



EDUCATION AND HEALTH LAW CLINIC
(formerly the Special Education Clinic)

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TO: Dueprocessfeedback@doe.nj.gov
DA: February 28, 2020

Comments to the Proposed Pre-Hearing Due Process Guidelines
Jointly Issued by the NJ Department of Education and the Office of Administrative Law
By the
EDUCATION AND HEALTH LAW CLINIC – RUTGERS LAW SCHOOL IN NEWARK

Please be advised that the comments below are submitted by the Education and Health Law Clinic at Rutgers Law School in response to Proposed Special Education Due Process Prehearing Guidelines that were issued on January 17, 2020.

We object to the implementation of the Proposed Guidelines on the basis that the State failed to provide an opportunity for parents of students with disabilities and adult students with disabilities, the primary stakeholders and intended beneficiaries of the IDEA, to participate in their formation, in violation of the IDEA as well as the State’s Administrative Procedure Act. The Education and Health Law Clinic was not aware that the guidelines were being developed and only learned of their issuance by virtue of our participation in the school law committee. We further object on the grounds that the Proposed Guidelines will not remedy the State’s ongoing violation for the 45-day rule, the Guidelines will deprive children with disabilities and their parents of their due process rights, and many of the Guidelines violate federal and state law and regulations.

We fully support the comments submitted by Rebecca Spar, Esq. on behalf of the NJ Special Education Practitioners of which we are members and reiterate the same here by reference. These comments provide a comprehensive summary of the concerns and problems presented by the Proposed Guidelines.

In addition to these comments, there are other concerns that impact the population that we represent and serve that we highlight below. The Education and Health Law Clinic provides free legal representation to parents of children with disabilities who are poor or low-income, underserved and typically reside in poorer school districts. We are often one of a few limited advocacy resources that are available to them.

First and foremost, Guideline #3 (Decision Due Date) fails to provide a realistic solution to the issue of timely disposition of due process complaints within 45 days. This is merely a



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restatement of the current practice. There is no reference to streamlining cases that have limited issues or cases that are filed by School Districts that do not require a 30-day waiting period. Until there is a system in place with hearing officers who are fully trained and assigned only to Special Education cases, there is little likelihood that the recommended changes will have any effect on ensuring the federal timeline for a hearing is met. No reference has been made regarding time limitations on motion practice, requiring cases to be heard during the summer months, or holding hearings on consecutive days, all of which would reduce the time for a hearing. The State's ongoing violation of the 45-day rule often causes even greater harm to students who are poor or low-income because they are unable to front the costs of appropriate educational programs and services during the dispute resolution process. As a result, the length of their educational deprivations are often doubled and tripled due to the time it takes to obtain a decision. Further, the remedy of compensatory education is far inferior to one of reimbursement because critical windows of development are often closed making it even harder, if not impossible, for a child to recoup the time lost due to the denial of an appropriate education.

Guideline #1 proposes a heightened requirement with respect to requesting an adjournment of a settlement conference. If a parent needs a particular date adjourned due to inability to miss the day of work without risk of getting fired or losing a day's pay, or is unable to obtain child care, or cannot miss a long-awaited medical appointment, then the adjournment should be granted. Our clients typically have the least flexibility in scheduling and this should be considered and respected.

Guideline # 8 is problematic in that it shifts the burden of proof in these cases even though New Jersey is one of the few states that has had a history of placing the burden of proof on School Districts and is statutorily mandated to do so. This guideline provides an unfair advantage to school districts and signals to them that limiting the presentation of witnesses would meet their burden of proof. Such burden switching actually will serve to lengthen hearing times. What should happen instead is that at the end of the District's presentation of its case, more judges should be willing to entertain motions for directed verdict and determine if the District even met its burden before moving forward. If the District has not met its burden, the case should end at that time.

Guideline # 9 fails to take into consideration that parents often obtain their own evaluations as a part of the treatment by a health care professional who are experts in their field. These reports are instrumental in determining diagnoses, functional levels, and the need for related services. Often, Districts recommend that parents obtain these evaluations and rely upon them for determining whether a student is entitled to special education and related services. This is



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especially true for children who have been diagnosed with Autism and Attention Deficit Hyperactivity Disorder (ADHD). These reports are crucial to a parent's claim and should never be excluded.

Guideline # 10 limits a witness' testimony on direct and cross examination to 60 minutes as well as the number of days for a hearing to two (2) days. These cases involve voluminous records, including Individualized Education Plans and reports from multiple related service providers and health care providers, which must be analyzed and explained. In many of these cases, children with disabilities have been unidentified, misclassified, and languished in inappropriate placements for years. Thus, there are often many issues including the appropriateness of the program, placement, and compensatory education that must be resolved. Two days of hearing in these cases and limiting witness testimony would be detrimental and would deprive our clients of a full and fair hearing.

Thank you for the opportunity to submit our comments.

Respectfully,



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