ELC EDUCATION LAW CENTER

July 3, 2013

Barbara Gantwerk, Assistant Commissioner
New Jersey Department of Education
River View Executive Plaza
Building 100, P.O. Box 500
Trenton, NJ 08625-0500

Re: **N.J.A.C. 6A:16, Programs to Support Student Development**

Dear Assistant Commissioner Gantwerk:

Education Law Center ("ELC") works to secure the legal rights of New Jersey's 1.3 million public school children to high quality education under state and federal laws, particularly our state's at-risk students, students with disabilities, and students of color. As an advocate for students in New Jersey's high need school districts, ELC serves as counsel to the class of urban school children in the landmark Abbott v. Burke education equity case and provides legal services to students in special education, student discipline, school residency, bilingual education, and other matters. As one of the nation's premier advocates for education rights, ELC has substantial expertise in this area.

Proposed Repeal of Existing Regulations

At the outset, ELC urges the State Board of Education and the New Jersey Department of Education to rein in efforts to delete existing regulatory requirements. We believe that the Department's proposal has not thought through the unintended consequences of removing requirements that were enacted for good reason, and fails to further the goal of improving educational opportunities for New Jersey's students. On the surface, increasing district "flexibility" by reducing administrative requirements has popular appeal, but, upon closer examination, the "red tape" that the Department seeks to remove will actually eliminate critical protections for students. As will be set forth below, the current proposal fails in several regards to justify dramatic changes in course from the policies that were previously determined to fulfill statutory and constitutional

obligations. Without a "reasoned analysis" of the need for the change, the repeal of existing regulations is arbitrary and capricious. Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41-42, 103 S. Ct. 2856, 2866, 77 L. Ed. 2d 443 (1983)("State Farm"). See also Glukowsky v. Equity One, Inc., 180 N.J. 49, 66 (2004) (citing State Farm and acknowledging "when an agency changes its course, it must provide a 'reasoned analysis'"); In Re Adoption to Amendments to N.J.A.C. 6:11-8.4 and N.J.A.C. 6:11-8.5, 249 N.J. Super. 52, 58, 59-60 (App. Div. 1991) (distinguishing State Farm, supra, because agency "fully explained the reasons for the changes which were only moderate in nature").

In a number of areas, the Department's deletion of existing regulations is wholly unjustified and will harm students. ELC discusses three of these areas below: 1) the wholesale elimination of the current regulations governing alternative education programs, N.J.A.C. 6A:16-9.1, -9.2, and -9.3; 2) the elimination of N.J.A.C. 6A:16-7.9(a)(2)(ix)(1), defining the minimum level of response required by school districts to address harassment, intimidation, and bullying ("HIB"); and 3) the elimination of the option under N.J.A.C. 6A:16-2.2(f)(1) to use the school physician for medical examinations. Still further examples of the unwarranted deletion of existing requirements are discussed in the comments of the New Jersey Special Education Practitioners ("NJSEP"), on which ELC also relies. See section on Endorsement of NJSEP Comments, below.

1. Alternative Education

Subchapter 9 of N.J.A.C. 6A:16 presently sets forth the standards and criteria for the establishment and operation of alternative education programs, as well as for student placement in an alternative education program. The Department proposes to eliminate this subchapter "in its entirety" on the ground that it creates an "unnecessary layer of approvals and review" and subjects districts to "burdensome regulations from the State." 45 N.J.R. 987, 998 (May 6, 2013). The Department's proposed action, which revokes longstanding agency policy and greatly diminishes students' educational rights, is arbitrary and capricious and unconstitutional.

The Department's support of minimum State standards for alternative education has been a matter of public record for well over a decade. Voicing its agreement that "an alternative education program is preferable to home instruction in all circumstances," 33 N.J.R. 1443(a) (Comment & Response 55) (May

7, 2001), the Department also expressed its agreement that State regulations must do the following:

1. Establish criteria for the approval of alternative education programs by the Commissioner. [Id., (Comment & Response 65)];

2. Require all alternative education programs to provide an academic curriculum that meets the New Jersey Core Curriculum Content Standards and provides "needs-based, individualized instruction." [Id., (Comment & Response 61)];

3. Require all alternative education programs to incorporate "comprehensive support services and programs which address each student's health, social development and behavior." [Id., (Comment & Response 63)].

Clearly, then, the Department has considered the existing regulations, which include all of these provisions, to be essential to fulfilling its statutory and constitutional obligations to New Jersey's students. The provision of alternative education is constitutionally required – to students in the former Abbott districts as a supplemental program, Abbott v. Burke, 153 N.J. 480, 515, 527 (1998), and to students who are removed from general education for disciplinary reasons, P.H. v. Bergenfield Board of Education, State Board Docket No. 60-00 & 27-01 (consolidated) (July 2, 2002). Both the Robinson and Abbott line of cases have established that, at its core, New Jersey's constitutional right to a thorough and efficient education, N.J. Const. Art. VIII, §4, ¶1, protects the rights of students to equal educational opportunity. As such, state regulations ensuring minimum and uniform standards in the provision of alternative education are constitutionally necessary.

With the elimination of N.J.A.C. 6A:16-9.1 and -9.2, each of New Jersey's approximately 600 school districts will be free to determine the quality of alternative education programming offered to its students and, without state standards, there will be vast disparities from district to district. Those disparities will be exacerbated by shortfalls in state school aid, since many school districts, no matter how well meaning, will implement cuts in their alternative education programs if those programs are no longer regulated. The quality of the program received should not depend on where in the State the

student resides, but this will be the inevitable result of removing the current program standards.

The current regulatory requirements – establishing maximum student-teacher ratios, requiring development of an individualized program plan ("IPP"), ensuring that curricular and teacher certification standards are the same as those in general education programs, requiring comprehensive support services, case management services, and transition services – are all directly related to remediating the student's lack of success in the general education program and to ensuring the provision of a thorough and efficient education. Students in these programs require additional services to achieve the constitutional standard of "an education that will prepare public school children for a meaningful role in society, one that will enable them to compete effectively in the economy and to contribute and to participate as citizens and members of their communities." Abbott v. Burke, 149 N.J. 145, 166 (1997), citing Abbott v. Burke, 100 N.J. 269, 280-281 (1985) and Landis v. Ashworth, 57 N.J.L. 509, 512 (Sup. Ct. 1895). The State has properly established alternative education criteria that will provide additional supports to students in need, and cannot eliminate these criteria in the name of district flexibility without providing a reasoned analysis as to how its constitutional duty will be met. See, e.g., Abbott v. Burke, supra, 149 N.J. at 182 ("The State … cannot shirk its constitutional obligation under the guise of local autonomy").

Aside from fulfilling a constitutional mandate, ensuring appropriate services to students receiving alternative education throughout the State is a matter of sound educational policy. As emphasized by the State Board:

> … we stress the importance of providing educational services to students who present serious disciplinary problems. Although it may be more challenging to provide such students with effective educational services, we do not believe that it is sound educational policy to turn our back on students just because it may be difficult to educate them. To the contrary, it is all the more imperative that we fulfill our responsibilities to these children both for their sake and for society's.
> [P.H., supra, at page 14]

Additionally, please note that the elimination of N.J.A.C. 16A:16-9.3 deprives students of any due process

protection prior to removal from general education to alternative education. One can certainly argue whether the existing regulation provides sufficient due process protection to students, but, in enacting N.J.A.C. 16A:16-9.3, the Department was attempting to fulfill its state and federal constitutional duties to afford due process to students before removing them from general education. See 38 N.J.R. 4411(c) (Comment & Response 86) (October 6, 2006) (noting that Department "established a regulation to require parental consultation and notification prior to a student's placement in an alternative education," and that this provision, together with others, was "sufficient to ensure the protection of the student"). As with the other alternative education regulations proposed for deletion, the Department is repealing existing protections without providing a reasoned analysis as to how constitutional rights will remain intact.

Finally, ELC endorses and incorporates by reference the July 2013 comments of the Juvenile Law Center opposing the Department's proposed elimination of N.J.A.C. 6A:16-9 for the reasons stated therein.

For all of these reasons, the proposed repeal of the current alternative education regulations, N.J.A.C. 6A:16-9.1, -9.2, and -9.3 is both arbitrary and capricious and unconstitutional and must not be enacted.

2. Harassment, Intimidation, and Bullying

Currently, N.J.A.C. 6A:16-7.9(a)(2)(ix) requires, consistent with N.J.S.A. 18A:37-15(b)(7), that a school district's policy against HIB define "[t]he range of ways in which a school will respond once an incident of harassment, intimidation or bullying is identified." The Department has proposed to delete subsection one of that regulation, which currently states:

> The responses, at a minimum, shall include support for victims of harassment, intimidation or bullying and corrective actions of documented systemic problems related to harassment, intimidation or bullying. [N.J.A.C. 6A:16-7.9(a)(2)(ix)(1)]

The Department's sole explanation for eliminating N.J.A.C. 6A:16-7.9(a)(2)(ix)(1) is that "the Anti-Bullying Bill of Rights Act does not include a provision requiring support for victims

of harassment, intimidation, and bullying or for corrective actions for systemic problems related to harassment, intimidation, and bullying." 45 N.J.R. 987, 997 (May 6, 2013). However, the Department's removal of regulatory language that is not explicitly found in the statute changes agency policy in a way that directly undermines the intent and purpose of the Anti-Bullying Bill of Rights ("ABR"), N.J.S.A. 18A:37-13 to 32.1.

In fact, the Department's decision to delete N.J.A.C. 6A:16-7.9(a)(2)(ix)(1) is directly at odds with its prior interpretation of New Jersey's anti-bullying law. In 2005, the Department expressly voiced its agreement that the State's HIB rules "should require district board of education policies to address support for victims and responses to systemic problems in regard to harassment, intimidation or bullying." 37 N.J.R. 3295(b) (Comment and Response 95) (September 6, 2005). The Department specifically determined that such a requirement acted "in support of" the statutory mandate of N.J.S.A 18A:37-15(b)(7) that school districts establish "the range of ways in which a school will respond" once HIB is identified. Id.

Thus, since 2005, the Department has interpreted state law to require support for victims and responses to systemic problems as an essential minimum level of response required by school districts to HIB. With the passage of the ABR in 2011, the Legislature made clear its intent "to strengthen the standards and procedures for preventing, reporting, investigating, and responding to incidents" of HIB to achieve its goal of "a safe and civil environment in school." N.J.S.A. 18A:37-13.1(f) and -13. The Legislature also specifically found that the strengthening of the law was necessary "to reduce the risk of suicide among students and avert … the needless loss of a young life." N.J.S.A. 18A:37-13.1(i). Further, the Legislature amended N.J.S.A. 18A:37-15(b)(7) itself to mandate that the range of ways that a school responds to HIB "shall include an appropriate combination of counseling, support services, intervention services, and other programs…." The Department has provided no reasoned analysis as to how these legislative amendments serve to undermine authority for the current regulation.

To the contrary, the legislative amendments strengthening the HIB make it all the more imperative that districts be directed to support victims and address systemic problems in responding to HIB. The Legislature cannot have made clearer its concern about students who are targeted by HIB and its desire to have districts improve school climate overall, not merely

respond to individual acts of HIB. See, e.g., N.J.S.A. 18A:37-13.1(a), (b) and (c) (noting prevalence of school bullying, nationally and in New Jersey and causal relationship between "chronic persistence of school bullying" and "student suicides"); N.J.S.A. 18A:37-17 (requiring districts to "annually establish, implement, document, and assess bullying prevention programs or approaches" that are "designed to create school-wide conditions to prevent and address" HIB); and N.J.S.A. 18A:37-21 (requiring districts to establish school safety teams "to develop, foster, and maintain a positive school climate by focusing on the on-going, systemic process and practices in the school….") Removal of the regulatory requirement that districts provide support to victims and address systemic problems can only serve to misdirect school districts on the intent of the ABR. Elimination of this provision sends the clear, but mistaken, message to school districts throughout New Jersey that providing support to victims and addressing systemic problems is no longer mandatory under the ABR. Such an interpretation of the ABR by the Department is nothing short of arbitrary and capricious and cannot be sustained.

3. Required Health Services

The Department proposes to eliminate the regulation that allows parents to choose "either the school physician or their own private physician" to perform required medical examinations. N.J.A.C. 6A:16-2.2(f)(1). According to the Department, this deletion is necessary "because medical examinations, including the athletic pre-participation examination, should be conducted in the medical home, unless the student does not have a medical home, in which case the school physician may conduct the examination." 45 N.J. R. 987, 989 (May 6, 2013). However, N.J.S.A. 18A:40-4, the statutory provision authorizing medical examinations of students, places primary responsibility for conducting examinations on the school physician or "medical inspector." While the statute clearly establishes that the medical inspector "may accept the report of such an examination by a physician licensed to practice medicine and surgery within the State," it does not mandate that parents obtain examinations from their own physicians. There has been no change in law that justifies the elimination of parental choice of the examining physician. ELC is specifically concerned that, if the existing regulation is deleted, low income parents will be compelled to seek examinations at their child's "medical home," even if they cannot afford to do so. This means that low income parents will face a difficult choice: either paying out-of-pocket for a co-pay, deductible, or cost of an examination that will likely mean

foregoing other necessities for their family; or telling their children that athletics participation is not an option in order to avoid the cost of the medical examination. Instead, parents should retain the option of using the school physician for examinations as intended by statute.

Failure to Spell Out Statutory Requirements

In the context of public education, New Jersey courts have held that regulations must be clear so that both school personnel and parents are apprized of their full meaning and "all are on an equal playing field." Matter of N.J.A.C. 6:28-2.10, 305 N.J. Super. 389, 404-06 (App. Div. 1997); Matter of Repeal of N.J.A.C. 6:28, 204 N.J. Super. 158, 164 (App. Div. 1985). However, in proposing regulations to incorporate the ABR's requirements pertaining to the appointment of a school anti-bullying specialist ("ABS") and district anti-bullying coordinator ("ABC"), and to the formation of a school safety team ("SST"), the Department has failed to spell out important statutory provisions in the regulations. Rather than setting forth in regulation the statutory obligations of these three entities, the Department has merely cross-referenced the relevant statutory provisions. Anyone reading the regulations, without access to the statute, would have no way of knowing the role and duties of the ABS, ABC, and SST, and therefore no way to judge compliance in his or her own district. Given that these "regulations are written to be read and followed by nonlawyers in hundreds of school districts across the state," Matter of Repeal of N.J.A.C. 6:28, 204 N.J. Super. at 163, it is arbitrary and capricious for the Department to fail to define these terms and to lay out the specific responsibilities of each in the administrative code.

Similarly, the Department needs to provide further guidance with regard to N.J.S.A. 18A:37-15(b)(7)'s mandate that the range of ways that a school responds to HIB "shall include an appropriate combination of counseling, support services, intervention services, and other programs as defined by the Commissioner." In addition to maintaining the existing regulation, N.J.A.C. 6A:16-7.9(a)(2)(ix)(1), for the reasons set forth above, the Department must expand the regulation to mandate that an appropriate combination of specified programs be provided and to provide a URL cite to the Department guidance where the Commissioner has defined other appropriate programs to address HIB.

Scope of Regulations

The Department, despite an earlier promise to undertake a review of the application of Chapter 16 to early childhood education settings, has persisted in extending the protections of Chapter 16 only to "students in kindergarten through grade 12." N.J.A.C. 6A:16-1.2. There are no reasons why the provisions for school health services required by subchapter 2, the development and implementation of a school safety and security plan required by N.J.A.C. 6A:16-5.1, or the reporting of potentially missing or abused children currently required by subchapter 11, would be inappropriate or misplaced when applied to preschoolers enrolled in public school districts. There is also no reason why the prohibition of the use of suspension or expulsion under N.J.A.C. 6A:13A-4.4(g) for preschoolers in universal preschool programs should not apply to all preschoolers with disabilities served by their public school district, whether included in a general education program or placed elsewhere. To the contrary, the Department's failure to afford the protections of Chapter 16 and N.J.A.C. 6A:13A-4.4(g) to all preschoolers is arbitrary and capricious and has a discriminatory impact on preschoolers with disabilities.

Endorsement of NJSEP Comments

ELC expressly endorses and incorporates by reference the July 2013 comments of NJSEP pertaining to the following provisions of Chapter 16: N.J.A.C. 6A:16-2.3(a)(3)(iii) Health Services Personnel; N.J.A.C. 6A:16-4.2(a) Review and Availability of Policies and Procedures for the Intervention of Student Alcohol or Other Drug Abuse; N.J.A.C. 6A:16-5.2(b) School Violence Awareness Week; N.J.A.C. 6A:16-7.1(a), (b), and (c) Code of Student Conduct; N.J.A.C. 6A:16-7.3 (a)(10(i)(1) Long Term Suspensions; N.J.A.C. 6A:16-7.8 Attendance; N.J.A.C. 6A:16-10 Home or Out-of-School Instruction Due to Temporary or Chronic Health Conditions. ELC urges the Department to revise those regulatory provisions in accordance with the NJSEP comments.

Continuing Objection to Waiver of Constitutional Rights

N.J.A.C. 6A:16-7.3(a)(5)(iv) maintains the provision that "[f]urther engagement by the student in conduct warranting expulsion … shall amount to a knowing and voluntary waiver of the student's right to a free public education." As has been set forth by ELC in prior comments to the Department, this

provision creates a blanket rule – two strikes and a student is out forever – that is inconsistent with the relevant constitutional analysis (briefed at length by the petitioners in the P.H. v. Bergenfield case) that limits the right of government to infringe upon a fundamental right, such as education, to situations in which a substantial governmental interest has been demonstrated and the narrowest means available has been used. See, e.g., Doe v. Poritz, 142 N.J. 1, 90 (1990). The rule is particularly problematic because of the insufficiency of substantive standards to guide district decision-making, and because of its failure to account for the age of the student involved. Only in the extremely rare instance that a district can demonstrate a need related to safety and order that cannot be met by an appropriate continuum of alternative education programs should the discontinuance of educational services be allowed.

Moreover, there is no support in case law – or in research or common knowledge regarding adolescent development - for the far reaching conclusion that student misconduct, even after notice provided in accordance with N.J.A.C. 6A:16-7.3(a)(5)(iv), constitutes a knowing, intelligent and voluntary waiver by a student of his or her constitutional rights. Under relevant case law, full knowledge of one's legal rights and the deliberate intention to relinquish those rights are prerequisites to an effective waiver of rights. Because this standard is likely impossible to be met by student misconduct, particularly when the student is a minor, ELC urges the Department to propose the revocation of this regulation.

Thank you for your consideration of these comments. If I can provide additional information, please do not hesitate to contact me at (973) 624-1815, ext. 20.

Respectfully,

Elizabeth Athos

Elizabeth Athos, Esq.
Senior Attorney

Submitted via NJDOE's website
Hard copy via regular mail
(with copy of NJSEP comments enclosed)

Cc: Michael C. Walters, AAG