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P.O. Box 500
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Re: N.J.A.C. 6A:3, Controversies and Disputes

Dear Director Duncan:

On behalf of our clients, Education Law Center (ELC) submits the following comments on the Proposed Readoption with Amendments of N.J.A.C. 6A:3. Since its founding in 1973, ELC has acted on behalf of disadvantaged students and students with disabilities to achieve education reform, school improvement and protection of individual rights. In addition to serving as lead counsel to over 350,000 urban school children in *Abbott v. Burke*, ELC provides a full range of direct legal services to parents and caregivers involved in a dispute with public school officials. Each year, ELC serves hundreds of individuals in cases involving special education, student discipline, and school residency.

Pro Se Petitioners:

While ELC commends the New Jersey State Board of Education and Department of Education for their development of special rules of procedure for *pro se* petitioners in residency cases, ELC urges the State Board and the Department to amend N.J.A.C. 6A:3-1.1(b) and N.J.A.C. 6A:3-8.1 to expand the available exceptions to the general appeal requirements to include other *pro se* petitioners. At a minimum, it is critical that students at risk of not receiving a public education who are initiating appeals under the regulations at N.J.A.C. 6A:17 also be afforded relaxed procedures for the filing of petitions, and ELC recommends that the relaxation of procedures also be applied to *pro se* petitioners whose children are out of school due to disciplinary action that is the subject of the appeal, as well as those who are enforcing entitlements under *Abbott v. Burke*. The regular appeal procedures can be complicated and overwhelming to people who are uneducated or unsophisticated and vulnerable children may have their rights impaired while their parents or guardians struggle to prepare, file, and serve appeals. Since many *pro se* litigants will be unable to read, understand and follow the requirements for the filing and serving of petitions, their petitions should be accepted in letter form, thereby protecting the interest of schoolchildren whose parents are unable to afford or obtain representation.

Petitions for Students with Disabilities:

ELC agrees that state regulations should address the filing of petitions by students who are, or who may be as the result of a pending evaluation, eligible for special education and related services or eligible under Section 504 of the Rehabilitation Act. ELC concurs that it is useful to have information in the petition as to whether a

student falls into one of those categories and/or whether the matter has been concurrently filed with the Department's Office of Special Education Programs. To avoid creating additional hurdles for *pro se* petitioners, however, the regulations should make clear that *pro se* petitions will not be found defective, or otherwise penalized, if such information is missing.

ELC supports adoption of the procedures set forth at proposed N.J.A.C. 6A:3-1.3(e)(1) for the docketing of cases that share special education and non-special education issues, with one exception. The draft regulation must be amended to clarify that if an ALJ finds that some issues raised are within the authority of the Commissioner, then OAL must docket the matter as an EDU case in addition to docketing it as an EDS case. The regulation is somewhat ambiguous as currently drafted, suggesting that a matter will be handled as either an EDS or EDU case when, in fact, it may be required to be handled as both, with a final decision from an ALJ on special education issues and an initial decision from an ALJ on those issues that are within the authority of the Commissioner.

Technical Correction:

ELC notes the inconsistent use of the words "motion" and "application" throughout N.J.A.C. 6A:3-1.6.

Need for Time Frames for Decision-Making:

Neither the current regulations nor proposed readoption establish time frames for agency action on motions, emergent relief applications, transmittal to the Office of Administrative Law (OAL), initial decisions by OAL, and final decisions following either initial decision at the OAL or hearing or dispositive motion in a case retained by the Commissioner. ELC has witnessed and been involved in cases before the

Commissioner in which substantial, unjustifiable delays in decision-making have prejudiced the rights of parents and students. To avoid this problem, and to promote fairness and uniformity, the Controversies and Disputes regulations should be amended to set deadlines for prompt agency decision-making.¹

Need for Regulation Requiring Disclosure of the Attorney General's Dual Role:

The regulations should be expanded in the interest of fundamental fairness to require that all litigants in cases in which the Commissioner is named as a party to the dispute receive a written notice concerning the Attorney General Office's dual role as both the attorney and advisor to the Department in its decision-making capacity, and as the attorney and advocate for the Department as a party. Specifically, this notice should contain a statement of the Attorney General's internal policies and procedures to ensure due process and impartiality in the performance of these two potentially conflicting roles, see IMO Opinion No. 583, 107 N.J. 230 (1987), as well as disclose the names of the deputy attorney generals who will be representing the Department in its decision-making capacity and in its role as a party to the litigation.²

1

ELC has also witnessed and experienced undue and unfair delays in agency decision-making before the State Board. The rules governing proceedings before the State Board, N.J.A.C. 6A:4, need to be amended as well to provide for prompt agency decision-making. The time delays permitted in each forum – before the Commissioner and before the State Board – work in combination to deny litigants a fair and timely resolution of school law disputes.

2

Again, an identical regulation should be included in the regulations governing proceedings before the State Board, N.J.A.C. 6A:4, since the Attorney General's Office performs this dual role in cases on appeal to the State Board.

Abbott Appeals:

It is essential that the Department and State Board establish procedures for the receipt and processing of complaints from parents and other aggrieved parties involving alleged violations of the education entitlements established in the *Abbott v. Burke* rulings. These entitlements are significant, and include programs, services and staff to improve education for all students in the 31 Abbott districts. At the present time, there are no procedures available for the filing of Abbott complaints against schools districts, or the State, on behalf of the student beneficiaries of the *Abbott* rulings.

Prior Abbott regulations provide an appeals process, in some cases expedited, but only for “an aggrieved applicant from any Department decision.” N.J.A.C. 6A:10A-10.1(a). ELC recommends that the Department and State Board amend these regulations to include students and parents as “aggrieved parties,” and establish *pro se* procedures and an expedited process for the handling of Abbott complaints from parents and students. In addition, ELC recommends that the Department establish, by regulation, a pre-appeals complaint investigation and informal dispute resolution process for Abbott complaints.

NCLB Complaints:

The federal No Child Left Behind (NCLB) Act requires state educational agencies submitting plans under the Act to provide assurances that the State will “adopt and use proper methods” of administering each program under the Act, including “the adoption of written procedures for the receipt and resolution of complaints alleging violations of law in the administration of the programs.” 20 U.S.C. § 7844 (a)(3)(C). While New Jersey has included this assurance in its state plan, to ELC’s knowledge, there are no written procedures for the filing of NCLB complaints that have been adopted by the

Department and the State Board. To comply with federal law, the State must ensure that such procedures exist and are available for use by parents and students. The Controversies and Disputes code is the proper place for the State to spell out to the public the procedures that will apply to NCLB complaints. ELC urges the Department and the State Board to amend N.J.A.C. 6A:3 to include these federally-required complaint procedures.

Thank you for your consideration of these comments.

Very truly yours,

Elizabeth Athos, Esq.

Cc: Members of State Board of Education