents are useless without scrutiny for compliance and should be fully transparent and identify any holdings, ties, or connections that an individual may have to companies, groups, vendors, lawmakers, or other individuals that directly or indirectly are connected to, or benefit from, the school district or school. (5)  
Response: The proposed amendment at N.J.A.C. 6A:32-3.2(a)3 requires district boards of education and charter school or renaissance school project boards of trustees to maintain documentation that each member has received and reviewed the Code of Ethics. The additional information that the commenter requested exists at N.J.S.A. 18A:12-25 and 26 and at N.J.A.C. 6A:28-3.
22. Comment: The commenter stated that N.J.A.C. 6A:32-5.1(b), as proposed for amendment, fails to clarify that seniority credit must be restored if a discipline or suspension is modified, overturned, or otherwise set aside or found unwarranted or excessive by a board, court, arbitrator, or other State adjudicating body. The commenter also stated that N.J.A.C. 6A:32-5.1(e) should apply to individuals who hold, and are working pursuant to, an emergency or provisional certificate only to the portion of their assignment covered by that certificate. The commenter further stated that there may be instances where a standard certificate holder is working under both a standard certificate and a provisional certificate and that the individual should not be penalized from gaining seniority under the standard certificate. The commenter also stated that N.J.A.C. 6A:32-

5.1(e), as proposed for amendment, is confusing and subject to misinterpretation. (5)

Response: The Department disagrees that N.J.A.C. 6A:32-5.1(b) is unclear. The regulation, as proposed for amendment, specifically states that leaves of absence or suspension resulting from confirmed discipline do not count toward seniority credit, which means that unconfirmed discipline leave would automatically count towards seniority. Further, the Department disagrees that N.J.A.C. 6A:32-5.1(e) is confusing and subject to misinterpretation. N.J.A.C. 6A:32-5.1(f) specifies that, whenever a person holds employment simultaneously under two or more endorsements, or in two or more categories, seniority shall be counted in all endorsements and categories in which the person is, or has been, employed.

23. Comment: The commenter requested the rational of permitting, at N.J.A.C. 6A:32-5.1(b), an unpaid leave of absence for disciplinary reasons to count toward seniority while unpaid leaves for reasons such as maternity or workplace injury would not be counted. The commenter also requested confirmation that N.J.A.C. 6A:32-5.1(b) involves only seniority and has no bearing on the rules regarding acquisition of tenure. (6)

Response: The Department disagrees with the commenter that the proposed amendments at N.J.A.C. 6A:32-5.1(b) permit an unpaid leave of absence for disciplinary reasons to count toward seniority credit. Rather, the proposed amendments state that any leave of absence or suspension resulting from confirmed discipline shall not receive seniority credit. Specifically, only unpaid leaves of absence for study or research, up to 30 days, may be credited toward seniority. Lastly, N.J.A.C. 6A:32-5.1(b), as proposed for amendment, applies only to seniority.

24. Comment: The commenter recommended that the Department amend N.J.A.C. 6A:32-5.1(b) to state that paid leaves of absence that occur during an investigation while a decision is pending, and that ultimately result in disciplinary action, shall be credited toward seniority. (2)

Response: The Department disagrees that N.J.A.C. 6A:32-5.1(b) needs further amendment. Under the regulation, as proposed for amendment, paid leaves continue to count toward seniority. The proposed amendments clarify that the unpaid leaves only for study or research count toward seniority.

25. Comment: The commenter expressed support for N.J.A.C. 6A:32-6.2, as proposed for amendment. The commenter agreed that policies and procedures for physical or psychiatric examinations must guarantee confidentiality of such records. (5)

Response: The Department appreciates the support.

26. Comment: The commenter stated that the proposed amendments at N.J.A.C. 6A:32-7 will increase the potential for misuse of student records and the potential liability for, and attacks against, school staff and school districts in erring in the release of student record information. The commenter also stated that the proposed amendments will create provisions enabling the release of student records that are not in concert with case law. The commenter further stated that the risk of releasing identifiable student indicators is great, particularly with respect to the wide array of potential identifiers. (5)

Response: The Department appreciates the commenter's concerns about releasing personally identifiable information when a school district releases records through an OPRA request. The proposed definition of "personally identifiable information" aligns to the term's definition in FERPA. If an LEA eliminates all personally identifiable

information from a student record, then it is no longer considered a student record and can be released. The LEA is responsible for ensuring that the record is redacted for all personally identifiable information.

27. Comment: The commenter stated that the proposed amendments at N.J.A.C. 6A:32-7, Student Records, are inconsistent and unclear and could risk violations of student privacy. (1)

Response: Although the commenter did not specify which amendment(s) at Subchapter 7 is inconsistent and unclear; the Department maintains that the amendments proposed at Subchapter 7 provide guidance to school districts in responding to OPRA requests for student records and will decrease the likelihood that student privacy will be compromised.

28. Comment: The commenter expressed concern that the proposed amendments at N.J.A.C. 6A:32-7 contain multiple problematic changes related to student records and student privacy. (3)

Response: The commenter did not provide details regarding specific problematic changes related to student records and student privacy at Subchapter 7; therefore, the Department cannot respond.

29. Comment: The commenter inquired whether recodified N.J.A.C. 6A:32-7.5(b), which states that school districts may charge a reasonable fee for reproduction of student records, not to exceed the schedule of costs set forth at N.J.S.A. 47:1A-5, includes special service charges as permitted at N.J.S.A. 47:1A-5.c. The commenter also asked which procedures or criteria boards of education should use to determine whether the cost is

preventing parents or adult students from exercising their rights. (6)

Response: The cross-reference to OPRA, N.J.S.A. 47:1A-5, is inclusive of N.J.S.A. 47:1A-5.c. District boards of education are responsible for determining a reasonable fee for reproduction of student records that aligns with the provisions at N.J.S.A. 47:1A-5. District boards of education can consult with their attorneys to determine if a fee aligns with OPRA or is preventing parents or adult students from exercising their rights under N.J.A.C. 6A:32-7 or other Federal and State rules and regulations regarding students with disabilities, including N.J.A.C. 6A:14.

30. Comment: The commenter suggested an amendment to the first sentence at N.J.A.C. 6A:32-7.5(e)7, which allows secretarial and clerical personnel under the direct supervision of certified school personnel to be permitted access to portions of the record to the extent necessary for the entry and recording of data and the conducting of routine clerical tasks. The commenter stated that the regulation should state that “certificated school district employees and secretarial and clerical personnel who are school district employees employed directly by the district board of education on a permanent basis and under the direct supervision of certified school personnel” are permitted access. The commenter also stated that temporary employees or individuals from external companies should not have any access to student records. (5)

Response: The commenter’s suggested language assumes that all staff in a school district are employed directly by the school district on a permanent basis. District boards of education have the authority to staff school districts, as necessary, and the Department cannot regulate that a school district employ secretarial and clerical staff on a permanent basis, which is why the existing rules require access to be under the supervision of certified

school personnel. Existing N.J.A.C. 6A:32-7.5(e)14, 15, and 16 establish strict parameters for external individuals accessing a student record. Organizations, agencies, and persons from outside the school may access student records if they have the written consent of the parent or adult student, or a court order, or if they are a *bona fide* researcher.

31. Comment: The commenter stated that the proposed amendments at N.J.A.C. 6A:32-7 would inadvertently increase liability for school districts, run the risk of violations of students' privacy rights, and do not follow the Appellate Division's decision in *L.R. v. Camden City School Dist.*, 452 N.J. Super. 56 (App. Div. 2017) *aff'd* 238 N.J. 247 (2019).

The commenter stated that the ability under OPRA for an individual to make an anonymous request would be a potential violation of student privacy. The commenter also stated that the broadened term "organizations," in lieu of a *bona fide* researcher, is problematic for school districts and does not meet the standards of the definition of *bona fide* researcher in current law and rule. The commenter further stated that the broadened term would enable organizations, with their own agendas, to access student records that should remain private. The commenter stated that, as an example, N.J.A.C. 6A:32-7.5(e) provides that individual student discipline records are private records and not for observation by anyone other than the record holder or the record holder's parent or legal guardian or under limited circumstances prescribed by court order. The commenter further stated that the proposed amendments will open up access to a broader range of individuals contrary to the interests of students and past law/practice in the State. (2)

Response: The Department disagrees with the commenter's interpretation of the proposed amendments at N.J.A.C. 6A:32-7. Proposed N.J.A.C. 6A:32-7.5(g)1 establishes that a student record removed of all personally identifiable information is no longer considered a

student record and, therefore, can be released through an OPRA request. If a party not listed at N.J.A.C. 6A:32-7.5(e) submits an OPRA request, the district board of education, charter school, or renaissance school project must ensure that all personally identifiable information has been removed before releasing the record(s) without consent. N.J.A.C. 6A:32, as proposed for readoption with amendments and new rules, continues to require parental consent when a school district is releasing a student record. Proposed N.J.A.C. 6A:32-7.5(g)1 concerns only OPRA requests for a student record submitted by a party other than those listed at N.J.A.C. 6A:32-7.5(e). Existing N.J.A.C. 6A:32-7.5(e)16 continues to allow bona fide researchers to have access to students' records.

32. Comment: The commenter stated that proposed N.J.A.C. 6A:32-7.5(g)1 does not meet the requirements of the Superior Court Appellate Division in *L.R. v. Camden City School Dist.*, 452 N.J. Super. 56 (App. Div. 2017) *aff'd* 238 N.J. 247 (2019). The commenter also stated that, in *L.R. v. Camden City School Dist.*, the Appellate Division was tasked with resolving various claims concerning student records and whether they were accessible under OPRA. In bringing resolution to the claims, the commenters stated that the Appellate Division held that the plaintiffs must either show that they were "bona fide" researchers or that they had obtained a court order as required at N.J.A.C. 6A:32-7.5. The commenter further stated that the currently proposed regulations would eliminate that requirement for OPRA requests for student records. (6)

Response: The Department disagrees with the commenter. N.J.A.C. 6A:32-7.5(e)16 continues to allow bona fide researchers to have access to students records. Proposed N.J.A.C. 6A:32-7.5(g)1 concerns only OPRA requests for a student record submitted by a party other than those listed at N.J.A.C. 6A:32-7.5(e). If a party not listed at N.J.A.C.

6A:32-7.5(e) submits an OPRA request, the district board of education, charter school, or renaissance school project must ensure that all personally identifiable information has been removed before releasing the records without consent.

33. Comment: The commenter stated the Appellate Division in *L.R. v. Camden City School Dist.*, 452 N.J. Super. 56 (App. Div. 2017) *aff'd* 238 N.J. 247 (2019) said that “the school districts shall not turn over the redacted records until they first provide reasonable advance notice to each affected student's parents or guardians. The parents and guardians must be afforded the opportunity to object and provide insight to the school district officials about what may comprise or reveal personally identifying information in their own child's records before the redactions are finalized.” The commenter also stated that proposed N.J.A.C. 6A:32-7.5(g)1 contains no procedure for notice to parents or for parents to object to the release of a redacted student record. The commenter further stated that the proposed language specifically says that records may be released “without consent.” The commenter further stated that the lack of language permitting parental notice and objection violates the court mandate, needlessly endangers student privacy, and unreasonably increases liability for district boards of education attempting to fulfill OPRA requests. The commenter also stated that the proposed amendments attempt to authorize a process whereby a student record can become, through enough redaction, a government record under OPRA, even though that approach specifically was rejected by the Appellate Division. (6)

Response: Proposed N.J.A.C. 6A:32-7.5(g)1 establishes that a student record removed of all personally identifiable information is no longer considered a student record and can be released through an OPRA request. If a student record has been redacted properly, it will

have no impact on the individual student and, therefore, not require parent approval to be released. Additionally, the Department continues to require parental consent when a school district releases a student record. Specifically, N.J.A.C. 6A:32-7.6(a)4 states that prior to disclosure of student records to organizations, agencies, or persons outside the school district pursuant to a court order, the district board of education shall give the parent or adult student at least three days' notice of the name of the requesting agency and the specific records requested unless otherwise judicially instructed. The notification shall be provided, in writing, if practicable. Only records related to the specific purpose of the court order shall be disclosed. Additionally, N.J.A.C. 6A:32-7.7(a)3 states that student records are subject to challenge by parents and adult students on grounds of inaccuracy, irrelevancy, impermissible disclosure, inclusion of improper information, or denial of access to organizations, agencies, and persons. The parent or adult student may request an immediate stay of disclosure pending final determination of the challenged procedure as described in this subchapter.

34. Comment: The commenter stated that proposed N.J.A.C. 6A:32-7.5(g)1 does not provide the detailed guidance requested by the courts regarding redaction of student records so they are an accessible government document under OPRA. The commenter also stated that the proposed regulation describes a standard of reasonableness when redacting a student record. The commenter further stated that any detailed guidance should provide to school district administrators clear and concise instructions on the handling of anonymous record requests and that guidance should place an emphasis on student privacy and safety without increasing liability to district boards of education. (6)

Response: FERPA states a reasonable standard must be used when ensuring that a

student's identity cannot be determined. The Department maintains that proposed N.J.A.C. 6A:32-7.5(g)1 is consistent with FERPA. The district board of education is responsible for ensuring that the requestor cannot identify a student when releasing a student record requested through OPRA.

35. Comment: The commenter stated that proposed N.J.A.C. 6A:32-7.7(a)4 would require school districts to provide records to third parties at parental request immediately, pending the challenge of any student records appeal. The commenter also stated that this provision would harm student privacy and increase liability for school districts. The commenter further stated that district boards of education should not be required to provide records to third parties unless and until the appeal has been finalized. (6)

Response: The Department disagrees with the commenter. N.J.A.C. 6A:32-7.7(a) states that a parent or adult student may request that the district board of education release the student record to the organization, agency, or person that previously was denied access to the same record. The district board of education may deny such a request.

36. Comment: The commenter stated that the use of "immediate" at proposed N.J.A.C. 6A:32-7.7(a)4, regarding access to student records, could be viewed as a way to bypass OPRA. The commenter also stated that the expectation of "immediate" could cause school districts to forgo critical checks to ensure that all identifying information has been removed and that could lead to mistakes when redacting records. The commenter further stated that the district board of education attorney usually reviews records before release, which takes additional time. The commenter also stated that OPRA distinguishes between records that must be provided immediately and those that must be provided within seven days of the request's submission. The commenter contended that student records, if releasable pursuant to OPRA,

would fall under the law's seven-day provision and not require immediate release.

The commenter also recommended that proposed N.J.A.C. 6A:32-7.7(a)4, which allows a parent or adult student to request immediate access to student records for organizations, agencies, and persons denied access pending final determination of the challenged procedure, as described in the subchapter, be deleted. The commenter stated that there is a buffer that has been in place for a long time and new regulations should not be creating opportunities for important, private student records to be accessible by anyone other than the record holder, or record holder's parent or guardian, without extremely strict scrutiny. The commenter also stated that access to student records should never be immediate, absent a court order or express written consent of the record owner. (2)

Response: The Department disagrees with the commenter. N.J.A.C. 6A:32-7.7(a) states that a parent or adult student may request that the district board of education release the student record to the organization, agency, or person that previously was denied access to the record. The district board of education may deny such a request. N.J.A.C. 6A:32-7.7 is not related to OPRA, but pertains to a parent's or adult student's right to appeal a portion of the student record in general or for release.

37. Comment: The commenter stated that the proposed amendments at N.J.A.C. 6A:32-8, Student Attendance and Accounting, are troublesome. The commenter also stated that the subchapter, as proposed for amendment, seems to be unforgiving and lacks any exception for legitimate medical absence. The commenter further stated that this is perplexing, particularly in the middle of a pandemic. (5)

Response: The amendments proposed at Subchapter 8 -- specifically N.J.A.C. 6A:32-8.4 -- address how a school district accounts for student absences for State reporting

purposes. Absences for medical reasons have always been reported to the State as unexcused absences, and the proposed regulations do not change this reporting requirement. The proposed amendments at Subchapter 8 also address how a school district may adopt policies that establish locally approved or excused absences consistent with N.J.A.C. 6A:16-7.6 for the purposes of expectations and consequences regarding truancy, student conduct, promotion, retention, and the award of course credit.

38. Comment: The commenter expressed concern with the proposed amendment at N.J.A.C. 6A:32-8.2(a) to replace “class” with “program of instruction.” The commenter stated that the two terms are not synonymous or equivalent. (4)

Response: The term “class” at existing N.J.A.C. 6A:32-8.2(a) means the type of program a student is enrolled, for reporting purposes in the New Jersey School Register. Some examples include, but are not limited to, a student’s grade level, half-day or full-day kindergarten, pre-school, multiple disabilities class, or autism special class. The term “program of instruction” is much broader than “class” and, therefore, better meets the section’s purpose.

39. Comment: The commenter stated that the proposed amendment at N.J.A.C. 6A:32-8.3(a) to delete “[f]or purposes of school attendance” at the beginning of the regulation about a day in session could have a negative impact on implementation and interpretation of negotiated agreements between public school employees and district boards of education, particularly with respect to educational support professionals. The commenter also stated that custodial/maintenance or secretaries and clerks may still have to report for duty to a building when the physical building is closed. The commenter further stated that the section should re-emphasize that it relates to “student school attendance.” (5)

Response: The Department disagrees with the commenter that the proposed amendment at

N.J.A.C. 6A:32-8.3(a) could have a negative impact on implementation and interpretation of negotiated agreements between public school employees and district boards of education, particularly, with respect to educational support professionals. A “day in session” is one factor in calculating student attendance rates and chronic absenteeism rates as set forth at N.J.A.C. 6A:32-8.6. Specifically, the rate is determined by subtracting the student’s total number of days present from the student’s days in membership and dividing the result by the student’s days in membership. A “day in session” means the school district is open for instruction and all staff should be working. The Department agrees that a school district will determine whether custodial/maintenance or secretaries and clerks may still have to report for duty to a building when it is closed to in-person instruction, but that has no impact on student attendance.

40. Comment: The commenters expressed concern with the notice of proposal at N.J.A.C. 6A:32-2.1 to replace “school day” with “day in session.” The commenters stated that the new term is not found in statute or negotiated contracts. The commenters also stated that the new term fails to identify when a building is closed to students, but other services or tasks may still need to be performed on or around school property by school staff. The commenters further stated that a school day should remain a school day whether learning is in-person or remote/virtual. (3 and 4)

Response: The Department is not proposing a definition of “day in session” at N.J.A.C. 6A:32-2.1. Rather, N.J.A.C. 6A:32-8.3, as proposed for amendment defines a “day in session” as related to accounting for school attendance. The definition does not need to take into account when a building is closed to students, but other services or tasks may still need to be performed on or around school property by school staff because that has no impact on

student attendance. Proposed N.J.A.C. 6A:32-8.3 clarifies what a school day means as related to student attendance. The Department's proposed amendments allow a school district to consider a remote or virtual instruction day as a "day in session" when the State or local health department determines that it is advisable to close, or mandates closure of, the school district's schools due to a declared state of emergency, declared public health emergency, or a directive by the appropriate health agency or officer to institute a public health-related closure for more than three consecutive school days.

41. Comment: The commenter stated that, by eliminating the concept of "school day," the Department failed to take into account the unintended consequences in moving away from language long used in negotiated agreements between school employees and school districts and in school funding determinations. The commenter further stated that the removal of "school day" could have severe consequences for educational support professionals and create unnecessary conflict in implementation and interpretation of negotiated agreements. (5)

Response: The Department disagrees with this commenter. The Department is not proposing to eliminate the concept of a school day; rather, the Department proposes to clarify that a school day is a "day in session," which is defined as a school day for purposes of being considered one of the 180 required days of school. The Department does not anticipate this clarification will result in consequences for educational support professionals or a conflict in the implementation and interpretation of negotiated agreements because LEAs remain responsible for providing 180 required days of instruction.

42. Comment: The commenter stated that N.J.A.C. 6A:32-8.4(c), as proposed for amendment, indicates that an enrolled student shall be recorded as present if they are present for at least half a day in session. The commenter also stated that N.J.A.C. 6A:32-8.3(b) defines "day in

session” as not less than four hours. The commenter asked if the intent of the proposed amendments and new rules is that an enrolled student shall be recorded as present if the student is present for as little as two hours. The commenter recommended that the regulations be amended to reflect that a student shall be marked present if present for not less than four hours. The commenter further recommended that the Department hold a thorough conversation with the education community about the intent of the proposed rule and how it is mapped to NJSMART.

The commenter also recommended that the Department hold a more thorough conversation with the education community to explain the intent of the new language and how it is mapped to NJSMART. The commenter further recommended suspending any substantive changes to student attendance and accounting, as long as the State is in a pandemic. The commenter also recommended consideration of a separate section that would enable a school district to list a student absent due to COVID-19 circumstances. (2)

Response: Proposed N.J.A.C. 6A:32-8.4(c) is meant to clarify the existing regulation at N.J.A.C. 6A:32-8.3(k), which also requires students to be present for at least two hours to count as a day in attendance. The existing regulation also requires a student in a school that is in session during both the forenoon and the afternoon to be present for at least one hour in the forenoon and one hour in the afternoon to be recorded as present for the full day. Proposed N.J.A.C. 6A:32-8.4(c) provides more flexibility for LEAs in scheduling a day in session but does not change the minimum two-hour attendance rule for students. Therefore, the Department declines to amend N.J.A.C. 6A:32-8.4(c).

If Subchapter 8 is adopted by the State Board of Education as proposed, the Department intends to provide LEAs with guidance on the subchapter’s amendments

through its county offices of education. NJSMART currently collects attendance in the manner set forth at Subchapter 8. The Department cannot maintain separate rules for student absences related to COVID-19 because it would be inequitable under State and Federal law.

43. Comment: The commenter stated that N.J.A.C. 6A:32-8.4(e) and (f) make no allowances for, or recognition of, pandemic-related absences in which students and staff were required to quarantine due to exposure to COVID-19, both within and outside of, school buildings. The commenter also stated that not recognizing or making a distinction between this situation and normal chronic absenteeism is a disservice to school districts, students, and staff. (5)

Response: The Department appreciates the commenter’s concern. The calculation of chronic absenteeism is established in the New Jersey ESSA State Plan and has not been modified for COVID-19; therefore, the proposed regulations reflect the same.

44. Comment: The commenter stated that “enrichment course” is used and defined very broadly at N.J.A.C. 6A:32-2.1 and 10. The commenter also stated that the term could be used to undercut the State statute that requires courses in public schools to be taught by staff members certified in the related subject area. The commenter further stated that there should be no distinction between who can teach credit and non-credit courses that are offered in public schools during the school year, particularly since certificated teaching staff can be evaluated in any assignment that they hold. The commenter also stated that it is educationally unsound, unfair, and harmful to both students and staff to allow individuals who are not teaching staff members certified in a specific content area to be assigned to teach courses offered within a public-school program during the school

day. The commenter further stated that the Department should not be providing any impression that State certification requirements can be violated. The commenter also stated that an artist-in-residence or similar program should be conducted in partnership with a licensed teaching staff member who is an employee of the school district and certified in the content area. (5)

Response: The Department disagrees with the commenter. Enrichment courses are offered only during summer school session and not during a school day. Specifically, enrichment course means any course or subject of a vocational nature for which no credits are awarded. The definition further states that district boards of education conducting summer school sessions shall employ teachers who possess valid certificates for the subjects taught. For curriculum enrichment courses, a school district may include resource persons serving for specific periods of time under the supervision of a certified administrator, supervisor, or teacher, but not for the entirety of the course. This provision provides a school district the flexibility to include educational and vocational experience taught by an expert in the vocational field of the enrichment course. The inclusion of a resource person still requires the school district to ensure that the enrichment course is led by a certified staff member.

45. Comment: The commenters expressed concern that the proposed amendments at N.J.A.C. 6A:32-10 fail to reinforce and make clear that summer courses must be taught by certified teachers. (4 and 5)

Response: The Department's proposed amendments have not changed the requirement that summer courses must be taught by certified teachers. Specifically, N.J.A.C. 6A:32-10.3 states that district boards of education conducting summer school sessions must

employ teachers who possess valid certificates for the subjects taught. Curriculum enrichment may involve resource persons serving for specific periods of time under the supervision of a certified administrator, supervisor, or teacher.

46. Comment: The commenters stated that the change to increase the class size for kindergarten is concerning because research shows that smaller class sizes in early grades are essential to student success. (1 and 4)

Response: The Department is not proposing at new N.J.A.C. 6A:32-12.1 to increase class size for kindergarten classes. The Department proposes to relocate the rules related to kindergarten from existing N.J.A.C. 6A:32-8.3(c) to new Subchapter 12. The Department also proposes to maintain – at 25 students per teacher – the maximum enrollment for a kindergarten classroom in school districts that are not subject to the *Abbott v. Burke* decisions at 153 *N.J.* 480 (1998) and 177 *N.J.* 578 (2003) (*Abbott* decisions) or the provisions at N.J.A.C. 6A:13-3.2. The proposed new rules at new N.J.A.C. 6A:32-12.1 also require school districts subject to the *Abbott* decisions or in which 40 percent or more of the students are “at-risk” as defined at P.L. 2007, c. 260, to follow the provisions for kindergarten at N.J.A.C. 6A:13-3.2. Existing N.J.A.C. 6A:13-3.2 sets the limit at 21 students in kindergarten. Therefore, the class size limits will not change pursuant to new N.J.A.C. 6A:32-12.1.

47. Comment: The commenter expressed concern that proposed N.J.A.C. 6A:32-12.1(c) will require school districts to maintain a maximum enrollment for a kindergarten class of 25 students per teacher. The commenter stated that the class size is antithetical to what research shows is essential to student success in an early education program. The commenter also stated that the proposed regulations will impact at-risk students. The

commenter further stated that, as an example, families with resources will be able to shop for a private school with a smaller class size. The commenter requested that the Department amend proposed N.J.A.C. 6A:32-12.1(c) to establish the maximum enrollment at 20 students per teacher in a kindergarten classroom. The commenter stated that best practices indicate that every kindergarten class should have an extra pair of hands, even if it is part-time. The commenter also stated that a district board of education experiencing budget issues could wait until the class size reaches 26 to hire an additional staff member under the proposed regulation. The commenter further stated that codifying 20 students or less per teacher in a kindergarten classroom provides the equity, opportunity, and access essential to a good start in a public school. (2)

Response: The Department appreciates the commenter's concern and continues to require school districts subject to the *Abbott* decisions or in which 40 percent or more of the students are "at-risk" as defined at P.L. 2007, c. 260, to follow the provisions for kindergarten at N.J.A.C. 6A:13-3.2. Existing N.J.A.C. 6A:13-3.2 sets the limit at 21 students in kindergarten. The Department is continuing to limit all other school districts' kindergarten class sizes to 25, allowing school districts the flexibility to staff the classroom, as needed. The proposed regulations do not require a school district to wait to hire additional staff until the class size reaches 26 students if the determination is made to provide additional support to a kindergarten class with a size less than 25 students.

48. Comment: The commenter expressed concern that the class size requirements for kindergarten at existing N.J.A.C. 6A:32-8.3(c) and proposed N.J.A.C. 6A:32-12.1(c) are much higher than recommended by long-standing educational research on class size. The commenter stated that small class size is essential for students beginning their formal

educational journey. The commenter also stated that the maximum enrollment for kindergarten classes should be 15 students and never exceed that number. The commenter further stated that the addition of teacher assistants, aides, or paraprofessionals should not be an excuse or tool used to increase class sizes and, instead, should be used to augment services for students who are from impoverished backgrounds or otherwise at risk, students with disabilities, or students who require additional assistance for any number of social, emotional, or academic reasons. (5)

Response: The Department appreciates the commenter's concern and continues to require school districts subject to the *Abbott* decisions or in which 40 percent or more of the students are "at-risk" as defined at P.L. 2007, c. 260, to follow the provisions for kindergarten at N.J.A.C. 6A:13-3.2. Existing N.J.A.C. 6A:13-3.2 sets the limit at 21 students in kindergarten. The Department is continuing to limit all other school district kindergarten class sizes to 25, allowing school districts the flexibility to staff the classroom, as needed. Existing N.J.A.C. 6A:32-8.3(c), which is being recodified as new N.J.A.C. 6A:32-12.1(c)1, allows the executive county superintendent to permit non-*Abbott* school districts to increase the number of students in a classroom provided a paraprofessional is employed full-time to provide for the increased size. The Department disagrees that the addition of a paraprofessional staff member is only to increase classroom size. The addition of a full-time paraprofessional staff member will also augment services for students who are from impoverished backgrounds or otherwise at risk, students with disabilities, or students who require additional assistance for any number of social, emotional, or academic reasons, while ensuring the certified teacher can continue to deliver the required educational standards for kindergarten. The executive

county superintendent's approval is a safeguard to ensure that all kindergarten students are being educated appropriately.

49. Comment: The commenters stated that N.J.A.C. 6A:32-13, Virtual or Remote Instruction, does not define "appropriate health agency." (1, 2, 3, and 5)

Response: "Appropriate health agency" is identified in the authorizing statute, at N.J.S.A. 18A:7F-9.b, as an agency that can declare an emergency, which allows for a school district to implement its Department-approved virtual or remote instruction plan if the closure lasts longer than three consecutive days. The authorizing statute accounts for unforeseen local emergencies that may have to be called by an agency or officer that is not a Statewide public health agency, such as a local environmental agency. Therefore, a definition is not necessary.

50. Comment: The commenter asked if virtual or remote instruction can be used to provide home instruction, as defined at N.J.A.C. 6A:16-1.3. (6)

Response: An LEA may choose to use virtual or remote instruction to provide home instruction for individual students entitled to home instruction pursuant to N.J.A.C. 6A:16-1.3.

51. Comment: The commenter stated that the reference "to the extent appropriate and practicable" at proposed N.J.A.C. 6A:32-13.1(b)1i could lead to litigation between school districts and families. The commenter also stated that even though the proposed regulation is congruent with Federal guidance that was issued at the beginning of school closures to in-person instruction due to COVID-19, the use of "to the extent appropriate and practicable" is not a high enough standard for the provision of educational opportunities to students with disabilities and their families. (2)

Response: The Department disagrees with the commenter. Proposed N.J.A.C. 6A:32-13.1(b)1i allows the school district flexibility in providing students with disabilities the same educational opportunities provided to general education students based on the type of emergency and the needs of each student. The proposed regulation does not circumvent due process rights that parents have to argue that the school district's interpretation of "to the extent appropriate and practicable" is not enough and request additional educational opportunities.

52. Comment: The commenters stated that proposed N.J.A.C. 6A:32-13, Virtual or Remote Instruction, misses an opportunity to promote increased labor-management collaboration between the district board of education, school district administrators, and the school employees' majority representative in the planning and implementation of the virtual or remote instruction plan. (4 and 5)

Response: The virtual or remote plan must be submitted by the district board of education that will establish the criteria for the development and implementation of the plan.

53. Comment: The commenters stated that the proposed subchapter allows school districts to receive retroactive approval for a virtual or remote instruction plan if they cannot complete the plan and submit it to the Department by July 31 annually but does not require a public hearing or public comment on such a move. The commenters also stated that the proposed subchapter does not require involvement of the school employees' majority representative in the plan's development. (4 and 5)

Response: The Department is not proposing a public hearing or public comment prior to a district board of education's submission of the virtual or remote instruction plan because the authorizing statute, N.J.S.A. 18A:7F-9.b, does not require a hearing or comment. A

district board of education can hold a public hearing or public comment period for the plan without it being required.

**3. Comments Received upon Publication of Notice of Proposed Substantial Changes upon Adoption to Proposed Amendments at N.J.A.C. 6A:32-5.1, 12.1, 13.1, and 13.2.**

54. Comment: The commenter expressed support for the proposed substantial changes at N.J.A.C. 6A:32-5.1, 12.1, 13.1, and 13.2 because they will clarify the proposed amendments. The commenter stated that the proposed substantial changes at N.J.A.C. 6A:32-13.1 related to the criteria for remote instruction will provide greater clarity regarding the standards to be implemented concerning the utilization of remote instruction. (6)

Response: The Department thanks the commenter for the support.

55. Comment: The commenter expressed support for the change at proposed N.J.A.C. 6A:32-12.1(c)1 to replace “an auxiliary teacher or a teacher aid” with “or paraprofessional.” The commenter stated that the use of “paraprofessional” will align the rule with Federal law, rather than using terms not universally used Statewide. (5)

Response: The Department thanks the commenter for the support.

56. Comment: The commenter expressed support that proposed N.J.A.C. 6A:32-13, Virtual or Remote Instruction, specifically references N.J.S.A. 18A:7F-9.b and the context within which the subchapter must be viewed and administered. The commenter stated that N.J.A.C. 6A:32-13, as amended under the notice of substantial changes upon adoption, still does not address who is involved in creating the plan. The commenter also stated that the Department missed an opportunity to promote labor-management collaboration in the planning and implementation of the virtual or remote instruction plan. The commenter further stated that

school administrators, principals, district board of education members, parents and school staff – through the majority representative(s) – need to be engaged in the virtual or remote instruction plan’s development. The commenter also stated that the participation and feedback from all parties is essential to ensuring that the plan is not only a pro forma filing with the State, but is a realistic, viable, transparent, and academically sound approach to operating during an extended health emergency or other state of emergency. (5)

Response: The authorizing statute does not contain provisions regarding the school district’s process for creating the plan. Therefore, the district board of education and school district administration are responsible for the process of virtual or remote instruction plan development, including determining the level of involvement of district staff, board members, and parents.

57. Comment: The commenter stated that N.J.A.C. 6A:32-13 must be amended to address the length of a virtual school day. The commenter also stated that the existing requirements at N.J.A.C. 6A:32-8.3 for a school day to be not less than four hours of instruction to count toward the 180-day requirement in first through 12th grades and 2.5 hours for kindergarten must explicitly be incorporated into the regulations governing virtual or remote instruction. (10)

Response: The Department disagrees that the commenter’s suggested amendment is necessary. The length of a school day is consistent, whether in-person, remote, or virtual instruction are being provided. Therefore, including requirements for the length of a school day at N.J.A.C. 6A:32-13 would duplicate existing rules and is unnecessary.

58. Comment: The commenter stated that the Department’s proposed regulations must protect the constitutional entitlement of all New Jersey school-age children to a free thorough and

efficient education for the 180 days mandated by the Legislature. The commenter also stated that a school district's ability to count one or more days of virtual instruction toward the 180-day requirement must be conditioned on all school-aged children having their own device that is sufficient for accessing virtual instruction, as well as access to broadband sufficient for all family members to use simultaneously during a school day. The commenter contended that, instead, proposed N.J.A.C. 6A:32-13.1(c)3 merely requires that a school district's program of virtual or remote instruction explains, to the greatest extent possible, the equitable delivery of, and access to, virtual and remote instruction without actually assuring that equitable delivery and access will be provided. (9)

Response: The Department contends that the commenter's concerns are addressed at proposed N.J.A.C. 6A:32-13.1(c)3i(3), which states that the virtual or remote instruction plan must contain a description of the school district's plan for measuring and addressing any ongoing digital divide issues, including a lack of internet access, network access, and/or sufficient access to devices. By virtue of developing a plan for measuring and addressing ongoing digital divide issues, the school district will be continually assessing any ongoing digital divide issues to ensure equitable delivery and access are provided.

59. Comment: The commenter expressed concern that proposed N.J.A.C. 6A:32-13.1(c)3 improperly requires a school district's program of virtual or remote instruction to explain to the greatest extent possible, the equitable delivery of, and access to, virtual and remote instruction. The commenter stated that a school district should not be allowed to count virtual days toward the 180-day requirement if a school district cannot explain how there will be equitable access to virtual instruction. (10)

Response: The Department disagrees with the commenter that school districts should be

able to provide in the plan how they will provide equitable delivery of, and access to, virtual and remote instruction for all students. At the time of the plan's development, the school district knows its student population and their needs; however, the student population does not remain the same throughout the course of the school year. Therefore, the school district may need to create a new way to provide equitable delivery of, and access to, virtual and remote instruction for a new student who was not enrolled in the school district during the original development of the plan. Proposed N.J.A.C. 6A:32-13.1(c)3 provides this flexibility. Even if it is not stated in the school district's plan for virtual or remote instruction, school districts are required to provide equitable delivery of, and access to, virtual and remote instruction for all students.

60. Comment: The commenter stated that the Department needs to provide, at proposed N.J.A.C. 6A:32-13.1(c)3i(1) and (2), further direction to school districts regarding the design of virtual or remote instruction programs and the measurement of student growth and learning. The commenter also stated that it is unclear how the Department is distinguishing "student growth" from "student learning." The commenter stated that the mix of synchronous and asynchronous learning must also maximize engagement, motivation, and connection of students, as well as increasing levels of student self-direction. The commenter also stated that the mix of synchronous and/or asynchronous learning varies depending, among other things, on the student's age and academic level, the student's level of self-direction, and the student's learning style. The commenter further stated that there is not one mix of synchronous and asynchronous learning that will maximize growth, learning, engagement, motivation, connection of students, and student self-direction for all students. The commenter stated that each school district's

virtual learning plan must set forth how the school district will determine the mix of synchronous and asynchronous learning depending upon the needs of students. (10)

Response: The Department disagrees that clarification is needed for school districts to understand how to measure student growth and student learning during virtual or remote instruction. School districts understand the difference between the two commonly used terms and know that there are ways to measure each through benchmark, formative, and summative assessments.

61. Comment: The commenters stated that proposed N.J.A.C. 6A:32-13.1(c)3i(3), which requires the submission of a school district “plan for measuring and addressing any ongoing digital divide issue(s)” is not sufficient to ensure all students have free and adequate digital access. The commenters also stated that, after two years and billions of Federal dollars to address the COVID-19 pandemic, it is reasonable to require school districts to provide all students with the devices and adequate internet access needed for virtual learning at no cost to students’ families. (9 and 10)

Response: The Department disagrees that the requirement for school districts to have a plan to address any digital divide issues is insufficient to ensure access to technology for virtual or remote learning. School districts are developing this plan at a certain point in time and must have a system in place to continually monitor for any digital divide issue that may arise related to changes in the student population.

62. Comment: The commenter stated that it is a violation of statutes, such as the IDEA, Section 504, the ADA, and the New Jersey Law Against Discrimination, to leave any student without free, adequate digital access. The commenter suggested that proposed N.J.A.C. 6A:32-13.1(c)3i(3) be amended to include the following: The school district’s

plan shall include how it has determined that all students will have access to the needed device(s) and any other technology needed to access the virtual instruction, as well as adequate broadband at no cost to the family. When there is more than one school-age child in the home, each child must have their own device and broadband access must be adequate for the number of children in the household who need to access it simultaneously during a virtual day. (10)

Response: The Department disagrees that the requirement for school districts to have a plan to address any digital divide issues is insufficient to ensure access to technology for virtual or remote learning. School districts are developing this plan at a certain point in time and must have a system in place to continually monitor for any digital divide issue that may arise related to changes in the student population. Requiring school districts to have a plan to address any ongoing digital divide issues, including a lack of internet access, network access, and/or sufficient access to devices, will ensure that all students have free, adequate digital access, and that there are no violations of statutes, such as the IDEA, Section 504, the ADA, and the New Jersey Law Against Discrimination.

63. Comment: The commenters stated that the inclusion of “to the extent appropriate and practicable” at N.J.A.C. 6A:32-13.1(b)1i and “to the greatest extent possible” at N.J.A.C. 6A:32-13.1(c)3ii(1) and (3) is insufficient to comply with IDEA, Section 504 of the Rehabilitation Act, or the Americans with Disabilities Act (ADA). The commenters also stated that the requirement at proposed N.J.A.C. 6A:32-13.1(b)1i for school districts to provide students with a disability with the same educational opportunities provided to general education students to the extent appropriate and practicable does not take into account that the IDEA and other anti-discrimination laws entitle students with disabilities to the supports,

accommodations, and modifications needed to have equally effective access to the same educational opportunities provided to general education students. (9 and 10)

Response: The first part of the comment is outside of the scope of the notice of substantial changes upon adoption, which did not include amendments at N.J.A.C. 6A:32-13.1(b)1i.

The Department disagrees with the commenters that N.J.A.C. 6A:32-13.1(c)3ii(1) and (3) are insufficient to comply with the IDEA, Section 504 of the Rehabilitation Act, or the ADA. The proposed regulation provides the school district flexibility in providing students with disabilities the same educational opportunities provided to general education students, as well as any supports, accommodations, and modifications specified in a student's IEP or Section 504 plan, based on the type of emergency and the unique needs of each student.

64. Comment: The commenter stated that proposed N.J.A.C. 6A:32-13.1(c)3ii(1), which requires the school district's remote or virtual instruction plan to describe the delivery of virtual or remote instruction in order to implement, to the greatest extent possible, students' IEPs, including material and platform access, needs to be amended. The commenter suggested that the regulation be amended to require IEPs and 504 plans to be implemented during virtual school days unless the student's IEP team, including the student's parent, or Section 504 team has met and determined that some IEP services cannot be provided during virtual days. The commenter suggested that proposed N.J.A.C. 6A:32-13.1(c)3ii(1) be amended to read as follows:

(1) Special education and related services, including speech-language services, counseling services, physical therapy, occupational therapy, and behavioral services, as well as accommodations and modifications, may be delivered to students with disabilities through the use of a virtual platform and as required by

the student's IEP or Section 504 team, but only if the steps taken below are followed and if the school district ensures that it provides the devices and adequate broadband needed to access the instruction. At least annually and before any virtual instruction for students with disabilities is counted toward the 180-day requirement, an IEP or Section 504 meeting, including the parent, must be convened, at which time the participants will:

- (A) Decide if virtual instruction is appropriate for this student and if not, how, when, and where the special education, related services and accommodations and/or modifications required by the IEP or Section 504 plan will be made up;
- (B) Determine if the student has access to the device(s) and broadband necessary for participating in virtual instruction and if not, take the necessary steps to ensure that the student does have access at no cost to the student or family;
- (C) Decide if all of the special education, related services and accommodations/modifications in the IEP or 504 plan can be implemented virtually and if not, whether additional services or supports can be added to the IEP or 504 plan that will allow all IEP or 504 services to be implemented virtually;
- (D) If it is not possible to provide all of the IEP or Section 504 services during virtual instruction, decide how, when, and where the missing services/accommodations/ modifications will be made up;

- (E) Include all of this information in the student’s IEP or Section 504 plan and provide proper written notice of the decisions to the parent in accordance with Section 504 or IDEA’s requirements; and
- (F) Notify the parents that if they do not agree with the decisions of the IEP or 504 teams, they may exercise all of their rights and remedies under IDEA or Section 504, including but not limited to filing for mediation or due process and having their child entitled to the protections of the stay-put or maintaining the status quo during the pendency of the dispute and any appeals. (10)

Response: The Department disagrees because the proposed regulations at N.J.A.C. 6A:32-13.1(c)3i(3) and(c)3ii(1) through (4) address the commenter’s concerns and the requested language. The inclusion of “to the greatest extent possible” enables school districts to try to meet the IEP or Section 504 requirements during virtual or remote instruction but if the services cannot be provided for an individual student, that student will be entitled to compensatory or make-up services.

- 65. Comment: The commenter expressed support for the requirement at proposed N.J.A.C. 6A:32-13.1(c)3ii(3) to require the school district’s virtual and remote instruction plan to describe how case managers follow up with parents to ensure services are implemented in accordance with IEPs. The commenter stated that the inclusion of “to the greatest extent possible” after “implemented” must be deleted. The commenter stated that IEP or Section 504 teams must make determinations as to what IEP services and accommodations can be implemented virtually and when make-up or compensatory services are needed. The commenter also stated that it is the case manager’s responsibility to ensure that services

are implemented in accordance with the student’s IEP, and it is not the parent’s obligation to act as their child’s teacher or paraprofessional or to oversee their child’s virtual school day. The commenter suggested that N.J.A.C. 6A:32-13.1(c)3ii(3) be amended to read as follows:

- (3) How case managers will follow up with parents to ensure services, accommodations, and modifications are being provided in accordance with IEPs or Section 504 plans, determine whether there are issues with the implementation including whether additional supports and services are needed, and, when needed, convene an IEP or Section 504 meeting to revise the plan for virtual instruction and determine any make up or compensatory services. (10)

Response: The Department appreciates the commenter’s concerns, but the requested language is unnecessary because N.J.A.C. 6A:14 already ensures the process suggested by the commenter for students with disabilities.

- 66. Comment: The commenter states that N.J.A.C. 6A:32-13.1(c)3ii(4) needs to be amended to add “timely” before "identify, evaluate, and/or reevaluate students with disabilities.” (10)

Response: The Department disagrees that the term “timely” should be inserted at N.J.A.C. 6A:32-13.1(c)3ii(4). The commenter provided no context for the definition of timely.

Further, depending upon the reason for the emergency closure resulting in virtual or remote instruction, the regulation must be flexible to allow for the school district to address how it plans to conduct IEP meetings, evaluations, and other meetings to identify, evaluate, and/or reevaluate students with disabilities.

- 67. Comment: The commenters recommended that proposed N.J.A.C. 6A:32-13.1(c)3iii be amended to incorporate not only the general factors for English language learners (ELLs)

that are in the proposed regulation, but also considerations relevant to ELLs during virtual or remote instruction. The commenters stated that the added descriptions should include the following: how ELLs will access virtual or remote instruction, including the availability of adequate broadband and devices with appropriate software for ELLs and native language communication with parents and students about virtual or remote instruction; how ELLs' progress will be tracked during virtual or remote instruction; how ELLs will be timely identified and exited during virtual or remote instruction; and how school staff will follow up with parents of ELLs to determine whether ELLs are able to appropriately access services during virtual or remote instruction and, if not, determine how those services will be made up. (9 and 10)

Response: The Department disagrees that proposed N.J.A.C. 6A:32-13.1(c)3iii needs to be amended. A school district's remote or virtual instruction plan does not negate the school district's responsibilities to ensure that the services and supports afforded to ELLs continue during virtual or remote instruction. The proposed regulation affords the school district flexibility to provide services to ELLs based on the emergency and the individual student's needs.

68. Comment: The commenters supported the Department's addition at proposed N.J.A.C. 6A:32-13.1(c)3iii(2), which requires a school district's program of virtual or remote instruction to address the needs of English language learners (ELLs) and include a description of the process to communicate with parents of ELLs, including providing translation materials, interpretative services, and information available at the parent's literacy level. The commenters stated that limiting the process to "the parents of ELLs" is under-inclusive because it leaves out parents with a primary language other than English

whose children may not be classified as ELLs. The commenters stated that Federal law requires meaningful communication with all parents in a language they can understand, not only those parents whose children are also currently learning English. The commenters suggested that the Department amend N.J.A.C. 6A:32-13.1(c)3iii(2) to require school districts to include a process for communicating with all parents (that is, parents of ELLs and any parent with limited English proficiency) in their native or preferred language. (8, 9, 10, and 11)

Response: The Department disagrees that amendments to the regulation are necessary. All school districts that receive Federal funding under Title I of the ESSA are required to have, as part of their standard operating procedures, a process for communicating with parents in their native language.

69. Comment: The commenters suggested that the Department amend proposed N.J.A.C. 6A:32-13.1(c)3iii(3), which requires a school district’s program of virtual or remote instruction to describe the use of instructional adaptations, for example, differentiation, sheltered instruction, Universal Design for Learning, access to technology, and strategies to ensure ELLs access the same standard of education as non-ELL peers. The commenters requested that the Department replace “technology” with “digital devices, internet, technical support (in language accessible to both student and parent/guardian/sponsor) for every student in the household.” (8 and 11)

Response: The Department disagrees with the commenters. Proposed N.J.A.C. 6A:32-13.1(c)3i(3) requires the school district’s remote learning plan to include the school district’s plan for measuring and addressing any ongoing digital divide issue(s), including

a lack of access to the internet, network, or devices. This includes providing technical support to students and families, as necessary.

70. Comment: The commenter objected to the inclusion of “to the extent appropriate and practicable” at proposed N.J.A.C. 6A:32-13.2(d), which requires an approved private school for students with disabilities (APSSD) to provide virtual or remote instruction that is consistent with the student’s IEP to the extent appropriate and practicable and that meets the New Jersey Student Learning Standards. (10)

Response: The inclusion of “to the extent appropriate and practicable” allows APSSDs to try to meet the IEP or Section 504 requirements during virtual or remote instruction and, if services cannot be provided for an individual student, ensure that the student receives compensatory or make-up services.

71. Comment: The commenter expressed concern that the proposed definition of “remote instruction” at N.J.A.C. 6A:32-2.1 does not define what remote instruction is or how it will be facilitated. The commenter stated that the only differences between the definitions of “remote instruction” and “virtual instruction” are that the former is not “active” instruction or “facilitated through the internet and computer technologies.”

The commenter stated that the use of paper packets and activity sheets as the sole means of instruction should not be permitted if that is the intent of the separate definition of “remote instruction.” The commenter also stated that, during school closures related to the COVID-19 pandemic, school districts used paper packets that were completed by students, returned to school, and not reviewed by teachers for months or, for related services, students with disabilities were emailed activity sheets to do on their own. The commenter further stated that the use of paper packets and activity sheets may have been

necessary during the abrupt closure of schools in March 2020, but school districts have had two years to obtain the technology needed to provide virtual instruction and to train staff. The commenter also stated that the proposed definitions of “remote instruction” and “virtual instruction” will allow school districts to use, during intermittent school closures, paper packets for instruction to count toward the 180-day requirement and activity sheets for physical and occupational therapies. The commenter further stated that this would violate school districts’ legal obligation to provide a thorough and efficient education to all students, as well as a free and appropriate public education to students with disabilities. (10)

Response: The comment is outside of the scope of the notice of proposed substantial changes upon adoption, which did not include amendments at N.J.A.C. 6A:32-2.1.

72. Comment: The commenter stated that “remote instruction” and “virtual instruction” often are used interchangeably and suggested that the Department replace the separate definitions proposed at N.J.A.C. 6A:32-2.1 with the following combined definition: “Remote or virtual instruction is where the student and the teacher and related service provider are in different locations and instruction is facilitated by the child’s teacher or related service provider through the internet and computer technologies, such as discussion boards, video conferencing, and other online options due to the closure of the facility(ies) of the district board of education, charter school, renaissance school project, or approved private school for students with disabilities. Remote or virtual instruction can occur through a combination of synchronous with real-time active instruction and peer-to-peer collaboration, or asynchronous, with self-paced learning activities

that take place independently of the teacher or related service provider. In both cases, teachers and related service providers must engage in regular and effective contact with students. The closure of the facility(ies) shall be pursuant to N.J.S.A. 18A:7F-9 or 18A:46-21.1 and for more than three consecutive school days due to a declared state of emergency, a declared public health emergency, or a directive by the appropriate health agency or officer to institute a public health-related closure.” (10)

Response: The comment is outside of the scope of the notice of proposed substantial changes upon adoption, which did not include amendments at N.J.A.C. 6A:32-2.1.

73. Comment: The commenter expressed concerns with the proposed definitions of “remote instruction” and “virtual instruction” at N.J.A.C. 6A:32-2.1 because the interchangeable use of the terms throughout the chapter and the absence of robust standards for remote and virtual instruction will lead to violations of students’ to a thorough and efficient education under the State constitution and, for students with disabilities, to the right to a free and appropriate public education under the Federal Individuals with Disabilities Education Act (IDEA).

The commenter stated that it is improper to use remote instruction when virtual instruction is authorized. The commenter also stated that the proposed definition of “remote instruction” is insufficient to ensure that constitutional, statutory, and regulatory standards of instruction are met. The commenter further stated that the proposed definition is vague regarding how remote instruction is to be implemented and conjures images of paper packets and activity sheets that were substituted for in-person instruction

during the early days of the COVID-19 pandemic. The commenter also stated that days that are absent of active instruction should no longer count toward the required 180 days of instruction. The commenter further stated that the Department must describe how remote instruction is to be implemented, how it differs from virtual instruction, and the conditions under which remote instruction is capable of providing thorough and efficient education or a free and appropriate public education.

The commenter also stated that the proposed definition for “virtual instruction” is inadequate to support constitutional and statutory standards because it is vague and does not specify if synchronous instruction must be included. The commenter asked whether the Department intends to permit school districts to provide solely asynchronous instruction with no requirement for daily and live, yet virtual, interaction between students and teachers. The commenter also asked, if the Department intends to allow solely asynchronous instruction, how that model delivers a thorough and efficient education or a free and appropriate public education.

The commenter further suggested that the Department incorporate into the definitions of “remote instruction” and “virtual instruction” the existing requirements at N.J.A.C. 6A:32-8.3 for a school day to be not less than four hours of instruction to count toward the 180-day requirement in first through 12th grades and 2.5 hours for kindergarten. (9)

Response: The comment is outside of the scope of the notice of proposed substantial changes upon adoption, which did not include amendments at N.J.A.C. 6A:32-2.1.

74. Comment: The commenters stated that the lack of technology in ELLs’ households was a well-documented issue during the COVID-19 pandemic. The commenters also stated that

accommodations were made to provide technology for all students, but student access to technology at home since the return to in-person instruction has not been maintained at the same level. (8 and 11)

Response: The Department has no rules requiring a certain level of technology at home when in-person instruction is being offered. The rules proposed at N.J.A.C. 6A:32-13.1 apply only to meeting technology needs for remote and virtual instruction.

75. Comment: The commenters stated that proposed N.J.A.C. 6A:32-13.1(b) violates N.J.S.A. 18A:7F-9 by not requiring the district board of education and the Commissioner to approve the school district’s program of virtual or remote instruction in advance of the plan’s implementation. (9 and 10)

Response: The comment is outside of the scope of the notice of substantial changes upon adoption, which did not include amendments at N.J.A.C. 6A:32-13.1(b).

76. Comment: The commenter requested that the Department amend proposed N.J.A.C. 6A:32-13.1(b). The proposed rule states that, if the State or local health department determines that it is advisable to close, or mandates closure of, the schools of a school district due to a declared state of emergency, declared public health emergency, or a directive by the appropriate health agency or officer to institute a public health-related closure for more than three consecutive school days, the chief school administrator shall have the authority to implement the school district’s program of virtual or remote instruction, pursuant to N.J.S.A. 18A:7F-9. The commenter requested that “then once it has been approved by the board of education and then Commissioner,” be added before “the chief school administrator.” (10)

Response: The comment is outside of the scope of the notice of substantial changes upon adoption, which did not include amendments at N.J.A.C. 6A:32-13.1(b).

77. Comment: The commenter stated that “electronic communication” is referenced at N.J.A.C. 6A:32-13.1(b)1ii, but the term is not defined in the regulation or at N.J.A.C. 6A:32-2.1. The commenter also stated that N.J.A.C. 6A:32-13.1(b)1ii does not relate the use of electronic communication to virtual or remote instruction. The commenter stated that a thorough and efficient education and a free and appropriate public education cannot be satisfied solely by, for example, teachers emailing or faxing activity sheets to students with instructions to complete the activity sheets. The commenter also stated that the emailing or faxing of activity sheets arguably could constitute “active instruction” that is “facilitated through the internet or computer technologies.” The commenter suggested that the amount of electronic communication used during virtual or remote instruction be limited to the amount and type of electronic communication that has been found to be effective in promoting the academic progress of, or providing a particular related service to, school-age children during intermittent school closures. The commenter also suggested that the role of electronic communication in virtual or remote instruction be spelled out. (9)

Response: The comment is outside of the scope of the notice of proposed substantial changes upon adoption, which did not include amendments at N.J.A.C. 6A:32-2.1 or 13.1(b)1ii.

78. Comment: The commenter recommended that a definition for “electronic communication” be added at N.J.A.C. 6A:32-13.1(b)1ii. The commenter stated that telephones are one means of communication and related services, like counseling, are provided through telephones. The commenter also stated that, absent a definition,

“electronic communication” could include teachers emailing or faxing paper packets or activity sheets to students and counting it as fulfilling the one of the 180 days of instruction, which is unacceptable and unlawful. The commenter further stated that the term should be limited to the types of electronic communication that have been found to be effective in providing a particular related service to school-age children during intermittent school closures. The commenter also stated that the telephone was the only form of electronic communication deemed by the United States Department of Education to be a viable means of providing related services during the COVID-19 pandemic.

The commenter proposed the following as a definition for “electronic communication”: “Electronic communication means the provision of related services telephonically or through other means of electronic communication that have been shown to be effective in providing the particular related service to school-age children.” (10)

Response: The comment is outside of the scope of the notice of substantial changes upon adoption, which did not include amendments at N.J.A.C. 6A:32-13.1(b)1ii.

79. Comment: The commenter stated that proposed N.J.A.C. 6A:32-13.1(b)1i leaves open what criteria are used to determine whether it is appropriate for a student with a disability to participate in the same educational opportunities offered to general education students, as well as who makes the determination. The commenter stated that it is the responsibility of the IEP team or Section 504 committee, as applicable, to use criteria in statute, regulations, and case law to make the determination. The commenter also stated that proposed N.J.A.C. 6A:32-13.1(b)1i, which requires school districts to provide students with a disability with the same educational opportunities provided to general education students to the extent appropriate and practicable, suggests that a school district can

decide unilaterally that it is not practicable to allow students with disabilities to access the same educational opportunities provided to general education students when virtual or remote instruction is provided because schools are closed. The commenter further stated that the IDEA, Section 504, and the ADA do not allow entities to decide whether it is practicable to not discriminate against students with disabilities.

The commenter requested that the Department replace proposed N.J.A.C. 6A:32-13.1(b)1i with the following: “The school district shall ensure that students with disabilities are provided with equally effective access to the same educational opportunities provided to general education students, including but not limited to providing any support services, accommodations or modifications needed to ensure this happens. Decisions as to what supports, accommodations and modifications a student may require for equally effective access to educational opportunities offered to general education students is a decision that must be made at a properly convened meeting by the student’s IEP team, including the parent, or for students found eligible for Section 504 services, by a group of persons knowledgeable about the student. If the IEP or Section 504 team determines that separate or different services must be provided, the student must still be educated to the maximum degree appropriate with nondisabled peers.” (10)

Response: The comment is outside of the scope of the notice of substantial changes upon adoption, which did not include amendments at N.J.A.C. 6A:32-13.1(b).

80. Comment: The commenter stated that the decision about whether to replace in-person instruction with electronic, virtual, or online platforms is appropriate for a student must be made by the student’s IEP or 504 team and not unilaterally by the school district. The commenter also stated that consideration of whether a student’s IEP or Section 504 plan

can be implemented virtually, through electronic communications or online platforms, whether additional supports or services are needed, or whether virtual, electronic communication or online platforms are appropriate for a student even with additional supports and services should all be considered in advance by the student's IEP or Section 504 team, along with the need for make-up or compensatory services if electronic, virtual, or online services are not appropriate. The commenter further stated that alternatives to in-person instruction can be discussed and determined during the annual IEP meeting or in a separate IEP meeting. (9)

Response: The Department agrees with the commenter that the student's IEP or 504 team must determine whether it is appropriate to replace in-person instruction with an electronic, virtual, or online platform, as governed at N.J.A.C. 6A:14, Special Education.

81. Comment: The commenters stated that proposed N.J.A.C. 6A:32-13.1(c)4 exceeds the statutory authority by authorizing the Commissioner to approve a school district's program for virtual or remote instruction retroactively when it is not submitted by July 31 of each year. The commenters contended that P.L. 2020, c. 27, enabled the Commissioner to retroactively approve only initial plans that were not submitted within 30 days of the statute's effective date and did not extend the retroactive approval to the late submission of future plans. The commenters stated that a grace period should not be permitted for an annual submission of a school district's plan following the initial submission. (9 and 10)

Response: The comment is outside of the scope of the notice of substantial changes upon adoption, which did not include amendments to the language at N.J.A.C. 6A:32-13.1(c)4.

82. Comment: The commenter expressed support for the proposed amendments at N.J.A.C. 6A:32-5.1(e), which states, as proposed for amendment, that an employee who holds an

emergency or provisional certificate shall not be entitled to seniority rights, but the years of employment under the emergency or provisional certificate shall count toward seniority when the employee becomes the holder of a standard certificate. The commenter stated that the proposed amendments continue to recognize that all teaching staff members are held to the same standards as others during their employment and that time worked in those positions should be credited after they earn a standard certificate. The commenter also stated that the issuance of emergency certificates should remain limited and never apply to instructional certificates. The commenter further stated that emergency certificates are not an appropriate way to address teacher shortages. The commenter stated that teacher shortages should be addressed through recruitment and retention, which is done by making higher education and educator preparation programs more affordable, accessible, diverse, relevant, and culturally responsive; increasing and improving partnerships between educator preparation programs and school districts and linking potential or preservice educators with experienced educators; raising the status of and respect for the teaching profession by enhancing compensation (both salary and benefits) and improving working conditions on many levels; providing extensive support for novice educators and educators in new assignments; enabling all teaching staff members and other school staff to engage in relevant and varied professional learning experiences; allowing them to try new approaches in working with and supporting student learning; and expanding opportunities for teacher leadership and collaboration. (5)

Response: The Department appreciates the comment, but it is out of the scope of the notice of substantial changes upon adoption.

83. Comment: The commenter expressed concern that proposed N.J.A.C. 6A:32-12, Kindergarten, relocates provisions that have been contained at N.J.A.C. 6A:13, Programs and Practices to Support Student Development, and 6A:13A, Elements of High Quality Preschool Programs. The commenter questioned why the section on kindergarten would be carved out and moved to a catch-all set of rules. The commenter also cited multiple research studies that show smaller class sizes in early grades are essential to student success. The commenter stated that the Department missed the opportunity to align the rules with long-standing research on the appropriate class size and environment for supporting the social, emotional, and academic needs of all students, especially kindergarten students. The commenter suggested that the Department amend the rules to set the maximum kindergarten class size at 15 students to one teacher. The commenter also stated that paraprofessionals are not equivalent to certified teachers but can be used in accordance with N.J.A.C. 6A:32-12 to request to expand a kindergarten class size. (5)
- Response: The Department appreciates the comment, but it is out of the scope of the notice of proposed substantial changes upon adoption. The Department's Responses to Comments 46, 47, and 48 address kindergarten class size under the proposed readoption of N.J.A.C. 6A:32.
84. Comment: The commenter urged the Department and the State Board to readopt the majority of the existing regulations at N.J.A.C. 6A:32 while continuing to discuss the proposed amendments. The commenter stated that it is understandable that the Department may need to move forward with the proposed regulations concerning virtual and remote instruction at N.J.A.C. 6A:32-13 because of timelines in State statute, as well as with the proposed amendments to clarify the regulation regarding emergency

certificates and seniority. (5)

Response: The comment is outside the scope of the notice of substantial changes upon adoption. The Response to Comment 2 addresses commenters' concerns regarding stakeholder engagement related to the proposed readoption of N.J.A.C. 6A:32.

85. Comment: The commenter expressed concern that the State Board's public testimony schedule did not align with the deadlines for comments on the proposed readoption with amendments following publication in the New Jersey Register. The commenter stated that this trend continues with respect to other proposed rulemakings. The commenter also stated that this action only undercuts the provisions instituted to ensure adequate time for public review and comment after publication of the proposed rules that have extensive impact on school districts, schools, staffs, students, parents, and communities. The commenter further stated that it creates the impression that any comments submitted within the deadlines published in the New Jersey Register will not be seriously considered by the agencies and boards responsible for developing, producing, and adopting the rules. The commenter also stated that this transparent process is even more critical now since the State, communities, educational institutions, agencies, and organizations are still dealing with pandemic-related issues and concerns while emerging from this challenging period. (5)

Response: The readoption with amendments at N.J.A.C. 6A:32 was a topic for two State Board public testimony sessions (June 16 and September 8, 2021), while the additional amendments proposed in the notice of substantial changes upon adoption were subject to public testimony for the March 2, 2022, State Board meeting. The Department considers all comments received from the time the State Board first reviews a proposed rulemaking

up until the end of the 60-day comment period that occurs after the notice of proposal's publication in the New Jersey Register. The Department is committed to working with stakeholders to support students, educators, and school officials as the State emerges from the COVID-19 pandemic.

86. Comment: The commenter requested that the Department propose regulations related to the implementation at P.L. 2022, c. 2, which extends the statute of limitations for pandemic-related compensatory education claims and requires the scheduling of IEP meetings to address compensatory education by no later than December 31, 2022. (9)
- Response: The comment is outside the scope of the notice of proposed substantial changes upon adoption at N.J.A.C. 6A:32.

#### **Summary of Agency-Initiated Changes:**

The following changes were proposed in the Notice of Substantial Changes Upon Adoption.

1. The Department is deleting, at N.J.A.C. 6A:32-5.1(e), "Upon acquisition of a standard certificate" at the beginning of the second sentence because the original notice of proposal change to delete the phrase was mistakenly omitted from the published notice of proposal.
2. The Department is replacing, at proposed new N.J.A.C. 6A:32-12.1(c)1, "an auxiliary teacher or a teacher aid" with "or paraprofessional." "Paraprofessional" is defined at N.J.A.C. 6A:32-2.1 as a school or classroom aide who assists appropriately certified personnel with the supervision of student activities. The Department has determined that using "paraprofessional" will provide greater clarity and will support the section's purpose, which is to allow for approval of an increased kindergarten class size with additional supports for the teacher.

3. The Department is adding new N.J.A.C. 6A:32-13.1(c)3 to provide detail on the Commissioner-established criteria that district boards of education must use when creating their annual virtual or remote instruction plans. The additional criteria will ensure that school districts are providing instruction that meets the requirements of the New Jersey Student Learning Standards, meeting the digital needs of students, meeting the needs of English language learners (ELLs) and students with disabilities, communicating with families, establishing attendance policies, delivering meals, maintaining buildings, and meeting other district-specific needs. As stated at N.J.A.C. 6A:32-13.1(a), “district board of education” refers to district boards of education, charter school and renaissance school project boards of trustees, and private agencies that provide educational services by means of public funds. The Department also proposes to recodify proposed N.J.A.C. 6A:32-13.1(c)3 as new paragraph (c)4.
  
4. The Department is adding new N.J.A.C. 6A:32-13.2(b)3 to provide detail on the Commissioner-established criteria that approved private schools for students with disabilities (APSSDs) must include when creating their annual virtual or remote instruction plans. The new regulation will apply the criteria at N.J.A.C. 6A:32-13.1(c)3 to the annual virtual or remote instruction plans developed by APSSDs. The Department is also recodifying N.J.A.C. 6A:32-13.2(b)3 as new paragraph (b)4.

### **Federal Standards Statement**

The rules readopted with amendments, new rules, and a repeal are consistent with Federal law and regulations, including FERPA and 34 CFR Part 99. The rules readopted with amendments, new rules, and a repeal are in compliance with, and do not exceed, Federal

education requirements included in ESSA and the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 et seq.

**Full text** of the readopted rules can be found in the New Jersey Administrative Code at N.J.A.C. 6A:32.

**Full text** of the adopted amendments and new rules follows (additions to proposal indicated in boldface with asterisks **\*thus\***; deletions from proposal indicated in brackets with asterisks \*[thus]\*):

#### Subchapter 5. Seniority

##### 6A:32-5.1 Standards for determining seniority

(a)-(d) (No change from proposal.)

(e) An employee who holds an emergency or provisional certificate shall not be entitled to seniority rights, but the years of employment under the emergency or provisional certificate shall count toward seniority when the employee becomes the holder of a standard certificate\*,\* \*[. Upon acquisition of a standard certificate]\* as defined at N.J.A.C. 6A:9, Professional Standards.

(f)-(m) (No change from proposal.)

#### Subchapter 12. Kindergarten

##### 6A:32-12.1 Kindergarten programs

(a) – (b) (No change from proposal.)

(c) School districts that are not subject to the *Abbott v. Burke* decisions at 153 *N.J.* 480 (1998) and 177 *N.J.* 578 (2003) (“*Abbott* decisions”) or the provisions at N.J.A.C. 6A:13-3.2 shall maintain a maximum enrollment for a kindergarten classroom of 25 students per teacher. School districts subject to the *Abbott* decisions or in which 40 percent or more of the students are “at-risk” as defined at P.L. 2007, c. 260\*,\* shall follow the provisions for kindergarten at N.J.A.C. 6A:13-3.2.

1. School districts that are not subject to the *Abbott* decisions or the provisions at N.J.A.C. 6A:13-3.2 may submit a written request to the executive county superintendent for permission to increase the number of students in a kindergarten classroom, provided another teacher, \*[an auxiliary teacher,]\* or a \*[teacher aide]\* **\*paraprofessional\*** is employed full-time to provide for the increased size.

#### Subchapter 13. Virtual or Remote Instruction

##### 6A:32-13.1 Virtual or remote instruction

(a) – (b) (No change from proposal.)

(c) The district board of education may apply to the 180-day requirement established pursuant to N.J.S.A. 18A:7F-9.b, one or more days of virtual or remote instruction under the following conditions:

1. (No change from proposal.)
2. The virtual or remote instruction meets the Commissioner-established criteria for the occurrence of one of the events at (b) above; \*[and]\*
- \*3. The school district’s program of virtual or remote instruction:**

- i. Explains, to the greatest extent possible, the equitable delivery of, and access to, virtual and remote instruction, including descriptions of the following:**

  - (1) The design of synchronous and/or asynchronous virtual or remote learning plans that will maximize student growth and learning;**
  - (2) How the school district will continuously measure student growth and learning in a virtual or remote instruction environment; and**
  - (3) The school district’s plan for measuring and addressing any ongoing digital divide issue(s), including a lack of access to the internet, network, or devices;**
  
- ii. Addresses the needs of students with disabilities and includes descriptions of the following:**

  - (1) The delivery of virtual or remote instruction in order to implement, to the greatest extent possible, students’ individualized education programs (IEPs), including material and platform access;**
  - (2) The methods used to document IEP implementation, including the tracking of student progress, accommodations, and modifications;**
  - (3) How case managers follow up with parents to ensure services are implemented, to the greatest extent possible, in accordance with IEPs; and**

- (4) How the school district plans to conduct IEP meetings, evaluations, and other meetings to identify, evaluate, and/or reevaluate students with disabilities;
- iii. Addresses the needs of English language learners (ELLs) and includes descriptions of the following:
  - (1) How the school district includes an English as a second language (ESL) and/or bilingual education program aligned with State and Federal requirements to meet the needs of ELLs;
  - (2) The process to communicate with parents of ELLs, including providing translation materials, interpretative services, and information available at the parent’s literacy level;
  - (3) The use of instructional adaptations, for example, differentiation, sheltered instruction, Universal Design for Learning, access to technology, and strategies to ensure that ELLs access the same standard of education as non-ELL peers; and
  - (4) The training for teachers, administrators, and counselors to learn strategies related to culturally responsive teaching and learning, social-emotional learning, and trauma-informed teaching for students affected by forced migration from their home country;
- iv. Accounts for student attendance in accordance with (d) below and includes the following:

- (1) A description or copy of the school district’s attendance policies, including how the school district will determine whether a student is present or absent during virtual or remote instruction, and how a student’s attendance will factor into promotion, retention, graduation, discipline, and any other decisions that will reflect the student’s performance;**
- v. Describes how the school district is communicating with the parents when a student is not participating in virtual or remote instruction and/or submitting assignments;**
- vi. Includes a plan for the continued safe delivery of meals to eligible students;**
- vii. Includes an outline of how buildings will be maintained throughout an extended period of closure; and**
- viii. Includes district-specific factors, including, but not limited to, considerations for Title I extended learning programs, 21st Century Community Learning Center Programs, credit recovery, other extended student learning opportunities, accelerated learning, and social and emotional health of staff and students, transportation, extra-curricular programs, childcare, and community programming; and\***

**\*[3.]\* \*4.\* (No change in text from proposal.)**

**(d) (No change from proposal.)**

6A:32-13.2 Virtual or remote instruction in approved private schools for students with disabilities (APSSDs)

- (a) (No change from proposal.)
- (b) The APSSD may apply one or more days of virtual or remote instruction to qualify as a day of instruction for the purposes of calculating tuition pursuant to N.J.S.A. 18A:46-21.1.a, under the following conditions:
  - 1. (No change from proposal.)
  - 2. The virtual or remote instruction meets the Commissioner-established criteria for the occurrence of one of the events at (a) above; \*[and]\*
  - \*3. The APSSD’s program of virtual or remote instruction shall include the criteria at N.J.A.C. 6A:32-13.1(c)3; and\***
  - \*[3.]\* \*4.\*** (No change in text from proposal.)
- (c) – (d) (No change from proposal.)