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Re: Programs to Support Student Development, N.J.A.C. 6A:16 Pre-Proposed Readoption with Amendments

Dear Ms. Gantwerk and Honorable Members of the State Board of Education:

On behalf of our clients, Education Law Center (ELC) submits the following comments on the Pre-proposed Readoption with Amendments of N.J.A.C. 6A:16. 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 student rights cases.

Scope of Regulations – **N.J.A.C. 6A:16-1.2**

The pre-proposal would remove preschoolers with disabilities from the scope of the Programs to Support Student Development regulations, but does not address the need for alternative protections for preschoolers in the areas of health services and student conduct.

All public preschoolers, including preschoolers with disabilities, must be assured necessary health services in school. ELC is aware of NJ Department of Health regulations governing immunization requirements for all preschoolers and a limited preschool vision screening program run by the Commission for the Blind and Visually Impaired, but is unaware of any NJDOE or NJ Department of Health regulations governing items such as nurse staffing requirements, required health services, or universal health screening and exams for New Jersey preschoolers in public schools. This is a grave omission that must be addressed.

With regard to student conduct, while the Abbott regulations prohibit the use of suspension and expulsion for preschoolers in Abbott districts, see N.J.A.C. 6A:10A:2.2(a)(7)(i), ELC cannot find regulations providing similar protection to preschoolers, with or without disabilities, in non-Abbott districts. Under the proposed regulatory scheme, preschoolers in non-Abbott districts are neither protected from removal from school nor afforded the due process protections that older students must receive when disciplinary action is taken. ELC urges the State Board and NJDOE to adopt regulations prohibiting the suspension and expulsion of all preschoolers in the state.

ELC has serious objections to the pre-proposal recommendation that students in state facilities be removed from the scope of the Programs to Support Student Development regulations. NJDOE is mistaken in contending that nothing in the State Facilities Education Act, N.J.S.A. 18A:7B-1 et seq., “specifically authorizes the State Board of Education to regulate services, other than instructional services, provided by these other State agencies.” 37 N.J.R. 4677. To the contrary, when the State Facilities Education Act specifically authorizes the Commissioner and the State Board to promulgate rules and regulations “to ensure a thorough and efficient education” for children in State facilities. N.J.S.A. 18A:7B-5, it necessarily encompasses all aspects of a thorough and efficient education, not just instructional services. As recognized by the New Jersey Supreme Court in its Abbott decisions, see, e.g., 153 N.J. 480, 511 (1998), and by the State Board in adoption of New Jersey’s Core Curriculum Content Standards, addressing the health and social needs of students is an integral part of a thorough and efficient education in this state. To deny students in state facilities the programs that address student health and social needs constitutes a violation of the constitutional requirement that “all children in the State” receive a thorough and efficient education. N.J. Const. art. VIII, § 4, ¶ 1.

Health Screening – N.J.A.C. 6A:16-2.1(k)

ELC strongly urges the State Board and the Department to expand the current health screening requirements of state regulations to incorporate lead screening requirements. Lead poisoning, which is entirely preventable, has been identified as a major health issue in New Jersey for many years, with the elevated blood lead levels for New Jersey children reaching almost twice the national average. Preventing Childhood

Lead Poisoning in New Jersey, ACLU (October 2005), 1, 16. Historically, the state's lead screening rates have been low, as a result of inadequate enforcement of the state's Universal Screening Law and the screening requirements of the Medicaid Act. Id. 1, 3-6. Although the state has made progress in recent years in response to advocacy efforts, there is still much work to be done. Id. 1, 6, 16-20.

Schools must play a role in reducing and eliminating lead exposure because of the proven negative impact such exposure has on our student population. Through "a compelling body of scientific evidence," low-level lead exposure in early childhood has been "associated with hyperactivity, learning disabilities, and school failure," and linked to "later decreased intellectual and academic performance." Costs and Benefits of Enforcing Housing Policies to Prevent Childhood Lead Poisoning, Mary Jean Brown ScD, RN (Nov-Dec 2002), Health Economics, 482. One study has demonstrated that "the risk of dropping out of high school was 6 times higher for children with high lead levels compared to those with low lead levels." Id. Another study has shown that almost three-quarters of the benefits to be derived from reducing lead exposure in children is in avoiding future earning losses that would otherwise result from lead poisoning. Updated Estimates of Earnings Benefits from Reduced Exposure of Children to Environmental Lead, David S. Salkever, (1995), Environmental Research 70, 1-6.

The State Board and NJDOE can take affirmative steps to reduce the significant societal and educational costs of lead exposure by mandating that school districts screen for lead in all students in preschool and elementary school. The Centers for Disease Control has endorsed a filter paper method of lead testing that could be done at any school site. The method, which requires two drops of blood to be collected on treated filter paper and sent to a laboratory for analysis, is not invasive as it requires a

simple finger prick. Preventing Childhood Lead Poisoning in New Jersey, ACLU (October 2005), 9. Alternatively, although less preferable, school districts can be required to continuously remind parents of the need to obtain lead screening results. The voluntary implementation of such a policy in the Irvington Abbott Preschool program resulted in an 80% screening rate for those students.¹ Id. 12-13.

Home Instruction – **N.J.A.C. 6A:16-10.1, -10.2**

ELC agrees that all of the Department's regulations governing home instruction belong in one section of the code, but disagrees with the disparity of services provided to students receiving home instruction due to a health condition and those receiving home instruction for other reasons. There is no sound justification for providing only five hours per week of direct instruction to students who must be out of school because of a temporary or chronic health condition. These students should receive the same ten hours per week of direct instruction that all other students on home instruction receive, unless there is an individualized need for fewer hours as a result of the student's particular health condition. Moreover, since the students with temporary or chronic health conditions are more likely to be students with disabilities, the Department's provision of fewer hours of home instruction to that class of students is likely to violate federal and state laws against discrimination on the basis of disability.

¹ Aspects of Irvington's policy include the design of a health form by the district's Chief Nurse on which lead screening results can be recorded, family outreach, ongoing monitoring, and a prohibition against excluding any child from the program due to lack of screening. Id. The Universal Child Health Record endorsed by American Academy of Pediatrics, NJ Chapter, NJ Department of Health and Senior Services, and NJ Academy of Family Physicians has recently been updated to include an area to record lead screening results and its use should be required by school districts whenever a medical examination is required.

ELC has also identified a serious flaw in the Department's regulations governing home instruction for reasons other than a temporary or chronic health condition. There are no restrictions within the regulations to ensure that home instruction is a placement of last resort for students who are suspended from school. To the contrary, the regulations at N.J.A.C. 6A:16-10.2, when read together with N.J.A.C. 6A:16-9.2(a)(14) (requiring minimum enrollment in alternative education of not less than two complete marking periods), create a presumption that any student suspended less than two marking periods will be placed on home instruction rather than in an alternative school.

This presumption directly contravenes the State Board's rulings on motions in the P.H. v. Bergenfield Board of Education case, dated September 7, 2001 and October 5, 2001. The State Board was explicit in its directive that the expelled student in that case must be placed immediately "in an appropriate alternative education program" and that the school district could provide "home or out-of-school instruction **only until such placement can be arranged.**" (Sept. 7, 2001 at 6, emphasis added). The record before the State Board in the emergent relief application included the Administrative Law Judge's finding that home instruction is not an adequate substitute for placement in an alternative school. Init. Dec. at 27. The ALJ credited the petitioner's expert in further finding that home instruction is inadequate because it typically offers more limited hours than a structured school program, thereby increasing the opportunity for children to engage in negative or violent behavior; it denies youngsters the critical opportunity to learn how to resolve conflicts with other students; and it typically fails to cover engaging activities such as poetry or art which can help significantly reduce the likelihood of further aggressive behavior by students. Id.

Further, the pre- proposed regulations are internally inconsistent since students who commit some of the most egregious offenses must be provided immediate placement in an alternative education program – and may receive home instruction only until placement in an alternative education program is available. See N.J.A.C. 6A:16-5.5(e) (removal for firearms offenses) and N.J.A.C. 6A:16-5.6(e) (removal for assaults with weapons). To comply with P.H., to treat students fairly, and to promote sound policy, the regulations must be amended to mandate placement in school-based alternative education programs for all students subject to disciplinary removals and to limit the discretion of local school districts to chose out-of -school instruction only until placement in an alternative education program is available.

Alternative Education – N.J.A.C. 6A:16-9.2, -9.3

ELC urges the Department to reconsider the pre-proposal recommendation that students must, at minimum, be enrolled in an alternative education program for two complete marking periods (90 school days). Undoubtedly, alternative education programs can sustain better outcomes when students can receive a “meaningful sequence of instruction,” 37 N.J.R. 4679, but the solution to this problem is not to increase statewide reliance on home instruction. Instead, alternative education programs should be supported in designing programs that can meet the needs of students whose removals from school are both shorter and longer than two marking periods.

Further, the pre-proposal will have a negative impact on students with disabilities, in particular, whose placement in an alternative program for disciplinary reasons is limited by federal law to 45 school days. See 20 U.S.C. 1415(k)(1)(G). Under the state

pre-proposal, students with disabilities facing a 45 day removal will only be able to be placed on home instruction, not in an approved alternative education program. Historically, there are been significant problems statewide in ensuring that students with disabilities receive all the services required by their Individualized Education Program through placement on home instruction.

For students both with and without disabilities who have exhibited behavioral difficulties that led to removal from school, placement on home instruction is inadequate for all the reasons testified to by the expert in the P.H. case (see p. 6 above) and should be limited to an option of last resort.

While ELC concurs with the Department that placement in an alternative school may be a viable option for a student who is at risk of school failure, the pre-proposal does not provide sufficient safeguards and protections to students. As written, the pre-proposal appears to allow involuntary removals from the general education program without due process protections. The pre-proposal must be amended to require consultation with the student and his or her parents before a decision to place a student in an approved alternative education program is made. Additionally, there must be either informed, written parental consent or a due process hearing before a transfer to an alternative school program can be implemented. These protections are necessary to prevent students from being unilaterally or arbitrarily excluded from traditional public schools.

Alcohol, Tobacco and other Drug Abuse Programs – **N.J.A.C. 6A:16-4.3**

To ensure uniformity throughout the state in procedures for the removal of students suspected of being under the influence of alcohol or other drugs, ELC asks

that the pre-proposal be amended to provide that the Department, not individual school districts, establish (in cooperation with medical professionals) the minimum requirements for the medical examination and the medical report required by this section of the code. See N.J.A.C. 6A:16-4.3(a)(4)(i) and (7)(i).

In addition, N.J.A.C. 6A:16-4.3(a)(9) and (11) of the pre-proposal require revision to prevent what ELC believes is a common misinterpretation of the code. In our experience, students have been excluded from school as a result of receiving a positive drug test and must then obtain documentation that the drug use does not interfere with their physical or mental ability to perform in school in order to return to school. The regulations should clarify that a positive drug test, in and of itself, is not a basis for removal from school unless a physician reports that drug use currently interferes with the student's physical or mental ability to perform in school. Such an amendment is needed to ensure that students are not excluded from school on the basis of tests that detect past drug use that does not interfere with the student's ability to perform in school.

Students with Disabilities – N.J.A.C. 6A:16-7.1 et seq.

While the pre-proposal emphasizes in the code of student conduct that students with disabilities must be treated in accordance with applicable special education laws, the pre-proposal must provide equal assurance that students with disabilities will not be denied any rights that are afforded students without disabilities. ELC urges the Department to add regulatory language that provides such assurance.

Thank you for your attention to these comments. If ELC can provide additional information, please do not hesitate to contact me at 973-624-1815, ext. 20 or at eathos@edlawcenter.org.

Respectfully submitted,

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