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Barbara Gantwerk, Director
Office of Special Education Programs
New Jersey Department of Education
Trenton, New Jersey 08625

Dear Ms. Gantwerk:

We are deeply troubled by a position the Department is taking which we believe is directly contrary to federal and state special education law.

It is our understanding that, subsequent to enactment of IDEA '04, the Department has been taking the position that parents who request mediation and invoke stay put, will lose their child's stay put right if the mediation is unsuccessful and the parents then request a due process hearing. This is in direct violation of IDEA '04 which maintains the previous IDEA language that, except in certain discipline matters which are not relevant to this discussion, "during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child...." 20 U.S.C. § 1415(j) (emphasis added). See also N.J.A.C. 6A:14-2.6(d)(9) and -2.7(o). Section 1415(j), of course, contemplates both mediation and due process hearings.

Thus, the statement in John Worthington's September 27, 2005 letter to Diana Autin, copy attached, that "IDEA 2004 does not provide for stay put when mediation only is requested," is incorrect. As Mr. Worthington recognizes, the notion of "mediation only" is an artifact of New Jersey's regulations, and the Department's establishment of a separate procedure for "mediation only," as opposed to "mediation and due process hearing," cannot be used to deprive students of the right to stay put during the pendency of mediation and due process

hearings, as mandated by IDEA 2004. See 20 U.S.C. § 1415(e)(2)(A) (“The procedures shall ensure that the mediation process ... is not used to deny ... a parent’s right to ... any ... rights afforded under this part”).

The bottom line is that nothing has changed from IDEA ‘97 to IDEA ‘04, notwithstanding Mr. Worthington’s statements to the contrary. In addition, as the current state special education regulations – which have been interpreted to require stay put when a failed “mediation only” is followed by a request for a due process hearing -- are still in effect, the Department violates the Administrative Procedures Act by unilaterally changing its policy.

Even if it were permissible to deny children their right to stay put after failed mediation, it would not be permissible without providing proper notice. Not only did the Department provide no notice of this change in policy, but the Department’s newly revised “Pocket PRISE” leads one to conclude that the Department will continue to honor stay put if a due process hearing is requested subsequent to an unsuccessful mediation. Section F-1 states that “[w]hen a hearing has been asked for,” stay put is invoked. In addition, Sections E-1 and E-8-b state that parents may opt for mediation in lieu of a hearing, while Section I-1 states that “mediation can not be used to ... deny any ... rights that the parent has under the State or Federal special education laws.” In addition, neither your July 14, 2005 “Guidance Regarding Changes to the Due process System in the Individuals with Disabilities Education Act of 2004,” nor its appendices – the “Summary of Mediation and Due Process Requirements” and the “Quick Reference for Mediation – Due Process” – mention any change with respect to stay put rights.

We ask that you immediately revise the Department’s stay put policy and advise Districts accordingly, and thank you for your immediate attention to this matter.

Sincerely,

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