



Education Law Center

60 Park Place, Suite 300
Newark, New Jersey 07102

(973) 624-1815

TTY (973) 624-4618

Fax (973) 624-7339

elc@edlawcenter.org

<http://www.edlawcenter.org>

David G. Sciarra, Esq.
Executive Director

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Student Rights Project

Elizabeth Athos, Esq.
Senior Attorney

Ruth Deale Lowenkron, Esq.
Senior Attorney

David R. Giles, Esq.
Of Counsel

Aimee Roche
Intake Coordinator

New Jersey State Board
of Education
P.O. Box 500
100 River View Plaza
Trenton, NJ 08625-0500

Re: Amendments to N.J.A.C. 6A:14

Dear Members of the Board of Education:

Please accept the comments of the Education Law Center ("ELC") to the Pre-Proposed Special Education Regulations published in the New Jersey Register on December 19, 2005. These comments supplement the brief comments submitted by ELC on December 20, 2005 regarding the Second Discussion Level draft of the proposed amendments to the State Special Education Code at N.J.A.C. 6A:14.

First, ELC applauds many of the regulations proposed by the New Jersey Department of Education ("the Department"). ELC urges the retention of the following provisions, with clarifications as indicated:

N.J.A.C. 6A:14-1.2(h) -- ELC supports the Department's proposal to require school districts to have special education parent advisory groups. However, to ensure that the intent of the proposal is achieved, the Department must additionally mandate that districts conduct outreach to ensure that the parent advisory groups are representative of the special education population of the district in terms of special education services received, placements, programs, ages, disabilities, schools attended and racial, ethnic and gender diversity. ELC understands the Department's

concern of mandating parameters of the advisory groups as many districts already have groups in place, but ELC believes that the existing groups will only be enhanced by our proposed parameters which do not require removal of active members, only addition of members to ensure adequate representation of the special education community.

N.J.A.C. 6A:14-2.5(c)(7) – ELC welcomes the specific mandate that districts permit independent evaluators, especially those purchased by the parents at private expense, to observe students in classrooms and other educational settings.

N.J.A.C. 6A:14-2.6(c) – ELC appreciates the recognition that persons who have special knowledge of the student who is the subject of mediation are appropriate persons to accompany a parent to mediation.

N.J.A.C. 6A:14-2.6(d)(11) – ELC welcomes the clarification that mediation agreements can be enforced by either the Department or a court.

N.J.A.C. 6A:14-2.7(h)(1)(i) – ELC appreciates the proposed provision that a district shall not bring an attorney to a resolution meeting, unless the parent is accompanied by an attorney. This is both cost-effective for districts, as well as respectful of the fact that parents may feel intimidated in the presence of an attorney who represents the district when they themselves are not represented by attorneys.

N.J.A.C. 6A:14-2.8(a)(1) – ELC appreciates the clarification that preschool students with disabilities may not be suspended or expelled. However, further clarification is warranted to note that “removal ... from ... current educational placement to an interim alternative educational setting [or] another setting,” which is frequently termed a “suspension,” is also not permissible for preschool students, as such “removal” is referenced separately from “suspension” in the provision referenced by this provision.

N.J.A.C. 6A:14-2.8(b) -- ELC supports the Department’s proposed amendment allowing districts to consider unique circumstances when determining whether to discipline a student with a disability who violated a school code of conduct. This will permit consideration of a child’s disability and the impact of any sanction on the child without the unwarranted constraints of specific definitions of the grounds for discipline or removal. However, to ensure that the new language will be construed only to support a student’s education and receipt of services, the Department must add the word “mitigating” before the word “circumstances.”

In addition, the Department should clarify that school personnel may consider unique circumstances to decline to discipline students whether or not the students’ conduct is a result of the students’ disabling conditions. This must be the case, because, in a situation where a student may be removed to an interim alternative educational setting, no manifestation determination is required to be held, and thus, the district would not know whether or not the behavior was a manifestation, and in other circumstances, a student may not be disciplined for behavior that is a manifestation of their disability.

Further, the Department should continue to require use of the previous manifestation determination criteria, in addition to the criteria in the current Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. § 1400, *et seq.* (“IDEA”). The State may set a more lenient standard for determining whether or not a student’s behavior was a manifestation of their disability as IDEA does not require districts to impose removal to interim alternative educational settings, but merely permits it.

N.J.A.C. 6A:14-3.7(a)(3) -- ELC supports the Department’s proposal to require districts to maintain documentation that the teacher and special service providers are informed of their specific responsibilities related to implementing a student’s Individualized Education Program (“IEP”). However, the language should be amended to read that “the teacher [or] and provider, as applicable”¹ are informed of their IEP responsibilities, in order to ensure that districts do not choose to solely inform the teacher or the service provider(s). In addition, ELC urges the Department to ensure that other staff members who have contact with the student are also aware of IEP protocols to ensure seamless IEP implementation.

N.J.A.C. 6A:14-3.7(e)(11) – ELC appreciates the Department’s decision to retain the existing provisions that require IEP teams to begin the critical function of transition planning at age 14.

N.J.A.C. 6A:14-3.7(e)(17) -- ELC supports the Department’s proposed amendment to require districts to include in IEPs of students in out-of-district placements ways the student will participate in extracurricular and nonacademic activities with typically developing peers, with an emphasis on consideration of returning the student to the district in order to effectuate such participation. This will hopefully assist districts in honoring IDEA’s inclusion mandate.

N.J.A.C. 6A:14-3.7(l) -- ELC supports the Department’s proposal to require districts to provide parents with a copy of the IEP at the conclusion of IEP meetings. This will ensure that all relevant parties have prompt access to the IEP and ensure that the IEP does not look different than the document worked on at the IEP meeting.

N.J.A.C. 6A:14-4.2(a)(4) -- ELC supports the proposal to require IEP teams to annually consider strategies for students in separate settings which are necessary to transition the student to a less restrictive placement. This will hopefully assist districts in honoring IDEA’s inclusion mandate.

N.J.A.C. 6A:14-4.7(a)(2) -- ELC supports the Department’s proposal to reduce the age range for students in special education classes from four to three years. ELC urges an even further reduction, however, to ensure best educational practices.

N.J.A.C. 6A:14-4.7(e) – ELC supports the proposal to limit class size for some self-contained classes. This best educational practice will benefit the children in the classroom as well as create an incentive for districts to support more students in inclusive settings.

¹ Language in brackets denotes ELC’s proposed deletions; underlined language denotes ELC’s proposed additions.

Other -- ELC appreciates that the Department did not apply for a paperwork reduction waiver, or for three year IEPs, neither of which would have benefited students with disabilities.

ELC appreciates that the Department proposed numerous changes to the Code which promote “people first” language for persons with disabilities.

ELC is greatly concerned with the following Department proposals and urges their immediate amendment:

N.J.A.C. 6A:14-1.1(d)(2) -- The Department should add that teachers in both public and private schools must be “highly qualified” in accordance with State and federal law, as it states at N.J.A.C. 6A:14-1.2(b)(13).

N.J.A.C. 6A:14-1.3 -- Although the term “consent” is defined as written consent, the use of the term “written consent” in some places in the proposed regulations and “consent” in others, may result in a misunderstanding by parents or districts about the requirement that consent indeed be in writing. Accordingly, the code should be amended to consistently use “written consent” or “consent” in all sections.

The Department should define the term “resource parent” as used in the context of the definition of “parent.”

N.J.A.C. 6A:14-2.3 – It is unclear why the Department would have removed the mandate that it provide a copy of its procedural safeguards statement, PRISE, to all relevant advocacy agencies as provision of such information assists the numerous students and parents who turn to advocacy agencies for assistance. The Department should continue to broadly distribute PRISE.

N.J.A.C. 6A:14-2.3(a) -- This provision must be amended to require that every notice contain a clear and conspicuous statement that parents have the right to refuse consent without any adverse impact on their children.

N.J.A.C. 6A:14-2.3(a)(5) -- To ensure that districts are truly delivering a free and appropriate public education, the Department should advise districts that access to private insurance coverage is limited to instances where there is no cost to the student, including no deductible payment, co-insurance or limitation on annual or lifetime cap.

N.J.A.C. 6A:14-2.3(g)(7) -- The Department must retract its reduction of the number of times each year that the Department’s procedural safeguards statement must be distributed to parents. PRISE is critical to students’ rights to be informed of their rights to due process. When weighed against a district’s potential administrative interest to provide students with fewer copies of PRISE, the equities clearly support continued dissemination of PRISE at all relevant due process junctures where dissemination was previously required.

N.J.A.C. 6A:14-2.3(k) -- ELC opposes the proposed amendment that mandates combining eligibility meetings and initial IEP meetings. There may be many instances where students require the additional time afforded by two meetings to contemplate proposals and seek the advice of others. The current regulatory language should remain unchanged, as it allows for combination where appropriate, while protecting the needs of students who require a separate IEP meeting after evaluation.

N.J.A.C. 16A:14-2.3(k)(2)(ii)(1) -- This provision must be amended to enhance the contributions of IEP team members and the likelihood that the IEP they develop will meet IDEA mandates. Specifically, in the instances where the student has no general education teacher, the regulations must require the attendance at IEP team meetings of:

a teacher who is knowledgeable about the student's educational performance or, if there is no teacher who is knowledgeable about the student's educational performance, a professional who is knowledgeable about the student's strengths and weaknesses, and a general education teacher who is knowledgeable about the district's programs as well as about the general education programs and curricula assessed by statewide testing that would be offered in the general education classroom that is age-appropriate for the student.

N.J.A.C. 6A:14-2.3(k)(4) – ELC opposes the Department's proposal which will weaken the requirement that meetings be held at a time and place that is mutually agreed upon by the district and the parents. The amendment may result in districts promoting the suggested alternative means of participation rather than working to find a mutually agreeable time and place. This will be detrimental to children because a face-to-face meeting of all people with knowledge of the child's strengths, needs and educational program is a vastly more beneficial method of developing an IEP. The proposed section should be amended as follows:

If the parents are unable to attend at the times suggested by the district and are unable to suggest a mutually agreeable alternative time and place that they can attend in person [a mutually agreeable time and place cannot be determined], the parent(s) shall be provided the opportunity to participate in the meeting through alternate means, such as videoconferencing and conference calls. In no event shall the availability of such alternative means be a substitute for a district's good faith efforts to find a time and place for an IEP meeting that the student's parents can attend in person.

N.J.A.C. 6A:14-2.3(k)(9), (10) – ELC opposes the Department's proposal to excuse IEP team members from meetings as doing so offers no benefit to children and threatens to undermine the effectiveness of the collaborative process where the input of team members familiar with general education programs and the core curriculum is critical to the development of an educational plan that meets the student's academic needs. Moreover, it is through the contributions of all team members that a plan that appropriately supports the child's success in the general education setting can be developed. Even a teacher

whose program is not being discussed at a meeting can offer insights into strategies that work in the teacher's classroom, and can share which strategies have not been effective, to ensure that students receive appropriate services. The analogous language in IDEA is permissive; New Jersey can and should provide greater protections to its students with disabilities.

N.J.A.C. 6A:14-2.4 – The proposed Code fails to mandate that all special education documents be made available to parents in their native language. It is high time for this to occur in our multi-lingual state. Moreover, non-discrimination laws mandate it.

N.J.A.C. 6A:14-2.5(c) -- ELC opposes the Department's proposal to allow districts additional time to conduct evaluations not originally contemplated, in response to a parent's request for an independent evaluation. A district's belated determination to assess students should not stand in the way of the students' right to avail themselves of an independent evaluation pursuant to IDEA, without delay.

N.J.A.C. 6A:14-2.6(a)(4). -- ELC opposes the requirement that a district obtain the approval of the Commissioner of Education before implementing mediated agreements to place students in accredited nonpublic schools that are not specifically approved for the education of students with disabilities. This ability to overrule a placement agreement, reached voluntarily by the parties, undermines the effectiveness of the mediation process. The Code, the accreditation process and the mediation process provide sufficient means to ensure that the student is appropriately placed.

Indeed, there is no need to require Commissioner approval of non-mediated agreements to place students in non-approved, but accredited schools, since the accreditation process, as well as the Code, provide sufficient safeguards to ensure appropriateness of placement.

N.J.A.C. 6A:14-2.6, 2.7 -- Subsequent to enactment of IDEA '04, the Department took the position that parents who requested mediation and invoked stay-put would lose their child's stay-put right if the mediation was unsuccessful, even if the parents requested a due process hearing upon the failure of mediation. ELC is pleased that the Department subsequently rescinded this unlawful policy effective December 1, 2005. However, as students may have been negatively affected by the Department's policy between its implementation in July, 2005 and its rescission in December, 2005, we urge the Department to 1) rescind the policy retroactive to July 1, 2005; 2) ensure that all affected students regain their right to stay-put; and, 3) ensure that all affected students are otherwise compensated for any negative effect of the Department's policy.

N.J.A.C. 6A:14-2.7 -- In the recent United States Supreme Court case of *Schaffer v. Weast*, 546 U.S. ___, 2005 U.S. LEXIS 8554 (November 14, 2005), the majority expressly declined to prohibit states from maintaining laws that place the burden of proof on school districts at all times. 2005 U.S. LEXIS 8554 at *22. Accordingly, the Supreme Court left intact all state laws that place the burden of proof on school districts. Since New Jersey law places the burden of proof in educational matters on school districts, the *Schaffer*

decision leaves the burden of proof in New Jersey with the school districts. Specifically, the New Jersey Supreme Court in *Lascari v. Board of Educ. of Ramapo Indian Hills Regional High Sch. Dist.*, 116 N.J. 30 (1989) clearly interpreted New Jersey's common law, New Jersey's special education statute, N.J.S.A. 18A:46-1, *et seq.*, and New Jersey's special education regulations, N.J.A.C. 6:28-1.1, *et seq.* (1989), as placing the burden of proof on school districts. 116 N.J. at 44 (“[W]e believe it is more consistent with the State and federal scheme to place the burden on the school district not only when it seeks to change the IEP, but also when the parents seek the change”). *See also* 116 N.J. at 46 (“The school board should then bear the burden of proving that the IEP was appropriate. In reaching that result, we have sought to implement the intent of the statutory and regulatory schemes.”) Based on the position taken by at least some of the administrative law judges following *Schaffer*, ELC urges the Department to clarify that the burden of proof in special education matters remains with the school district.

Similarly, *Schaffer* specifically states that it does not at all touch the issue of burden of production at hearings, thus leaving intact the law established by *Lascari* that the burden of production is at all times in the hands of the school district. Based on the position taken by at least some of the administrative law judges, ELC urges the Department to clarify that the burden of production remains with the school district.

N.J.A.C. 6A:14-2.7(f) -- The proposed amendment gives districts another unwarranted opportunity to block or stall complaints. Since the form for requesting a due process hearing has been developed by the Department, the Department should provide that completion of the form automatically results in a determination of sufficiency of the request for due process. In the instance where an administrative law judge determines that a complaint is insufficient, the Department should mandate that the administrative law judge allow the parent the opportunity to amend the complaint, and that all timeframes relative to stay-put be retained.

N.J.A.C. 6A:14-2.7(h) -- ELC urges the Department to mandate that a district's failure to convene a resolution session within the prescribed 15-day period results in the Department's immediate transmission of the case to the Office of Administrative Law. If the district fails to evince a willingness to resolve a matter within the prescribed 15-days, it should not be afforded the additional time that IDEA allows districts for settlement purposes, and parents should not be deprived of critical time to contest a matter that is likely urgent in nature.

N.J.A.C. 6A:14-2.7(n) -- ELC opposes the Department's proposal to adopt a change in the rules regarding student removal that is permitted, but clearly not required, by IDEA. The Department's proposal to extend the time that an administrative law judge can assign a student with a disability to an interim alternative placement from 45 calendar days to 45 school days allows a 50% increase of the number of school days that a child can be removed from his or her placement over the objections of parents -- an increase to nine weeks, or one quarter of the school year. With such lengthy deprivations of services, students with disabilities will lose academic and social functioning en masse and be denied their right to a free and appropriate public education.

In addition to rescinding this proposal, the Department must mandate that interim alternate educational settings 1) not include leaving a child at home with few or no educational services or programs, and 2) be limited to full-day programs that fulfill all requirements of the student's IEP. Home instruction is unlikely to provide students with appropriate services, especially as it provides no opportunity for improving socialization skills. It also puts enormous stresses on working parents who cannot stay at home with their children.

Moreover, instead of supporting removal for extended periods, the Department should develop regulations and programs that encourage or mandate districts to implement positive behavior supports, whole school reform, and teacher training and support to minimize challenging or dangerous behavior, consistent with current research and best practices.

N.J.A.C. 6A:14-2.7(r) – ELC opposes the Department's proposal to limit the circumstances for which parties may seek emergent relief. There are likely to be circumstances which require emergency action but which do not fit into the enumerated bases for requesting emergent relief. For example, children who urgently require services that they had not previously received would not be able to seek emergent relief when in fact, they could well prove their entitlement to emergent relief, including proving that they face irreparable harm.

There is no need to limit the circumstances under which an applicant may seek emergent relief when, in order to obtain emergent relief, one must meet the heavy burden of showing that emergency action is warranted, including a showing of irreparable harm.

N.J.A.C. 6A:14-2.7(t) – As with enforcement of mediation agreements, the Department should clarify that enforcement of due process decisions can be requested of either the Department or a court.

N.J.A.C. 6A:14-2.8(f) -- ELC opposes the Department's proposal which allows for the removal of students to interim alternative settings for other than weapons or drugs offenses. Districts should be prohibited from unilaterally removing students for offenses involving "serious bodily injury." The analogous provision in IDEA is permissive, and the State can and should provide more protections for its students.

N.J.A.C. 6A:14-2.10(b)(1) – In order to tie reimbursement into compliance with N.J.A.C. 6A:14-6.5(b)(1)-(8), the Department must make a minor amendment to N.J.A.C. 6A:14-6.5(b)(2). That provision must read that a "suitable special education program ... cannot be or was not provided," as reimbursement involves a look at prior actions.

N.J.A.C. 6A:14-3.3(a)(3)(ii) -- The Department should clarify that "Referral" means "Referral for evaluation of eligibility for special education and related services."

N.J.A.C. 6A:14-3.3(b), (c) and (d) – ELC opposes the Department's proposal to remove the exceptions for intervention in the general education setting of 1) where "the student's educational problem(s) is such that direct referral to the child study team is required..."

and 2) when the parent requests a special education evaluation. These two exceptions are safeguards against delays in serving children with disabilities who urgently require special education services. Even with these exceptions in the current law, ELC has witnessed massive delays in evaluating students who were inappropriately referred to general education interventions prior to being evaluated.

N.J.A.C. 6A:14-3.4(h)(4), 3.5(c)(12) -- IDEA requires a state to adopt criteria for determining whether a child has a specific learning disability. “Discrepancy” determinations are defined in IDEA as the use of a “severe discrepancy between achievement and intellectual ability” for ascertaining whether a child has a specific learning disability. 20 U.S.C. § 1414(b)(6)(A). “Response to intervention” (RTI) methods determine whether a child responds to intervening services as part of an evaluation procedure. 20 U.S.C. § 1414(b)(6)(B). Although IDEA does not prohibit the use of discrepancy determinations, it does prohibit states from mandating discrepancy determinations and from prohibiting the use of RTI. In an explanation of its proposed regulations to implement IDEA, the United States Department of Education explained:

Recent consensus reports and empirical syntheses ... recommend abandoning the IQ-discrepancy model and recommend the use of response to intervention (RTI) models (citations omitted). The IQ-discrepancy model criterion is potentially harmful to students as it results in delaying intervention until the student’s achievement is sufficiently low so that the discrepancy is achieved.... The ‘wait to fail’ model that exemplifies most current identification practices for students with ... [specific learning disabilities] does not result in significant closing of the achievement gap for most students placed in special education.

70 Federal Register 118, p. 35802 June 21, 2005 (emphasis supplied).

Consistent with the United States Department of Education recommendations and their well documented rationale, ELC urges the Department to eliminate the use of discrepancy determinations. In addition, the Department must urge the promotion of RTI, with interventions being carefully chosen to ensure that interventions are indeed “research-based,” as well as validated.

Finally, it is imperative that the Department adopt statewide criteria so that eligibility for special education services does not depend upon where in the state the student happens to live.

N.J.A.C. 6A:14-3.7(d) -- ELC opposes the proposal to allow IEPs to be amended without meetings. Given the ease of convening a telephone conference of the IEP team to approve an amendment, there is absolutely no justification for removing this critical protection of a child’s right to an effective educational plan.

N.J.A.C. 16A:14-3.7(e)(2) -- The Department must not diminish the requirement that IEPs contain a statement of academic and functional goals that are related to the core curriculum content standards by limiting the provision in three instances to where it is

“appropriate.” The introduction of the concept of when “appropriate” opens the door for districts to develop IEPs that fail to meet basic federal and long-standing State standards. Moreover, the proposed language does not provide IEP teams with clear guidance on what should be included in an IEP. The Department should adopt the language found in the proposed federal regulations at 34 C.F.R. § 300.320(a) (2005) which focuses on meeting the child’s educational needs and enabling the student to be involved, and make progress, in the general education curriculum.

N.J.A.C. 6A:14-3.7(e)(3) – ELC opposes the Department’s decision to allow IEP teams to omit short term objectives and benchmarks except for students participating in alternate assessments (which is limited to a mere approximately 1% of students or 10% of classified students). The proposed New Jersey code provides that “the IEP team shall review other relevant matters,” N.J.A.C. 16A:14-3.7(j), and that the IEP must include “a statement of how the student’s progress toward the annual goals will be measured,” N.J.A.C. 16A:14-3.7(e)(15), and “how parents will be regularly informed of a student’s progress.” N.J.A.C. 16A:14-3.7(e)(16). Given that these provisions clearly contemplate the inclusion of statements that serve as short term objectives or benchmarks, the amended code should not permit the omission of such protections. Moreover, elimination of short term objectives results in the inability to adequately measure progress toward achieving annual goals.

In any event, the code must mandate that short term objectives and benchmarks be included in an IEP with regard to functional goals and other items not assessed by State testing. The report must also clarify that an IEP may include short term objectives or benchmarks whenever the IEP team or the parent wishes to include such sections.

The change in IDEA ’04 regarding short term objectives and benchmarks merely sets a floor as to what states may do; New Jersey can and should do more for its students with disabilities.

N.J.A.C. 6A:14-3.9(a)(8) -- There is no reason to single out nursing services as being provided “only to the extent such services are designed to enable a child with a disability to receive a free, appropriate public education as described in the individualized education program of the child.” This is the basis for provision of any services and to single it out as a related service which appears to be subject to limitation, may result in more limitations being applied to it.

N.J.A.C. 6A:14-4.1(d)(2) – While ELC appreciates the Department’s proposal to require a minimum of 25 hours of programs for preschool students with autism, ELC opposes designating this minimum number of hours solely for students with autism. Although this proposal appears to be motivated by the commendable desire to guarantee that children with autism receive intensive services, it determines the hours of services based on a diagnosis rather than an individual child’s needs, as mandated by IDEA. Such codification of differential treatment based on an immutable characteristic violates IDEA, as well as State and federal anti-discrimination laws. Any classified child who is entitled to 25 hours of special education services a week under IDEA should receive these hours regardless of diagnosis. Notably the literature supports such a minimum number of hours of services

for all students with disabilities, much as the relied upon Department publication Autism Program Quality Indicators sets forth for persons with autism. The proposed language should be amended to substitute the word “disabilities” for the word “autism.”

In addition, the Department should add the following language to this provision:

Preschool students with disabilities shall be provided with individual supports and services to facilitate attending a typical preschool program operated by the district or by a private entity.

N.J.A.C. 6A:14-4.1(g)(2) -- The Department should clarify with respect to a student who transfer from an out-of-state district that the student’s new IEP developed by the new district may be consistent in all respects with the previously held IEP, in effect, resulting in implementation of the previous IEP.

In closing we note that the New Jersey Special Education Practitioners – a group spearheaded by ELC and consisting of attorney and non-attorney advocates for the rights of students with disabilities – intends to comment on the proposed regulations shortly after our next bi-monthly meeting scheduled at the end of this month.

Thank you for your consideration.

Sincerely yours,

Ruth Lowenkron