



June 2, 2023

VIA E-MAIL

Acting Commissioner Angelica Allen-McMillan
N.J. Department of Education
PO Box 500
Trenton, NJ 08625-0500

RE: Threat assessment legislation (Bill A4075) and guidelines

Dear Acting Commissioner Angelica Allen-McMillan:

Education Law Center (ELC) advocates for the legal right of New Jersey's public school children to a high quality education under state and federal laws, particularly our state's at-risk students, students with disabilities, and students of color. We submit this letter with the support of other New Jersey groups advocating for students' rights: the American Civil Liberties Union of New Jersey, the Irvington NAACP, Make the Road New Jersey, March for Our Lives New Jersey, Newark Communities United for Accountable Policing, the New Jersey Coalition for Bullying Awareness and Prevention, New Jersey Policy Perspective, the New Jersey Public Education Coalition, NJ21United, the Paterson Education Fund, the People's Organization for Progress, Save Our Schools NJ, and SPAN Parent Advocacy Network.

We understand New Jersey legislators drafted and passed P.L.2022, c.83 (codified at N.J.S.A. 18A:17-43.4 to 43.6), the law requiring each school district, charter school, and renaissance school to establish threat assessment teams, in response to horrific incidents of school violence across the nation. We appreciate that lawmakers intended to better protect New Jersey students and educators by passing this law. However, based on our understanding of school discipline disparities and threat assessment team best practices, we are concerned that implementing this law will negatively impact New Jersey students, particularly students of color and those with disabilities.

As stated in our letter to the New Jersey Legislature, which is attached to this letter, we believe this law must be amended to avoid harming these students, contravening threat assessment team policy guidance, and conflicting with current legal protections for students and we strongly urge the New Jersey Department of Education (NJDOE) to support our recommended amendments. Further, we believe the guidelines contemplated in section three of the act, or N.J.S.A. 18A:17-43.6, are rules, and their promulgation must adhere to the New Jersey

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Administrative Procedure Act (NJAPA). Both in supporting statutory amendments and in complying with the NJAPA, we implore NJDOE to consult stakeholders and community members for their input. Involving stakeholders is absolutely vital to minimizing anticipated disparities faced by students of color and students with disabilities once this law takes effect.

I. N.J.S.A. 18A:17-43.6 is *de facto* rule-making and must be done pursuant to the NJAPA

As of the date of this letter, NJDOE has yet to promulgate guidelines pursuant to N.J.S.A. 18A:17-43.6. However, promulgating guidelines under N.J.S.A. 18A:17-43.6 would constitute *de facto* rule-making which must be done pursuant to the New Jersey Administrative Procedure Act (NJAPA).¹ In *Metromedia, Inc. v. Director, Division of Taxation*, the New Jersey Supreme Court identified six factors courts must weigh to determine whether administrative action qualifies as a “rule,”² explaining that an agency determination constitutes a rule when it:

(1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group; (2) is intended to be applied generally and uniformly to all similarly situated persons; (3) is designed to operate only in future cases, that is, prospectively; (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization; (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter; and (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy. *Id.* at 331-32.

Using the *Metromedia* factors, the guidelines referenced in N.J.S.A. 18A:17-43.6 clearly qualify as *de facto* rulemaking and, therefore, must comply with the NJAPA. In brief, the expansive policy directive described in P.L.2022, c.83 prospectively impacts every public, charter, and renaissance school in New Jersey, is intended to apply uniformly throughout the state, references not yet promulgated guidelines which are not inferable from existing statutes or regulations, and effects a material and significant change in school operation. Therefore, the guidelines in N.J.S.A. 18A:17-43.6 can only have the force of law if they are adopted as rules after notice to and comments from the public.³

If the New Jersey Legislature agrees to amend the law, we ask that NJDOE wait to promulgate regulations in accordance with the amended law. If the Legislature does not act to implement amendments, then we nonetheless ask NJDOE to consider the potential harms we have identified in our letter and to address them to the extent possible through regulation.

¹ N.J.S.A. 52:14B-1 *et seq.*

² 97 N.J. 313 (1984).

³ See N.J.S.A. 52:14B-2; N.J.S.A. 52:14B-4(a).

II. Stakeholder involvement

When implementing state-wide threat assessment teams, “it is critical that proposed legislation be fully vetted and reviewed by educators before implementation, so everyone understands the width and breadth of what is trying to be accomplished.”⁴

Given the potential harms of the statute, we ask NJDOE to consider supporting necessary amendments to the law, as detailed in our letter to the Legislature, and to develop implementation rules minimizing those harms. In doing so, we request NJDOE to actively seek out and involve stakeholders in the process, including from the undersigned organizations. Additionally, NJDOE should seek input from community members, mental health professionals, and current school staff, particularly those involved in Intervention & Referral Services and serving on School Safety Teams.

III. Conclusion

Each of the undersigned organizations understands the importance of a safe learning environment for all students. We believe school safety can be achieved by focusing resources on improving school culture and climate, by using existing standards and resources, and by inserting guardrails limiting threat assessment teams’ potential to compromise the rights and adversely impact the lives of New Jersey students. We thank you for considering our requests for NJDOE to support amendments to the governing statute and follow NJAPA procedures in implementing guidelines under N.J.S.A. 18A:17-43.6. We are available to answer any questions or address any concerns.

Sincerely,



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⁴ Michaelis, *supra* note **Error! Bookmark not defined.**

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