



February 26, 2020

Office of Administrative Law
New Jersey Department of Education
dueprocessfeedback@doe.nj.gov

Re: Proposed Special Education Due Process Prehearing Guidelines

Dear Assistant Commissioner McDonald and Acting Director/Chief
Administrative Law Judge Bass:

Please accept these comments from Education Law Center (ELC) about the Proposed Special Education Due Process Prehearing Guidelines (Proposed Guidelines) jointly issued by your agencies on January 17, 2020 to take effect on March 2, 2020. ELC has been an active special education stakeholder in New Jersey for more than two decades, providing free legal services to New Jersey parents in special education cases, regularly serving on statewide committees related to special education, commenting on special education regulations, and participating in other advocacy efforts on behalf of students with disabilities.

ELC fundamentally objects to implementation of the Proposed Guidelines on the grounds that ELC and other special education stakeholders who represent the interests of parents and students were not offered any opportunity to participate in their formulation. ELC was not even aware that the Proposed Guidelines were being developed until after they were issued and was not notified by OAL or NJDOE of their issuance. Moreover, the failure to follow procedures mandated by New Jersey's Administrative Procedures Act will render invalid any attempt to implement the Proposed Guidelines by your agencies.

With regard to the substance of the Proposed Guidelines, ELC endorses and incorporates by reference the enclosed February 18, 2020 Comments by Rebecca Spar, Esq. on behalf of New Jersey Special Education Practitioners (NJSEP). Like NJSEP, ELC has identified many areas of concern related to the Proposed Guidelines. Several problems that can be highlighted include the following:

1. The Proposed Guidelines would allow the 45-day deadline for the issuance of special education due process decisions to be extended for "other reasons" in violation of the governing federal law. See Proposed Guideline #3. Students are harmed when decisions concerning their educational rights are not made in a timely manner.
2. The Proposed Guidelines would shift the burden of proof ("i.e., the burden of persuasion and protection" in special education due process hearings onto parents, in violation of state statute and the New Jersey Supreme Court's Lascari decision. See Proposed Guideline #8. Because school districts possess knowledge and expertise that are not readily available to parents, the Proposed Guidelines "intent ... to shift the burden of production as early as possible" will harm the ability of parents to present their children's cases and enforce their rights.
3. The Proposed Guidelines would impose irrational scheduling rules, allowing up to ten days from a settlement conference for the scheduling of a prehearing conference, while permitting adjournments of any conference or hearing dates "only in extraordinary circumstances." See Proposed Guideline #1. In ELC's experience, the low income clients that we represent often have the least flexibility in taking time off work or securing child-care on short notice.
4. The Proposed Guidelines fail to explicitly address issues of importance to the fairness of due process hearings: Will district staff who seek to testify as experts be required to produce written expert reports at least five days in advance of the hearing, just as parents' experts must? Since virtually all documents relevant to special education hearings are in the possession of school districts, will pre-hearing orders establish discovery time-lines that ensure parental access to those documents more than five business days before the hearing?
5. The Proposed Guidelines' attempt to establish blanket rules for the length of hearings and for the direct and cross-examination of each witness should not be permitted. See Proposed Guidelines # 9 and 10. These blanket rules violate the individualization that is at the heart of rights guaranteed to students with disabilities by the Individuals with Disabilities Education Act. Further, they are likely to fuel appeals that challenge the limits to

the presentation of evidence imposed by Administrative Law Judges in individual due process hearings.

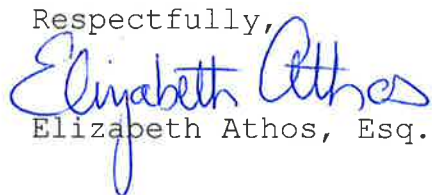
Finally, ELC uses this opportunity to inquire whether and where your agencies are publicizing the following promised information about the extent of due process hearing delays at OAL:

- Number of due process hearings conducted;
- Number of due process hearings resolved;
- Number of due process hearings pending before all ALJs;
- Number of extensions of the 45-day timeline requested, including the party seeking the extension of time and the reason for the request;
- Number of extensions of the 45-day timeline granted by each ALJ; and
- For each extension of the 45-day timeline granted, the OAL must include the revised due date of the final decision.

See NJDOE, Revised Procedures for Conducting Due Process Hearings (August 6, 2019) (describing documentation required by U.S. Department of Education corrective action plan), available at <https://www.nj.gov/education/specialed/fmr/SpecialEducationDueProcessHearings.pdf>.

The promised monthly posting of this information will cast an important light on whether progress toward the goal of timely due process hearings is being achieved.

Thank you for your consideration of these comments.

Respectfully,

Elizabeth Athos, Esq.

Encls.