California Department of Education

Executive Office

SBE-002 (REV. 11/2017)

# MEMORANDUM

**DATE:** April 16, 2018

**TO:** MEMBERS, State Board of Education

**FROM:** TOM TORLAKSON, State Superintendent of Public Instruction

**SUBJECT:** 2017 Annual Report of Waiver Activity

## Summary of Key Issues

California *Education Code* states:

The State Department of Education shall annually submit a report to the Governor, Legislature, State Board of Education, and make the report available to the superintendent and board president of each school district and county office of education.

This report includes a narrative about the waiver process, a summary of all waivers submitted, and a more detailed description of waivers requested in a major topic area in 2017.

Attachment 2 provides a spreadsheet listing of all waivers processed including the topic, the *Education Code* reference and action taken by the State Board of Education.

**Attachment(s)**

**Attachment 1:** Annual Report of Waiver Activity January 2017 – December 2017

(9 Pages)

**Attachment 2:** Summary of Actions Taken on Waivers by the State Board of Education

(4 Pages)

**California Department of Education**

**Report to the Governor, the Legislature, and the State Board of Education: 2017 Annual Report of Waiver Activity**



**Prepared by:**

**Waiver Office**

**Executive Branch**

April 2, 2018

*Description*: 2017 Annual Report of Waiver Activity

*Authority*: Section 33053 of the California *Education Code*

*Recipient*: The Governor, the Legislature, and the State Board of Education

*Due Date*: Annually

**California Department of Education**

**Report to the Governor, the Legislature, and the State Board of Education:**

**2017 Annual Report of Waiver Activity**

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California Department of Education

**Report to the Governor, the Legislature, and the State Board of Education:**

**2017 Annual Report of Waiver Activity**

# Executive Summary

California *Education Code (EC)* Section 33053 requires the California Department of Education (CDE) to submit an Annual Report of Waiver Activity to the Governor, the Legislature, and the State Board of Education (SBE) and make the report available to local agencies.

A waiver is an alternative to a legal requirement or prohibition for which no other remedy is apparent. General waivers are authorized by *EC* sections 33050–33053 and permit the SBE to waive most *EC* sections or *California Code of Regulations*, Title 5. Specific waivers and petitions are authorized as part of a statute for some or all particular sections of the *EC*. The SBE also has some authority to grant federal waivers.

The report shows the total number of waiver requests received from January 1, 2017, until December 31, 2017. The report also describes the types of waivers received, the dispositions of those waivers, and brief descriptions of the major type of waiver requests received.

In 2017, a total of 416 waivers were processed, of which 332 were approved, one was denied, and 63 were withdrawn. No formal action was taken on a total of 20 waivers.

If you have any questions regarding this report, please contact Stephanie Papas, Administrator, SBE Liaison Office, by phone at 916-319-0209 or by e-mail at spapas@cde.ca.gov.

You will find this report on the CDE Waiver Reports Web page at <http://www.cde.ca.gov/re/lr/wr/waiverreports.asp>. If you need a copy of this report, please contact the Waiver Office by phone at 916-319-0824 or by e-mail at waiver@cde.ca.gov.

**California Department of Education**

**Report to the Governor, the Legislature, and the State Board of Education:**

# 2017 Annual Report of Waiver Activity

California *Education Code* *(EC)* Section 33053 states:

The State Department of Education shall annually submit a

report to the Governor, Legislature, State Board of Education, and

make the report available to the superintendent and board president

of each school district and county office of education. This report

shall include a description of the number and types of waivers

requested of the board, the actions of the board on those requests,

and sources of further information on existing or possible waivers.

This report identifies the number of general and specific waiver requests received from January 1, 2017, to December 31, 2017. These waiver requests are for both state and federal statutes and state regulations. Waiver requests are heard by the State Board of Education (SBE) during regularly scheduled meetings.

## Waiver Requests for 2017

113 General Waivers

283 Specific Waivers

20 Federal Waivers

416 Total Waivers

## Dispositions of 2017 Waiver Requests

332 Waivers Approved

1 Waiver Denied

63 Waivers Withdrawn

20 Waiver with No Formal Action Taken

In 2017, 416 waiver requests were received; this represents a 44 percent increase from 2016. Of those, one was denied. Additionally, 63 of the waivers were withdrawn for various reasons by the requesting district. No action was taken on 20 of the waiver requests because they included requests to waive *EC* sections that cannot be waived by statute, waivers that were unnecessary due to a permissive statute, or the existence of formerly approved waivers that attained permanent status.

# Purpose and Types of Waivers

**General Waivers**

The purpose of a general waiver is to provide flexibility to a school district or County Office of Education (COE) without undermining the basic intent of the law. Under the SBE’s general waiver authority, EC sections 33050–33053, the governing board of a school district and COE may request a waiver of most parts of the EC and California Code of Regulations, Title 5 (5 CCR). Charter schools are required to go through their authorizing agency to request waivers under the current statute.

Non-waivable sections designated in EC Section 33050(a)(1) through (20) include sections dealing with apportionment, school facilities, financial management and control, and kindergarten through grade three (K–3) class size reduction. Other sections of the EC are also explicitly excluded from the SBE waiver authority through specific language within the same section or article. In order to deny a general waiver, the SBE must cite one of seven reasons found in EC Section 33051(a):

The state board shall approve any and all requests for waivers except in those cases where the board specifically finds any of the following: (1) The educational needs of the pupils are not adequately addressed. (2) The waiver affects a program that requires the existence of a schoolsite council and the schoolsite council did not approve the request. (3) The appropriate councils or advisory committees, including bilingual advisory committees, did not have an adequate opportunity to review the request and the request did not include a written summary of any objections to the request by the councils or advisory committees. (4) Pupil or school personnel protections are jeopardized. (5) Guarantees of parental involvement are jeopardized. (6) The request would substantially increase state costs. (7) The exclusive representative of employees, if any, as provided in Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1 of the Government **Code**, was not a participant in the development of the waiver.

**Specific Waivers**

A specific waiver offers the same flexibility to districts and COEs but has a different

process for approval. Some specific waiver requests do not require a school site council meeting, collective bargaining unit participation, or parental notice to be included in the waiver request. Spread throughout the *EC*, specific waiver authorities are limited in scope to a particular chapter, section, or area of the code.

**Federal Waivers**

Since 2002, the federal Elementary and Secondary Education Act, Title I, has allowed the SBE to grant waivers of portions of that federal statute. The SBE has been designated as the state educational agency for purposes of these waivers. These waiver authorities are found throughout the entire federal statute, similar to the specific waivers of California statute. Charter schools may also submit Carl Perkins Career and Technical Education Improvement Act of 2006 (Public Law 109-270) waivers without going through their authorizing district.

With the passage of the Every Student Succeeds Act in December 2015, the federal statutory requirement for waivers offered by the State has not changed. However, the language regarding federal approval of State waiver requests has been modified to encourage federal agencies to grant waivers. When LEAs request waivers of federal statute, the State must now be asked to approve the waiver request before passing it on to the U.S. Department of Education (ED), rather than merely being allowed to review it. However, the language still strongly encourages States to send these waivers to ED unless there are significant deficiencies.

## Waiver Process

After a local educational agency (LEA) or COE enters a waiver request into the online database system, the CDE analyzes each waiver request and provides a recommendation to the SBE: approval, approval with conditions, or denial. The waiver request is then scheduled for the next SBE meeting. In order for any motion on a waiver request to be acted upon, the waiver must be approved by a majority of board members present, and at least six votes are required. If a motion does not get the support of at least six votes to support or deny it, the waiver request is automatically rescheduled to the next SBE meeting. If action is not taken by the second regular meeting for general waivers only, pursuant to *EC* Section 33052, the waiver request is deemed approved for one year, commencing the first day of the following month.

## Waiver Descriptions and Analysis

Below is a brief description of waiver topics with the largest number of requests throughout 2017. A brief analysis related to the reasoning behind a large number of waiver requests is provided, if applicable.

## Equity Length of Time

(*EC* Section 37202)

Total Received: 41

*EC* Section 37202(a): Except if a school has been closed by order of a city or a county board of health, or of the State Board of Health, on account of contagious disease, or if the school has been closed on account of fire, flood, or other public disaster, the governing board of a school district shall maintain all of the elementary day schools established by it for an equal length of time during the school year and all of the day high schools established by it for an equal length of time during the school year.

Equity length of time waivers have been requested if the instructional minutes for a transitional kindergarten program are not the same number of instructional minutes as for the kindergarten program at each school site. If the number of minutes are not the same, a waiver is needed.

The Budget Act of 2017 (AB 99) amended EC 37202, effective January 1, 2018, so it is no longer necessary for LEAs who have established an early primary program to have an approved State Board of Education equity length of time waiver on file.

## Schoolsite Council

(*EC* Section 52852)

Total Received: 56

*EC* 52852 requires schools that must maintain a schoolsite council to have a specific size and composition.

There are a number of small, rural, isolated, or alternative type schools for which this requirement is problematic. Most commonly, waivers were sought to combine schoolsite councils with another school, reduce the total number of members required, or a combination of these two requests.

## School District Reorganization

**Selections to Change District Governing Board Election Methods**

(*EC* Sections 5019–5030)

Total Received: 21

A county committee on school district organization has the authority to approve a change to election methods for school district governing board elections (*EC* Section 5019 et seq.). Pursuant to *EC* Section 5020, County Committee approval of election methods constitutes an order of election; thus, voters in the districts have the final approval to change election methods.

As a result of the California Voting Rights Act (CVRA) of 2002, codified at sections 14025–14032 of the California *Elections Code*, many school districts have faced litigation (or have been exposed to potential litigation) because of their “at-large” election methods. The CVRA enables challenges to “at-large” election methods in which elections are characterized by “racially-polarized voting.” As importantly, the CVRA authorizes mandatory attorneys’ fee and expert fee awards to successful plaintiffs, with such fee awards reaching as high as seven figures.

To reduce the potential for litigation and to change to CVRA-compliant election methods as expeditiously as possible, over 150 school districts have requested waivers of the election requirement in *EC* Section 5020 since enactment of the CVRA. Some waiver requests primarily are efforts by districts to avoid potential litigation subsequent to receipt of demand letters from attorneys claiming the districts’ at-large election methods violate the CVRA. SBE approval of these waivers allows establishment of CVRA-compliant election methods to be adopted upon review and approval of the County Committee. Only the elections to establish the election methods are eliminated by approval of the waiver requests—voters in school districts continue to elect all governing board members. Moreover, approval of the waiver requests does not eliminate any existing legal rights of currently seated board members.

The number of CVRA-related waivers submitted had steadily decreased from a high of 29 in 2011 to nine in 2016. However, the number increased to 21 in 2017 due to increased activity by attorneys statewide attempting to force school districts to comply with the CVRA. This increased enforcement of the CVRA likely will continue in 2018.

## Special Education

Total received: 60

Districts have many federal and state requirements throughout the *EC* and Title 5 Regulations related to Special Education. For the waiver process, Special Education is considered a waiver topic area, and there are six *EC* sections that are requested to be waived. The two most common are:

**Educational Interpreter Regulations**

(5 *CCR* Section 3051.16(b)(3))

Total received: 7

Local Education Agencies (LEAs) are required by current state regulations, 5 *CCR* Section 3051.16(b)(3), to hire educational interpreters for deaf and hard of hearing students who meet the specific qualification standards. Since many educational interpreters throughout the state have found it difficult to meet these standards, waiver requests continue to be submitted on their behalf. CDE staff continues to work with LEAs and COEs to lower this number after multiple waiver requests in previous years. Of the seven waivers requests of this type, six were approved, one had no action.

**Extended School Year (Summer School)**

(5 *CCR* Section 3043(d))

Total received: 30

Extended School Year (ESY) is the term for the education of special education students “between the close of one academic year and the beginning of the next,” similar to a summer school. It must be provided for each individual with exceptional needs whose Individualized Education Program requires it. LEAs may request a waiver to provide an ESY program for fewer days, but with longer hours than the traditional model.

## Charter School Program

## Resource Center Location

(*EC* sections 47605(a) and 47605.1(d))
Total received: 79

There has been an increase in charter school waivers due to the court opinion, *Anderson Union High School District v. Shasta Secondary Home School* (2016) 4 Cal. App. 5th 262 (*Anderson*). In this opinion, the Third District Court of Appeal (Third District) held that the geographic restrictions in *EC* sections 47605(a) and 47605.1(d) apply to nonclassroom-based charter schools operating resource centers. Thus, in order to ensure compliance with this court opinion, a charter school resource center must operate within the boundaries of its authorizing school district, unless an exception applies. Additionally, the charter school may establish a resource center in an adjacent county.

On January 18, 2017, the California Supreme Court denied review of the Third District’s opinion, which became final on that date. In consequence, waiver applications relying on *Anderson* became eligible for consideration. In March 2017, the SBE adopted a policy that set forth guidelines for the processing of these waiver applications. The policy authorized a one-year waiver in order to give charter schools time to obtain local authorization. As a condition of the waiver, charter schools were required to adopt a transition plan and provide copies of that plan to the charter school’s authorizer and the districts where the resource centers were located. This policy expired on November 10, 2017, resulting in less charter school waivers on this issue in 2018.

## Results/Conclusions

The waiver process provides flexibility for a school district or COE without undermining the basic intent of the law. The implementation of an online waiver intake system in 2012 significantly improved efficiency and accuracy, streamlining the process for both LEAs and the CDE. This change allows the CDE’s Waiver Office to promptly respond to requests for assistance from the field and from program offices within the Department.