**COMMENTS OF EDUCATION LAW CENTER
TO NEW JERSEY STATE BOARD OF EDUCATION
ON PROPOSED REVISIONS TO N.J.A.C. 6A:16,
PROGRAMS TO SUPPORT STUDENT DEVELOPMENT**

I. Introduction

Education Law Center (ELC) has long advocated for and supported the need to revise N.J.A.C. 6A:16, Programs to Support Student Development, to incorporate student discipline regulations. Since its founding in 1973, ELC has represented the interests of disadvantaged students and students with disabilities to achieve education reform and protection of student rights. The area of student discipline is one in which ELC has a great deal of experience, including representation of the petitioners throughout the litigation of P.H. o/b/o M.C. v. Bergenfield Board of Education. Were it not for a significant leave of absence by staff during the past year, ELC would have weighed in sooner with the detailed comments presented below.

ELC understands the urgent need for regulations governing student discipline in New Jersey, yet nonetheless asks the State Board to hold off approving the current proposal[1] for publication until critical flaws can be corrected. While there are many good things about the Department's proposal, there are also significant omissions and serious errors. These include: 1) the failure to extend the scope of coverage of the regulations to all preschoolers entitled to a free public education, not just those with disabilities; 2) the

[1] These comments are based on the last proposal made available to the public prior to the April 6, 2005 State Board meeting.

impermissible narrowing of the State Board's rulings in P.H. by permitting the complete discontinuance of educational services to students under age 20 who engage in acts of misconduct while receiving alternative education services; 3) the contravening of P.H. by failing to limit the discretion of school districts to use out-of-school instruction only until placement in a school-based alternative education program is available; 4) the failure to provide substantive standards for expulsions and long-term suspensions adequate to protect the educational rights of students and ensure consistency in discipline throughout the state; 5) the proposal of a 30 day time frame for disciplinary hearings that violates governing case law; 6) the lack of clarity in a number of the procedures governing suspensions and expulsions; 7) the exclusion of children with disabilities from the due process protections accorded general education students; 8) the violation of special protections guaranteed children with disabilities under the Individuals with Disabilities Education Act; 9) the failure to regulate denials of credit or illegal "push-outs" within the attendance code; and 10) the need for additional regulatory guidance in the area of bullying and harassment prevention.

Each of these deficiencies must be corrected to ensure that New Jersey's student code of conduct regulations are legally compliant, promote sound policy, and carry out the purposes of governing law fairly and with clarity.

II. The Scope of the Regulations Must Be Expanded to Cover All Preschoolers Entitled to a Free Public Education

N.J.A.C. 6A:16-1.2 defines the scope of the Programs to Support Student Development code as covering "all pre-school students with disabilities and all students in kindergarten through grade 12." Conspicuously absent from the code's coverage are all

pre-school students without disabilities who are entitled to a free public education in New Jersey. This omission must be remedied.

lll. The Board's Student Conduct Regulations Should Uphold the Right of an Expelled Student to Alternative Education

The Department's proposed regulations on student conduct, as modified by agency initiated changes proposed on December 1, 2004, impermissibly narrow the right recognized by the State Board in P.H. II and III of an expelled student to an "alternative education program" in two ways. First, contrary to the State Board's holding in P.H. II and III, they authorize districts to "discontinue the educational services or discontinue payment of educational services for" a student who has, subsequent to being placed in an alternative education program pursuant to 6A:16-7.3, engaged in conduct that warrants expulsion pursuant to N.J.S.A. 18A:37-2. Second, also contrary to the State Board's rulings in P.H., the proposed regulations permit the use of home instruction and out-of-district instruction rather than mandating a preference for use of alternative education programs. The State Board should reject these proposed regulations and adopt regulations which, consistent with its holding in P.H. II and III, fully protect the right of an expelled student to an alternative education program until the age of twenty.

A. P.H. Does Not Authorize a Complete Termination of Educational Services for Continued Misconduct

The Department asserts that the State Board's holdings in P.H. II and III are limited to the facts of that case in which a student was expelled from a general education setting and do not apply to a situation in which a student has engaged in conduct warranting expulsion after being expelled from a general education setting and placed in an alternative education program. However, there is nothing in P.H. II and III that would suggest such a

limited reading; the clear language, logic and reasoning of P.H. II and III clearly suggest otherwise. For example, the State Board stated in P.H. II:

> We have concluded from both a legal and educational policy perspective that a student who is expelled from school must be provided with an alternative education program until he either graduates from high school or reaches his nineteenth birthday [P.H. III extends this right to a child's twentieth birthday], whichever comes first. In doing so, 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.

As stated in P.H. III, and explained fully in P.H. II, the State Board's decision "was grounded in the New Jersey State Constitution's mandate for a thorough and efficient system of free public education 'for the instruction of all children in the State between the age of five and eighteen years,' [omit cite] and the educational policy embodied in the statutory and regulatory framework implementing the constitutional mandate." There is nothing in the State Board's discussion of the State's constitutional mandate and the statutory and regulatory framework that implements the mandate that would suggest that the holdings in P.H. II and III do not apply to a student who engages in misconduct while attending an alternative education program.

The blanket rule created by the proposed regulations – two strikes and the student is out forever – ignores the relevant constitutional analysis (briefed at length by the petitioners in the P.H. case) that limits the right of government to infringe upon a fundamental right, such as education, to situations in which a substantial governmental interest have been demonstrated and that the narrowest means available have been used. See, e.g. Doe v. Poritz 142 N.J. 1, 90 (1995). The rule is particularly problematic because

of the insufficiency of substantive standards to guide district decision-making (see comments below in section V), and because of its failure to account for the age of the student involved.

The insufficiency of state standards means the disparity that has existed throughout the state in the expulsion of students without alternative education will now be evident in decisions to completely discontinue educational services to students already receiving alternative education. The failure to account for age means that districts could completely discontinue educational services to a student who has already been placed in alternative education, no matter the age of the student. Given that alternative education programs are available at the middle school level, this means that students as young as 11 or 12 who present serious disciplinary problems could be written off by a school district after a second offense.

A policy that allows such a result is unconstitutional because it fails to consider alternative means of educating the student while maintaining safety and order. Alternative education programs can serve different populations and should be varied enough to meet different needs.[2] 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.

In addition to ignoring the relevant constitutional analysis in devising its regulations,

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[2] To the extent that the state's current network of alternative education programs is insufficient to meet the varied needs of students, the Department and the State Board must promote the creation of additional programs and, if necessary, seek additional funding from the Legislature and/or the federal government to improve the options available.

the Department bases its rules on an inappropriate theory of waiver. While the Department has cited examples in its Comment/Response form in which courts have approved the knowing, intelligent, and voluntary waiver of constitutional rights, neither the authority cited by the Department nor a common understanding of youthful behavior supports the Department's position that "a student can knowingly, intelligently and voluntarily waive his or her right to a free public education" simply "by engaging in proscribed conduct." See Comment/Response form at 14.

The Department cites no cases upholding the waiver of the constitutional right to an education. As counsel for petitioners in the P.H. case, ELC is fully aware that the waiver argument was raised repeatedly by the respondent school board in the P.H. case and was implicitly rejected by the State Board.

Cases cited by the Department for the proposition that a student's constitutional right to go to school is subject to the student's adherence to lawful conditions and that a student who misbehaves may be suspended or expelled (State v. Conk, G.F. v. Board of Educ. of Washington Tp., and K.W. v. Board of Educ., Lower Camden Reg'l High Sch. Dist. No. 1) do not address the question of what services a student may be entitled to during a suspension or expulsion and certainly do not discuss whether, or conclude that, a student's misconduct can ever constitute a waiver of his or her constitutional right to a free public education. These cases conclude only that the right to education of a student who engages in misconduct may be limited by suspension or expulsion. These cases do not define what an expulsion is or discuss to what extent the right to education of an expelled student is limited by an expulsion.

The only case dealing with the waiver of a constitutional right by a child, State in the

Interest of Q.N., certainly does not support the far reaching conclusion that student misconduct, even after notice provided by the proposed language in 6A:16-7.3(a)iv., may constitute a knowing, intelligent and voluntary waiver by a student.

Significantly, the State Board has already concluded in B.P. on behalf of minor child, B.P. v. Board of Education of the Lenape Regional High School District, that even a parent's express, written withdrawal of a student from a district's schools after repeated violations of the district's drug policy did not constitute a knowing waiver of the student's right to a free public education. As the State Board found, "Waiver involves the intentional relinquishment of a known right and must be evidenced by a clear, unequivocal and decisive act from which an intention to relinquish the right can be based. [cite omitted] It must be shown that the party charged with the waiver knew of his or her legal rights and deliberately intended to relinquish them. [cite omitted] Waiver 'presupposes full knowledge of the right and an intentional surrender.'" [cite omitted].

Under the standards recognized by the State Board, as well as Q.N., as necessary for a knowing, intelligent and voluntary waiver of a constitutional right, particularly by a minor, it would seem very likely impossible to ever conclude that a student's misconduct constitutes anything close to an effective waiver of the student's right to a free public education in this State. Interestingly, State Board regulations already require that an explicit waiver of the right to attend school by students ages 16-17 be accompanied by written parental consent and that such a waiver is revocable at any time. See N.J.A.C. 6A:17-3.3(c).

B. P.H. Requires Placement in an Alternative Education Program, Not Out-of-School Services

The State Board, in its decisions on motions in the P.H. case, dated September 7, 2001 and October 5, 2001 (collectively, P.H. I), was explicit in its directive that the expelled student in that case must be placed immediately "in an appropriate alternative education program" and that the school district could provide "home or out-of-school instruction **only until such placement can be arranged**." (Sept. 7, 2001 at 6, emphasis added). The record before the State Board in the emergent relief application included the Administrative Law Judge's finding that home instruction is not an adequate substitute for placement in an alternative school. Init. Dec. at 27. The ALJ credited the petitioner's expert in further finding that home instruction is inadequate because it typically offers more limited hours than a structured school program, thereby increasing the opportunity for children to engage in negative or violent behavior; it denies youngsters the critical opportunity to learn how to resolve conflicts with other students; and it typically fails to cover engaging activities such as poetry or art which can help significantly reduce the likelihood of further aggressive behavior by students. *Id.*

Within this context of having ordered the student in P.H. placed in a school-based alternative education program, the State Board subsequently ruled in P.H. II that any expelled student "must be provided with an alternative education program...." (July 2, 2002 at 14.) The proposed regulations thus directly contravene the holding of the State Board by authorizing the use of educational services "either in school or out of school," without limiting the use of out-of- school services only until in-school services can be arranged. See N.J.A.C. 6A:16-7.5(a) (2) (regulation on expulsion, as amended by agency initiated change), N.J.A.C. 6A:16-7.3(g) (regulation on long-term suspension), and N.J.A.C. 6A:16-

7.2(a)(5) (regulation on short-term suspension). Further, the proposed regulations are internally inconsistent since students who commit some of the most egregious offenses are entitled to removal to an alternative education program (and to home or out of school instruction only until placement in an alternative education program is available). See N.J.A.C. 6A:16-5.5(e) (removal for firearms offenses) and N.J.A.C. 6A:16-5.6(e) (removal for assaults with weapons). To comply with P.H., to treat students fairly, and to promote sound policy, the regulations must be amended to mandate placement in school-based alternative education programs for all students subject to disciplinary removals and to limit the discretion of local school districts to chose out-of -school instruction only until placement in an alternative education program is available.

IV. The Board's Student Conduct Regulations Should Provide Clear, Practical and Flexible Definitions of the Terms "Expulsion" and "Suspension"

N.J.S.A. 18A:37-2 permits the suspension or expulsion of students for misconduct, but does not define what these terms mean. This leads to some confusion with respect to the rights of students and the extent and limits of district authority and responsibilities. Regulatory guidance is therefore necessary. Any definition provided within a local or state regulatory scheme must be consistent with the substantive and procedural rights guaranteed students under our state and federal constitutions and statutes and should be clear, practical and, to some degree, flexible.

In its initial proposal, the Department recommended that expulsion be defined as "the permanent removal of a student from either the school district's general education program or the school district's alternative education program." In its most recent proposal

of December 1, 2004, the Department recommends that expulsion be defined as "the discontinuance of educational services or the discontinuance of payment of educational services for a student." Both definitions are problematic.

Nothing in § 37-2 or case law requires or suggests that expulsions are necessarily "permanent" and that term should be avoided in the actual definition of expulsion. In fact, an important consideration in one case reviewed by the State Board was the fact that the student's expulsion was "not a permanent exclusion from the regular education program" and that the student "was expelled from the regular program with the provision that he could apply for readmission" after a certain amount of time. A.M. & S.M. o/b/o M.M. v. Board of Educ. of Livingston, EDU # 7831-01, Commissioner # 40-02S, State Board # 12-02. Also, as discussed above, P.H. II and III prohibit the complete discontinuation of educational services to a student expelled from school, so the definition of expulsion should not incorporate the discontinuation of educational services.

The most useful definitions are probably the simplest ones, which are also consistent with a common understanding of the terms. An expulsion is generally considered a final separation, dismissal or disenrollment from a particular school or school district. See e.g. Right of Student to Hearing on Charges Before Suspension or Expulsion from Educational Institution, 58 A.L.R. 2d 903, FN 1. Although final, an expulsion is not necessarily permanent as the terms of a particular student's expulsion may permit, as was the case in M.M., that the student reapply for admission to a school or district after certain conditions have been met. A suspension is generally a temporary separation or removal of a student from a particular school or program during which the student is not disenrolled or dismissed from the school or program and after which the student is expected to resume participation

or attendance in the school or program.

It would seem most clear and practical to define these terms simply in this fashion. That is, an expulsion is a final separation or removal of a student from a school or school district and a suspension is a temporary separation or removal of a student from a school or program. Later sections of the regulation governing the substantive and procedural requirements of suspensions and expulsion can further provide what standards, procedures and requirements apply to short-term suspensions (of ten days or less), long-term suspensions (of more than ten days) and expulsions. The other advantage to simple definitions such as these is that they permit some degree of administrative flexibility at the local level and are flexible enough to work within the context of any limits or standards that might be set by courts.

V. Substantive Standards Related to Expulsions and Long-Term Suspensions:

At its core, the right to a thorough and efficient education under the Education Clause of the New Jersey Constitution includes the right to an equal educational opportunity. See Robinson v. Cahill, 62 N.J. 473 (1973). This requirement of equal opportunity has been defined as meaning at least two things: first, no student can be denied the opportunity for a thorough and efficient education, and, second, differences in the provision of education that result in disparities so great that some students cannot compete effectively with peers in other schools will not be tolerated. See, e.g., Abbott v. Burke (Abbott I), 100 N.J. 269 (1985). Under the current system, disparities are tolerated from district to district so that, for example, in one district a student may be subject to a zero tolerance policy that results in a substantial or permanent exclusion from school

without any educational services for the same conduct that might result in a limited removal to an alternative setting and appropriate intervention services in another. Since such disparities cannot exist in a State system that is considered thorough and efficient, it is imperative that the new code set forth substantive standards to guide district decision-making.

The only substantive standards guiding district decision-making in expulsion and long-term suspension cases can be found in the general purposes language of Chapter 16 provided at N.J.A.C. 6A:16-7.1(b) and in the criteria set forth at N.J.A.C. 6A:16-7.3(c)-(f). Although the general purposes language of N.J.A.C. 6A:16-7.1 requires that the code of student conduct achieve appropriate goals – foster health, safety, and social and emotional well-being, prevent the occurrence of problem behaviors and establish parameters for the intervention and remediation of problem behaviors – it does not, as it should, directly link these goals to decisions related to long-term suspensions and expulsions. While §7.3(c)-(f) set forth appropriate criteria, it is unclear when and how they will be applied in the context of an individual's suspension or expulsion, and those criteria are not sufficient to protect the educational rights of students.

To protect the right of students to a thorough and efficient education and to ensure at least a minimally necessary level of consistency among school districts throughout the state, detailed and explicit substantive standards governing suspensions and expulsions must be incorporated into the student code of conduct regulations. The regulations should distinguish between the types of behaviors warranting suspension only and those warranting expulsion to alternative education. Further, consistent with relevant case law, such regulations must ensure:

1) school districts shall not completely discontinue or deny educational services to an expelled student and that such a student receives an alternative education program;

2) a student is not expelled or suspended long term unless such action is necessary to maintain school safety and order and no less severe or restrictive alternative is feasible to do so;

3) any decision to expel or suspend a student is based upon a case-by-case decision after due consideration by the local board of education of the facts, including:

a) appropriate and competent evaluations and advice of professionals, such as district educators, psychologists, physicians, psychiatrists, school nurses and social workers;

b) developmental age of the student, the nature and circumstances of alleged misconduct, history of misconduct, the student's response to previous interventions and efforts to correct misconduct, and the feasibility of less severe or restrictive alternatives; and

4) school districts must utilize appropriate interventions to address problem behaviors before students are removed from school for more than ten days and must consider student responses to such interventions and determine that less severe options are not feasible.

Finally, the regulations should establish standards for the protection of First Amendment rights of students and should provide guidance as to when student speech is subject to discipline. For example, the regulations should incorporate the standards from Third Circuit and United States Supreme Court case law as to what constitutes a "true threat" and when student speech causes a material and substantial disruption of school

activities.

VI. Procedural Issues

A. Procedures for Mandatory Removals: Subsections 5.5(b) and (d), 5.6(b) and (d), and 5.7(b) and (d) require an immediate removal imposed by the principal, but fail to afford students Goss-mandated minimal due process procedures for suspension of 10 days or less. Similarly, these sections of the code, like all other parts of these regulations, do not address what happens to a student between the 10th day of suspension and a hearing. This shortcoming is critical. As discussed in R.R.v. Board of Educ. of Shore Regional High School Dist., 109 N.J. Super. 337 (Ch. Div. 1970), some provision must be made for what happens to a student recommended for a long-term suspension and expulsion. Unless something more than an initial Goss type hearing is provided, a student may not be suspended for more than 10 days pending any formal hearing.

B. Procedures for Short-Term Suspensions (§7.2): This section sets forth procedures and services required in relation to the short-term suspensions (i.e, suspensions of 10 days or less). Proposed § 7.2(a) lists five things (see §§ 7.2(a)1-5) that local boards of education must provide in each instance of a short-term suspension. The regulation loses clarity and force because it groups together both procedures required under Goss v. Lopez (§§ 7.2(a)1 and 2 regard notice and opportunity for a hearing), which are conditions that must be met before a district may suspend a student, and services (§§ 7.2(a) 3 - 5 regard supervision, notice of removal to parents, and instruction), which must also be provided, but are not required as a matter of due process before a district may suspend a student. To be effective, the regulation should clearly and separately state that before a student may be suspended, except for situations in which the student must be

removed from school immediately because the student's presence poses a continuing danger, the district must provide the student with oral or written notice of the charges and an informal hearing at which the student is given an opportunity to present the student's side of the story regarding the charges.

Section 7.2(a)1 is also confusing because it combines both notice to the student and notice to the parent into one subsection. These are two different functions with distinct, albeit related, purposes. Notice to the student is required as a matter of due process and must be provided prior to imposition of the suspension. Notice to the parent, while serving the interests of due process and very important, is distinct from notice to the student and need not necessarily be provided before suspension is imposed. Notice to the parent should be provided orally as soon as practicable and in writing within some short period of time such as by the end of the day on which the student is suspended or within 24 hours.

Further, the regulation does not provide adequate direction with respect to the content of written notice to the parent. Such notice should include notice of 1) the charges, including reference to code allegedly violated and a description of the alleged misconduct, 2) the term and conditions of suspension, 3) the right to appeal the suspension at the school site or district level (see discussion below), 4) the right to appeal the suspension to the Commissioner, 5) information regarding the district's code of conduct, and 6) referrals to organizations where the parents may obtain free legal assistance.

Nor does this section provide a parent any avenue to appeal a suspension short of filing a petition with the Commissioner. Section 7.2 should include a subsection requiring districts to provide parents an opportunity to appeal a suspension locally. The regulation

should require that districts provide the parent with a prompt opportunity to meet with the official who imposed the suspension and, at a minimum, to promptly appeal that official's decision to a district level official.

C. Procedures for Long-Term Suspensions: As with the regulation governing short-term suspensions, this section (§7.3) should make clear in a separate subsection on due process notice and hearing requirements that a student may not be suspended for more than ten days unless the board of education complies with these requirements. Further, this section should clarify that the notice and informal hearing requirements of short-term suspensions apply to long-term suspensions in addition to the specific requirements for suspensions of more than ten days.

As to the content of the notice, for the reasons stated above in the discussion related to the right to alternative education, the State Board should not include the language proposed by the Department in § 7.3(a)3.iv. regarding engagement of the student in conduct amounting to a waiver of the student's constitutional right to education. Notice of a long-term suspension should also include notice of the potential consequences which may be imposed against the student if the charges are sustained.

In most cases, the case against a student is based upon the statements of witnesses. For this reason, it is critical to the student's due process rights to obtain the list of witnesses and statements referred to in § 7.3(a)4 in a timely manner. The regulation should set some parameters for when this information must be provided. For example, the regulations might require that this list be provided no later than ten days after the time that notice of the suspension hearing is provided. Alternatively, the regulation might require something like the list and statements will be provided as soon as available but in no case

later than 10 days before the hearing.

With respect to hearing requirements, the regulations should not permit the hearings to occur before a school administrator of the same district as it is too difficult for another administrator to be neutral in an expulsion hearing, and, if the board delegates responsibility for the hearing to a subcommittee of the board or to some other person (they should also be allowed to hire a "hearing officer" such as an attorney), the board should be required to obtain a transcript of the hearing, not just a detailed report, before making a final decision.

With regard to the timing of hearings, §7.3(a)9.iii. is unconstitutional because it permits districts to impose a long-term suspension upon a student without affording him or her a full hearing within 21 days of when the student was initially suspended. In R.R. v. Board of Educ. of Shore Regional High School Dist., 109 N.J. Super. 337 (Ch. Div. 1970), the Court addressed the issue of what procedural due process a student was entitled to under the Fourteenth Amendment of the United States Constitution before he or she could be suspended from school. Although state education statutes governing suspensions and expulsions did not set forth procedural due process requirements, the Court stated that those statutes "must . . . be construed to require public school officials to afford students facing disciplinary action involving the possible imposition of serious sanctions, such as suspensions and expulsions, the procedural due process guaranteed by the Fourteenth Amendment." Id. at 347. This, the Court held, included "a full hearing affording . . . procedural due process within a short period of time, no more than 21 days." Id. at 350.

Because the regulation proposed at §7.3(a)9.iii. permits a school district to impose a suspension upon a student for up to 30 days before affording the student a full hearing,

it violates the constitutionally mandatory time limit established in R.R. Although the legislature has enacted N.J.S.A. 18A:37-2.1, 2.4 and 10, none of which require a full hearing within less than 30 days, R.R. still controls because its holding sets forth constitutional requirements which take precedence over legistative enactments. And, whether or not those provisions are constitutional, they do not control what procedural due process is required for suspensions under N.J.S.A. 18A:37-2, the general suspension and expulsion law, which was construed specifically by R.R. to require a full hearing within a short period of time, no more than 21 days.[3]

Section 7.3(a)10, regarding notice to parents of the board's decision, should clearly require that the decision include the board's conclusion with respect to the charges and its decision with respect to any consequences imposed. The notice should be specific with respect to any term of suspension and any condition of the student's return to school as well as any readmission procedures that may be required or available. The notice should also include a statement of the student's right to appeal an unfavorable decision to the Commissioner of Education.

Nothing in the regulation addresses important evidentiary issues such as clearly establishing that the burden of proof is on the district and establishing rules to prohibit decisions based on hearsay evidence.

Section 7.3(c) limits a continuance of a student's suspension beyond the board's

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[3] New Jersey courts have not addressed the issue of what constitutes a timely student discipline hearing since the United States Supreme Court decisions in Goss v. Lopez, 419 U.S. 565 (1975) and Matthews v. Eldridge, 424 U.S. 319 (1976). Arguably, application of those cases leads to a determination that formal disciplinary hearings should be conducted even sooner than 21 days, but, until the issue returns to the courts, R.R. sets the outer time frame for disciplinary hearings in New Jersey.

second regular meeting following the suspension, but does not set forth any procedures or standards for determining when a suspension may be continued beyond ten days, presumably pending a hearing or the second board meeting. Such procedures and standards should be included in the regulation. As the regulations currently stand, no suspension beyond ten days is permissible until after a full hearing.

As to the decision referred to in § 7.3(c) to continue a student's suspension beyond the board's second meeting, it should be made clear that this decision can only be made after the student has been provided an opportunity for a full hearing.

While §§ 7.3(d) and (e) are important in ensuring ongoing review of disciplinary cases, these must be amended to clarify that the use of open-ended suspensions are prohibited. Suspensions which do not include a set termination date raise serious due process problems because their constitutionality cannot be judged without knowledge of the actual consequences imposed.

Finally, §7.3(f) should be amended to clarify that the input referred to in this section must be obtained prior to any expulsion hearing.

VII. The Proposed Student Conduct Code Regulations Violate the Rights of Children with Disabilities

Although the proposed student conduct regulations attempt to address the special circumstance of children with disabilities in the discipline context, there are many problems with the proposed regulations related to children with disabilities that must be corrected before the regulations are adopted. As explained below, these problems relate to the use of the terms "general education program" and "special education program," the exclusion

of children with disabilities from certain general procedural protections that apply to other students, the violation of special protections guaranteed to children with disabilities under the Individuals with Disabilities Education Act[4] and the failure to set forth here or anywhere else special procedures required for children with disabilities, leaving this population vulnerable to discriminatory discipline practices.

A. The Use of the Terms "General Education" and "Special Education" in the Proposed Regulations is not Appropriate: In an attempt to distinguish between procedures and services required for or limited to general students and students with disabilities, the proposed regulations improperly distinguish between children removed from the "general education program" (defined as "the educational programs and services provided to students other than students determined to be eligible for special education and related services") and children removed from the "special education program." There are at least two problems with the use of these terms.

First, it is based on the still too common misperception that special education is a place rather than a set of substantive and procedural protections available to children with disabilities, which, in this case, can lead to the misconception that special protections available to children with disabilities apply only to children in "special education" placements and do not apply to children with disabilities served in a general education setting. Second, because of its focus on the difference between students in general education programs versus children in special education programs, the regulations lose clarity on the point that, in the context of student discipline, special protections are available

[4]Beginning in July 2005, the Individuals with Disabilities Education Improvement Act (IDEIA 2004).

to all children with disabilities, whether they are placed in a special or general education program. Unless this problem with terminology is corrected, school officials will impose inappropriate disciplinary practices against, and fail to afford appropriate protections to, children with disabilities served in general education settings.

B. The Proposed Regulations Exclude Students with Disabilities from Certain Procedural Protections that Apply to General Students: This problem begins with the definitions of the terms "short" and "long-term suspension" provided at § 16-1.3. These definitions literally suggest that children with disabilities are subject to different procedures, those set forth in N.J.A.C. 6A:14-2.8, which do not include a full set of procedural protections. While the provision of a lesser level of protection may not have been the intended effect of the regulations, at least for short-term suspensions (see e.g., § 16-7.2(c)), a different set of procedures is also referred to in certain provisions regarding notice to parents (see §§ 16-5.5(d)5.iv. and 5.6(d)5.iv.) and specifically provided for in § 16-5.7(e).

Worse yet, children with disabilities are specifically excluded from several procedural protections available to general students. For example, under §§ 16-5.5(b) and 5.6(b), the removal of a general student for certain offenses is subject to modification by the chief school administrator on a case-by-case basis, whereas the removal of a student with a disability is mandated without exception and is not subject to a case-by-case modification. See §§ 16-5.5(c) and 5.6(c). While general students removed pursuant to §§ 16-5.5 and 5.6 are entitled to placement in an alternative education program (see 16-5.5(e) and 5.6(e)), students with disabilities removed under those sections are only entitled to a placement as determined by the student's individualized education program (IEP) team.

See §§ 16-5.5(f) and 5.6(g). While the latter requirement may seem more appropriate or protective of children with disabilities, it is not, because very often IEP teams will use the IEP process to simply place the student on home instruction, providing the student with a disability less than what other children would be entitled to under the proposed regulations. The regulations must make clear that students with disabilities should be provided no less support than other students.

Under §§ 16-5.5(h), 5.6(h) and 7.3(a)(11), any general education student found at any time not guilty of the relevant violation must be returned immediately to the general education program from which the student was removed, yet, for children with disabilities, under §§ 5.5 and 5.6 there is no comparable language, and, under § 7.3(a)12, while the language is somewhat similar to that of § 7.3(a)11, there is no guarantee as in § 7.3(a)11 that the student with a disability can return to the program or placement from which he or she was removed.

Under §§ 16-5.5(i), 5.6(i), 7.3(c) - (g), numerous substantive and procedural protections are available to general students subject to long-term suspensions or removals from school that are not available to children with disabilities (under § 16-7.3(h)3, protections available to general students under § 7.3(c) are explicitly made unavailable to children with disabilities). For example, for a general student removed from school for a firearms offense, the student may at the discretion of the chief school administrator be permitted to return to the general education program based on the application of criteria enumerated in § 16-5.5(i), but no comparable procedure is provided for children with disabilities. Likewise, under §§ 16-7.3(c) - (e), general students are provided with the following protections not available to children with disabilities: they may not be suspended

beyond the date of the board of education's second meeting following suspension unless certain criteria are met, their suspensions are subject to regular review by the board of education and chief school administrator, and they should be returned to the general education program if enumerated criteria are met. While the proposed regulation states at § 16-7.3(h) that for a student with a disability the board of education should proceed under § 6A:14-2.8 in determining, altering or changing the students educational placement to an "interim alternative educational setting," this provision only applies to a small minority of students with disabilities suspended from school and placed in such programs temporarily, § 14-2.8 does not discuss at all when or how the suspension of a student with a disability should be terminated, and while IEP teams are often empowered to make arrangements for the education of a student with a disability during periods of suspension, they do not have authority comparable to the board of education or chief school administrator to terminate a suspension and permit a student to return to his original program.

As these examples demonstrate, children with disabilities under the proposed regulations do not enjoy the same protections as do general students and therefore are not treated equally.

C. The Proposed Regulations Violate the Rights of Children with Disabilities to Special Protections Guaranteed under the Individuals with Disabilities Education Act: Despite the legislature's admonishment in N.J.S.A. 18A:37-8 that its provisions with respect to the removal of students for firearms offenses "shall be construed in a manner consistent with [IDEA]," the Department's most recent proposal removes such language and provides, to the contrary, in § 16-5.5(c)1 that "[n]othing in this section shall be

construed to prohibit the removal of a student with a disability, in accordance with the policies and procedures [therein]" and in § 16-5.5(c) that "a district board of education shall immediately remove students with disabilities for offenses involving firearms in accordance with the provisions of N.J.A.C. 6A:14 and applicable federal regulations incorporated therein."

Together these sections clearly violate the IDEA. IDEA has always prohibited the disciplinary exclusion of children with disabilities whose misconduct is a manifestation of their disability and these regulations cannot violate this right to be free from discriminatory discipline. While IDEIA 2004 will allow the temporary removal to an interim alternative education setting (IAES) for up to 45 "school days" of a student who commits a firearms offense, it certainly does not require such a removal and does not permit such a removal to last for more than 45 school days. Moreover, individualized decision-making is a central feature of IDEA which is reinforced in the new disciplinary provisions of IDEIA which specifically state "[s]chool personnel may consider any unique circumstances on a case-by-case basis when determining whether to order a change in placement for a child with a disability who violates a code of student conduct." (§615(k)(1)(A)). Hence, any mandatory removal of a child with a disability from his or her educational program for any offense would violate these provisions. Similar problems exist with respect to § 16-5.6(c) and 5.7(c).

D. The Proposed Regulations Fail to Set Forth Special Procedures Required for Children with Disabilities: While the proposed regulations refer to N.J.A.C. 6A:14-2.8 with respect to procedures applicable to students with disabilities, neither the proposed student conduct regulations, nor the regulations in Chapter 14, set forth a complete set of specific

procedures applicable to children with disabilities subject to long-term suspensions or removals. Such procedures should include, in addition of course to procedures available generally to all students, special procedures related to manifestation determinations, functional behavioral assessments and behavior intervention plans, placement and services of students during short-term suspensions, placement and services of students during long-term suspensions and removals, temporary placement of students under certain limited circumstances in interim alternative education settings, and procedures related to the right to return to their original placement or programs after a period of suspension or removal from school. Until such procedures are set forth, school district will continue to suspend and remove students with disabilities for disciplinary reasons without following procedures required under the IDEA.

Several specific sections as well fail to provide needed guidance with respect to the rights of children with disabilities under the IDEA. For example, §16-5.5(d)4 and 5.6(d)4, which regard notification to law enforcement, fail to include, as they should, a statement that for a child with a disability who commits an offense with a firearm, the District must also provide law enforcement with a copy of the student's special education and disciplinary records pursuant to 34 C.F.R. 300.529(b) and 20 U.S.C. 1415(k)(9)(b), consistent with the provisions of FERPA.

Although § 16-7.1(a)6. importantly refers to both children with disabilities protected under IDEA and Section 504 and states that the code of conduct shall be implemented in accordance with the components of the students' applicable plans (i.e., the IEPs and 504 Plans), as a general statement of the rights of students with disabilities, it is incomplete and potentially misleading. The regulation should make clear that district codes of conduct

must be construed in a manner consistent with IDEA and Section 504 and the State special education code, and not just what is included in the students' IEPs and 504 Plans, as these plans will not fully address the rights of any student and often will not include protections that should be there. This section, as a general statement, should also make clear that children with disabilities shall enjoy no less protection than any other students.

With respect to short-term suspensions, the regulations should address two issues which they currently do not. First, the regulations should state that disciplinary problems should be referred to the IEP team and addressed through the IEP process, even if a child is suspended. Second, although children with disabilities generally may be suspended for up to ten days like any other student, the regulations should make clear that where a student is suspended on more than one occasion and the total number of suspensions total more than ten days, then the student should be referred to the IEP team for a determination as to whether the suspensions amount to a change in placement. See 34 C.F.R. 300.519(b).

Also of great importance in the discipline context, the regulations do not discuss at all the rights of a child suspected of having a disability but not yet eligible. See 34 C.F.R. 300.527 Under certain circumstances, these rights can be critical to children with emotional and behavioral problems subject to discipline and should be addressed in the regulations.

Section 7.3(a)6 ensures a manifestation determination is provided for children with disabilities subject to long-term suspensions, but does not address other rights such as the right to a functional behavioral assessment and behavioral intervention plan, see 34 C.F.R. 300.520(b) or the right to immediately challenge a negative decision related to the manifestation determination, see 34 C.F.R. 300.525. Such rights are critical and should

be included in this section.

Finally, section § 16-7.3(h) unlawfully limits a student's placement during a suspension to an interim alternative educational setting, but such settings are supposed to be used only on an emergency interim basis for no more than 45 days. See 34 C.F.R. 300.520(a)(2). The IEP team should be able to consider any program that may be appropriate and necessary to meet the students needs as required under IDEA when a student is suspended from school for more than ten days.

VIII. The Proposed Attendance Must Regulate Denials of Credit and Illegal "Push-outs"

ELC welcomes the proposal of regulations in the area of school attendance that define the obligation of school personnel to address unexcused absences in constructive ways. Notably absent from the regulations, however, are requirements that school districts adopt and implement policies and procedures that ensure that any denials of credit based on absenteeism are subject to due process procedures and that prohibit the removal or exclusion of students from school based on absenteeism.

In order to prevent unfair deprivations of school credits, students who are alleged to have excessive absences, and their parents, must be provided written notice of district policies regarding denial of credit, written notice of specific conduct by the student that violates the district's attendance policy, an opportunity to review all attendance records related to the student, and an opportunity for a due process hearing before a denial of credit is imposed. N.J.A.C. 6A:16-7.8 should therefore be amended to require that districts adopt and implement policies that incorporate these elements.

In ELC's experience, school districts have often responded inappropriately to older

students with attendance problems, encouraging them to sign out of school, simply dropping them from the schools' rolls, or illegally prohibiting their return to school. In order to prevent "push-outs," a prohibition against these practices must be incorporated into the attendance code.

There is no requirement for the referral to or consultation with school district Individualized Education Program (IEP) teams for students with disabilities who accumulate unexcused absences. This is a critical area that should be addressed in the attendance regulations as IEP teams are empowered to make determinations regarding changes in educational services or programs that could benefit a student with a disability displaying attendance problems. Moreover, if the federal special education law's requirement that special education records be shared with law enforcement and judicial authorities (34 C.F.R. 300.529(b)) applies to truancy proceedings, then school districts should be explicitly directed to provide such records to the municipal court.

In several areas, ELC recommends that the state provide further definition in its attendance regulations. First, in those instances when the regulations require that school officials make a reasonable attempt to notify parents of absences or referrals, the regulations should be amended to define reasonable efforts to require the sending of written notice if the parents cannot be reached by telephone. Second, it is ELC's opinion that N.J.A.C. 6A:16-7.8(a)(3) would be clearer if it required the creation of a definition of excused absences, rather than unexcused absences, based on the regulatory considerations. Third, rather than simply referencing N.J.A.C. 6:3-9.3, the regulation should spell out that absences for the observance of religious holidays must be excused and should notify parents and school personnel how to access the Commissioner's list of

religious holidays whose observance must be excused.

IX. Further Regulatory Guidance is Needed in the Area of Bullying and Harassment Prevention

ELC notes that the purpose of regulations is not only to repeat statutory requirements in a form accessible to the public, but also to provide guidance on implementation of the authorizing statute. Thus, while it is laudable that N.J.A.C. 6A:16-7.9(a)(2) incorporates the statutory requirement that district policies include "appropriate" consequences and remedial action for bullying and harassment, the regulations should go further by providing regulatory guidance as to what constitutes appropriate action. Literature on best practices in the field of bullying and harassment prevention demonstrates consensus that peer mediation and conflict resolution are among inappropriate responses to bullying and harassment. Such literature also reveals the necessity of school-wide, comprehensive approaches to the elimination of bullying and harassment in schools and the ineffectiveness of individual responses alone. The regulations should therefore provide examples of responses that are clearly inappropriate and those that are appropriate.

Similarly, the regulations should provide further guidance as to the statutory requirement that district policies include "the range of ways in which a school will respond once an incident of harassment, intimidation or bullying is identified." Specifically, the regulations should explicitly require that the school's response include the following: 1) relief for the victims of bullying and harassment; and 2) the identification and correction of systemic problems.

Adding an explicit requirement that the range of ways that the school respond

include relief for the victim is consistent with the purposes of the state law and will remind school districts that their obligation is not only to stop the perpetrators of bullying and harassment, but also to ensure that victims have a safe and civil environment in which to learn. Given the frequency with which districts often require the victims of bullying or harassment to stay home "for their own safety," the regulations should also seek to eliminate this practice by preventing districts from removing victims from school against their wishes and by requiring that the range of ways in which a school will respond once an incident of bullying or harassment is identified include ways to protect the victim's safety in school. The regulations should also clarify that the payment of tuition and provision of transportation for attendance at another school may be required if sought by a victim who has been traumatized or whose safety cannot be guaranteed.

Adding an explicit requirement that school district identify and correct identified systemic problems is consistent not only with literature and best practices, but also with the conclusion of the L.W. case that school districts must address patterns of peer harassment and with the U.S. Department of Education's Sexual Harassment Guidance.

The requirement of N.J.A.C. 6A:16-7.9(d)(1) that districts annually review staff training needs should be amended to require that districts also review <u>student</u> training needs in this area. In ELC's opinion, such an amendment is consistent with the statutory purpose of eradicating bullying and harassment in schools and with the conclusion of the L.W. case that schools must address patterns of peer harassment, as well as individual incidents. To avoid any confusion, ELC recommends that, in addition to referencing N.J.A.C. 6A:16-17.1(a)(4), the regulation specify that the results of this annual review will be included in the chief school administrator's required annual public report on the

implementation of the student conduct code.

Finally, the requirement of N.J.A.C. 6A:16-7.9(d)(3) that school districts annually review the extent and characteristics of harassment intimidation and bullying behavior in their school buildings should also explicitly incorporate a public reporting requirement.

X. Conclusion

For all the foregoing reasons, ELC respectfully urges the State Board to direct the Department to revise the proposed Student Code of Conduct in accordance with these comments prior to approval of the proposal for publication in the New Jersey Register.

Thank you for your consideration of these comments.

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