

**6:28-1.3 Definitions**

Words and terms, unless otherwise stated in these definitions, when used in this chapter, shall be defined in the same manner as those words and terms used in the Individuals with Disabilities Education Act.

“Adaptive behavior” means the ability to demonstrate personal independence and social responsibility according to age and sociocultural group expectations.

“Adult pupil” means an emancipated minor or a person age 18 through 21, who is or was enrolled in the public school and who is not under legal guardianship.

“Approved private school for the handicapped” means an incorporated entity approved by the Department of Education according to N.J.A.C. 6:28-7.2 or 7.3 to provide special education and related services to pupils with educational disabilities placed by the district board of education responsible for providing their education.

“Consent” means that a parent having legal responsibility for educational decision making or the adult pupil has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language or other mode of communication; understands and agrees in writing to the implementation of this activity; and understands that the granting of consent is voluntary and may be revoked at any time.

“Department of Education” means the State Board of Education, the Commissioner of Education or its/his/her designee.

“Individualized education program” means a written plan developed at a meeting according to N.J.A.C. 6:28-3.6 which sets forth goals and measurable objectives and describes an integrated, sequential program of individually designed educational activities and/or related services necessary to achieve the stated goals and objectives. This plan shall establish the rationale for the pupil’s educational placement, serve as the basis for program implementation and comply with the mandates set forth in this chapter.

“Native language” means the language or mode of communication normally used by a person with a limited ability to speak or understand the English language.

“Nonpublic school” means an elementary or secondary school, other than a public school, within the State, providing education in grades kindergarten through 12, or any combination of grades, in which a pupil age five through 20 may fulfill compulsory school attendance and which complies with Title VI of the Civil Rights Act of 1964 (P.L. 88-352).

“Nonpublic school pupil” means any pupil who is enrolled full time in a nonpublic school. A pupil who boards at a

nonpublic school shall be considered a resident of the New Jersey district in which the parent(s) resides.

“Parent(s)” means the natural parent(s), the legal guardian(s), foster parent(s), surrogate parent(s), person acting in the place of a parent such as the person with whom the pupil legally resides and/or a person legally responsible for the pupil’s welfare. Unless parental rights have been terminated by a court of appropriate jurisdiction, the parent(s) retains all rights under this chapter.

“Pupil” means a person age three through 21 who is entitled to receive educational programs and services in accordance with Federal or State law or regulation.

“Pupil age” means the school age of a pupil as defined by the following:

1. “Age three” means the attainment of the third birthday. Children attaining age three shall have a free, appropriate public education available to them provided by the district board of education.

2. “Age five” means the attainment of age five by the month and day established as the kindergarten entrance cut off date by the district board of education. Pupils with educational disabilities attaining age five during the school year shall continue to be provided preschool services for the balance of that school year.

3. “Age 21” means the attainment of the twenty-first birthday by June 30 of that school year. Pupils with educational disabilities attaining age 21 during the school year shall continue to be provided services for the balance of that school year.

“Pupil with an educational disability” means a pupil who has been determined to be eligible for special education and/or related services according to N.J.A.C. 6:28-3.5.

“Recreation” for pupils with educational disabilities means instruction to enable the pupil to participate in appropriate leisure time activities, including involvement in recreation programs offered by the district board of education and the facilitation of a pupil’s involvement in appropriate community recreation programs.

“Related services” for pupils with educational disabilities means counseling for pupils, counseling and/or training for parents relative to the education of a pupil, speech-language services, recreation, occupational therapy, physical therapy, rehabilitation counseling, school nursing services, social work services, transportation, as well as any other appropriate developmental corrective and supportive services required for a pupil to benefit from education as required by the pupil’s individualized education program.

“Special education” means specially designed instruction to meet the educational needs of pupils with educational disabilities including, but not limited to, subject matter instruction, physical education and vocational training.

"Transition services" means a coordinated set of activities for a pupil with educational disabilities, designed within an outcome-oriented process, that promotes movement from school to post-school activities, including postsecondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation.

Amended by R.1989 d.239, effective May 15, 1989.  
See: 21 N.J.R. 239(a), 21 N.J.R. 1385(a).

Definitions to be consistent with Federal Act; deleted "least restrictive environment", "parental consent" and "preschool"; added "adult pupil", "approved private school for the handicapped", "consent", "nonpublic school" and "nonpublic school pupil".

Amended by R.1990 d.450, effective September 4, 1990.  
See: 22 N.J.R. 1412(a), 22 N.J.R. 2683(b).

In "Consent", added "legal responsibility for educational decision making".

Amended by R.1991 d.337, effective July 1, 1991.  
See: 23 N.J.R. 1053(b), 23 N.J.R. 2032(b).

Amended to change the definition of age three to the attainment of the third birthday.

Amended by R.1992 d.280, effective July 6, 1992.  
See: 24 N.J.R. 1150(a), 24 N.J.R. 2434(a).

Term "educationally handicapped pupil" replaced by "pupil with an educational disability".

Amended by R.1993 d.393, effective August 2, 1993.  
See: 25 N.J.R. 1318(a), 25 N.J.R. 3515(a).

Amended by R.1994 d.127, effective April 4, 1994.  
See: 25 N.J.R. 5734(a), 26 N.J.R. 1495(b).

#### Case Notes

Failure to gain timely approval for child study team does not defeat tenure rights gained in interim (citing former regulation). *Bisson v. Bd. of Ed., Alpha Boro., Warren Cty., 1978 S.L.D. 187.*

Definition of handicapped child under former N.J.A.C. 6:28-1.2. *T.A. v. Bd. of Ed., Edgewater Park Twp., Burlington Cty., 1973 S.L.D. 501.*

#### 6:28-1.4 District board of education policies and procedures

(a) Each district board of education shall develop and adopt written policies and procedures for the following:

1. Exemption of pupils with educational disabilities from the high school graduation requirements according to N.J.A.C. 6:8-7.1(b), 6:28-3.6 and 4.8;
2. Prevention of needless public labeling of pupils with educational disabilities;
3. Compilation, maintenance, access to and confidentiality of pupil records according to N.J.A.C. 6:3-6;
4. Identification, location and evaluation of potentially educationally disabled pupils;
5. Provision of full educational opportunity to pupils with educational disabilities;
6. Participation of and consultation with the parent(s) of pupils with educational disabilities toward the goal of providing full educational opportunity to all pupils with educational disabilities ages birth through 21;

7. Provision of special services to enable pupils with educational disabilities to participate in regular educational programs to the maximum extent appropriate;

8. Development and implementation of individualized education programs according to N.J.A.C. 6:28-3.6 and 3.7;

9. Protection of pupils' rights in regard to evaluation and reevaluation procedures according to N.J.A.C. 6:28-2.5;

10. Placement of pupils with educational disabilities in the least restrictive environment according to N.J.A.C. 6:28-1.1(h), 2.1(a), 2.10, 3.6(d)5, and 4.1(i); and

11. Establishment and implementation of procedural safeguards according to N.J.A.C. 6:28-2.3, 2.6, and 2.7.

New Rule, R.1989 d.239, effective May 15, 1989.

See: 21 N.J.R. 239(a), 21 N.J.R. 1385(a).

Amended by R.1990 d.450, effective September 4, 1990.

See: 22 N.J.R. 1412(a), 22 N.J.R. 2683(b).

In (a)1, deleted reference to 6:39-1.6.

Amended by R.1992 d.280, effective July 6, 1992.

See: 24 N.J.R. 1150(a), 24 N.J.R. 2434(a).

Term "educationally handicapped pupil" replaced by "pupil with an educational disability".

Amended by R.1994 d.127, effective April 4, 1994.

See: 25 N.J.R. 5734(a), 26 N.J.R. 1495(b).

#### Case Notes

Student with multiple disabilities required extra year of special education due to chronic absenteeism. *G.K. v. Roselle Borough, 95 N.J.A.R.2d (EDS) 86.*

Evidence supported in-district placement of neurologically impaired student; parents' preference for out-of-district placement only one factor in decision. *S.A. v. Board of Education of Township of North Brunswick, 92 N.J.A.R.2d (EDS) 220.*

## SUBCHAPTER 2. PROCEDURAL SAFEGUARDS

### 6:28-2.1 General requirements

(a) Each district board of education shall provide a free, appropriate public education program and related services for pupils with educational disabilities in the least restrictive environments according to N.J.A.C. 6:28-1.1(b)1.

(b) When a pupil with an educational disability between the ages of 16 and 21 voluntarily, and before receiving a high school diploma, leaves a public school program, he or she may reenroll at any time up to and including the school year of the pupil's twenty-first birthday.

(c) After parental consent for initial evaluation has been received, the district board of education shall ensure that within 90 calendar days, evaluation and determination of eligibility for special education and/or related services, and, if eligible, development and implementation of the individualized education program for the pupil shall be completed.

1. The individualized education program shall be written within 30 calendar days of the determination that the pupil is eligible for special education and/or related services; and

2. The individualized education program shall be implemented as soon as possible but no more than 30 calendar days after the individualized education program meeting.

(d) Whenever parental consent for initial evaluation is requested, a parent(s) identifies to the district board of education a child age three to five as potentially preschool handicapped or a notice is sent to the parent(s) to reevaluate, the parent(s) shall receive a copy of the procedural safeguard rights under this subchapter and N.J.A.C. 1:6A.

(e) Upon determination of a pupil's eligibility for special education and/or related services, by the child study team, the parent(s) or adult pupil shall receive a copy of this chapter.

(f) Upon request by a parent or adult pupil, each district board of education shall provide copies of special education statutes (N.J.S.A. 18A:46-1 et seq.), special education rules (N.J.A.C. 6:28), pupil records rules (N.J.A.C. 6:3-2), and information regarding the availability of free and low cost legal or other services relevant to a due process hearing and due process rules (N.J.A.C. 1:6A).

(g) If the mediation according to N.J.A.C. 6:28-2.6 or due process hearing according to N.J.A.C. 6:28-2.7 involves initial admission to the public school of a child age three through 21, the child, with the consent of the parent(s), shall be placed in the public school program or a placement agreed to by the parent(s) and district board of education pending the outcome of the hearing.

Amended by R.1989 d.239, effective May 15, 1989.

See: 21 N.J.R. 239(a), 21 N.J.R. 1385(a).

Reference in (f) to legal services, old (g) and (h) deleted, new (g) added re: placement in public school.

Amended by R.1990 d.450, effective September 4, 1990.

See: 22 N.J.R. 1412(a), 22 N.J.R. 2683(b).

In (c), added 1 and designated existing language as 2. In (f), changed "parental request" to "request by a parent or adult pupil". In (g), child age "three" was "five".

Amended by R.1992 d.280, effective July 6, 1992.

See: 24 N.J.R. 1150(a), 24 N.J.R. 2434(a).

At (c)2., 30 day time frame required; 90 day option deleted.

Amended by R.1994 d.127, effective April 4, 1994.

See: 25 N.J.R. 5734(a), 26 N.J.R. 1495(b).

#### Case Notes

Successful challenge to local board's decision to remove multiply handicapped child from residential school into home and local school programs; determination of appropriate placement. *Geis v. Bd. of Ed., Parsippany-Troy Hills, Morris Cty.*, 589 F.Supp. 269 (D.N.J.1984), affirmed 774 F.2d 575 (3rd Cir.1985).

Emergency relief request regarding classified student's suspension was rendered moot by student's withdrawal from school. *Brick Township Board of Education v. M.F.*, 96 N.J.A.R.2d (EDS) 127.

Student with multiple disabilities required extra year of special education due to chronic absenteeism. *G.K. v. Roselle Borough*, 95 N.J.A.R.2d (EDS) 86.

Impaired student's research paper was acceptable for grading as long as marking periods in subject were passed. *T.D. v. Rutherford Board*, 95 N.J.A.R.2d (EDS) 47.

Parents not entitled to emergent relief; no evidence offered to show that student was socially maladjusted. *N.P. v. Freehold Regional High School*, 94 N.J.A.R.2d (EDS) 218.

Handicapped child with increasing level of seizure activity; extended-year residential care. *J.S. v. West Windsor-Plainsboro Regional Board of Education*, 94 N.J.A.R.2d (EDS) 152.

Emergency placement for neurologically impaired child was not available absent evidence of irreparable harm. *M.B. v. Manville*, 93 N.J.A.R.2d (EDS) 233.

Student, classified as perceptually impaired, who filed an application for emergency relief return to his previously established course of study was returned to mainstream placement with resource room assistance pending outcome of the dispute over his proper classification and placement. *Milt v. East Windsor Regional School District*, 9 N.J.A.R. 159 (1986).

State Department of Human Services not a necessary party to special education placement determination; joinder of party denied due to lack of authority; consolidation denied as unqualified. *A.N. v. Clark Bd. of Ed.*, 6 N.J.A.R. 360 (1983).

Standing of foster parents (citing former regulations). *Orr v. Bd. of Ed., Caldwell-West Caldwell, Essex Cty.*, 1976 S.L.D. 264.

#### 6:28-2.2 Surrogate parents

(a) Each district board of education or responsible State agency shall ensure that the rights of a pupil are protected through the provision of an individual to act as surrogate for the parent and assume all parental rights under this chapter, when either:

1. The parent(s) cannot be identified according to N.J.A.C. 6:28-1.3;
2. The parent(s) cannot be located after reasonable efforts; or
3. The pupil is a ward of the State of New Jersey.

(b) Each district board of education or responsible State agency shall establish a method for selecting and training surrogate parents.

(c) The person serving as a surrogate parent shall have:

1. No interest that conflicts with those of the pupil he or she represents; and
2. Knowledge and skills that ensure adequate representation of the pupil.

(d) The person(s) serving as a surrogate parent may not otherwise be an employee of the local school district or responsible State agency. A surrogate parent may be paid solely to act in that capacity.

Amended by R.1989 d.239, effective May 15, 1989.

See: 21 N.J.R. 239(a), 21 N.J.R. 1385(a).

Reference to "responsible State agency" added throughout.

## Case Notes

Successful challenge to local board's decision to remove multiply handicapped child from residential school into home and local school programs. *Geis v. Bd. of Ed., Parsippany-Troy Hills, Morris Cty.*, 589 F.Supp. 269 (D.N.J.1984), affirmed 774 F.2d 575 (3rd Cir.1985).

Regulation valid. In re: Repeal of N.J.A.C. 6:28, 204 N.J.Super. 158, 497 A.2d 1272 (App.Div.1985).

### 6:28-2.3 Parental notice, consent, participation and meetings

(a) Consent shall be obtained:

1. Prior to initial evaluation; and
2. Prior to initial implementation of a special education program and/or related services resulting from (a)1. above.

(b) For those pupils classified as eligible for speech-language services, additional consent shall be obtained prior to initial evaluation by the child study team and/or implementation of a special education program and/or related services resulting from that identification.

(c) Written notice which meets the requirements of this section shall be provided to the parent(s) when a district board of education:

1. Proposes or declines to initiate or change the identification, classification, evaluation or educational placement of the pupil or the provision of a free, appropriate public education to the pupil;
2. Requests consent;
3. Plans to conduct a reevaluation; or
4. Approves or denies the written request of the parent(s) to initiate or change the classification, evaluation or educational placement of the pupil or the provision of a free, appropriate public education to the pupil.

(d) Written notice, according to (c)1 through 4 above, shall be provided to the parent(s) no later than 15 calendar days after making a determination and in no event less than 15 calendar days prior to the date for implementation, unless the parent(s) otherwise consents. If the parent(s) consents to implementation before the 15 days have elapsed, documentation of such consent shall be maintained.

(e) On receipt of any written parental request, written notice shall be provided to the parent(s) within 30 calendar days.

(f) Notice shall be written in language understandable to the general public and shall include:

1. A description of the action proposed or denied by the **district board of education** including:
  - i. An explanation of why it is taking such action; and

ii. A description of any options the district board of education considered and the reasons why those options were rejected;

2. A description of the procedures, tests, records or reports and factors used by the district board of education in determining whether to propose or deny an action; and

3. A copy of the procedural safeguards statement published by the New Jersey Department of Education which contains a full explanation of the procedural safeguards available to parents and/or adult pupils. A parent or adult pupil may refuse additional copies of the statement. District boards of education shall maintain documentation that the statement was made available each time written notice was provided to a parent and/or adult pupil.

(g) A district board of education shall take steps to ensure that the parent(s) is given the opportunity to participate in:

1. Evaluations of the pupil;
2. The determination of the pupil's eligibility for special education and/or related services;
3. The development of an individualized education program according to N.J.A.C. 6:28-3.6; and
4. The annual review.

(h) Meetings shall be conducted to determine eligibility and to develop, review and revise the pupil's individualized education program.

1. Each meeting shall include the following participants:

- i. The parent(s);
- ii. Teacher(s) having knowledge of the pupil's educational performance;
- iii. The pupil, where appropriate;
- iv. At least one member of the child study team; and
- v. Certified school personnel identifying the pupil as potentially educationally disabled, the school principal or designee and other appropriate individuals if they choose to participate.

2. Parent(s) shall be notified in writing of meetings early enough to ensure that they will have an opportunity to attend.

3. Meetings shall be scheduled at a mutually agreed upon time and place.

4. Notice of meetings shall indicate the purpose, time, location and participants.

**6:28-2.6 Mediation**

(a) For pupils age three through 21, when disputes arise under this chapter, mediation shall be available through the district board of education, the Department of Education through its county office and/or the Department of Education through the Division of Special Education. Mediation shall be provided in accordance with the following:

1. Attempts to resolve conflicts between the parent(s) and the district board of education prior to a request for a due process hearing are encouraged; however, a request for mediation is not a prerequisite to a hearing;

2. If either party is unwilling to participate in mediation, a request for a due process hearing under N.J.A.C. 6:28-2.7 may be made directly to the Department of Education;

3. Either party may be accompanied and advised at mediation by legal counsel or other person(s) with special knowledge or training with respect to the needs of pupils with educational disabilities; and

4. Each district board of education shall establish a mediation procedure consistent with this section.

(b) Mediation shall be provided as follows:

1. A request for mediation shall be made in writing to the superintendent of the local district, Child Study Supervisor of the Department of Education county office or the Director of the Division of Special Education, Department of Education with a copy to the other party. The mediation request shall specify the issue(s) in dispute and the relief sought;

2. A mediation conference shall be conducted within 20 calendar days after receipt of a written request at which time:

- i. Issues shall be determined;
- ii. Options explored; and
- iii. Mediation attempts made within the confines of New Jersey law and code;

3. The role of the mediator is not judgmental;

4. The mediation conference shall be:

- i. Informal; and
- ii. Held at a time and place reasonably convenient to the parties in the dispute;

5. If the mediation results in agreement, the conclusions shall be incorporated into a written agreement and signed by each party. If the mediation does not result in agreement, the mediator shall document the date and the participants at the meeting. No other record of the mediation shall be made;

6. The mediator may terminate the mediation after at least one meeting if in his or her judgment the parties are

not making progress toward resolving the issue(s) in dispute; and

7. Pending the outcome of mediation, no change shall be made to a pupil's classification, program or placement, unless both parties agree or emergency relief is granted by the Office of Administrative Law according to N.J.A.C. 6:28-2.7(g).

Amended by R.1989 d.239, effective May 15, 1989.

See: 21 N.J.R. 239(a), 21 N.J.R. 1385(a).

Formerly titled "Due process hearings"; mediation procedures delineated.

Amended by R.1990 d.450, effective September 4, 1990.

See: 22 N.J.R. 1412(a), 22 N.J.R. 2683(b).

In (a), added text regarding mediation for children below the age of three; in (b)7, corrected cross-reference.

Amended by R.1992 d.280, effective July 6, 1992.

See: 24 N.J.R. 1150(a), 24 N.J.R. 2434(a).

Term "educationally handicapped pupil" replaced by "pupil with an educational disability".

Amended by R.1993 d.393, effective August 2, 1993.

See: 25 N.J.R. 1318(a), 25 N.J.R. 3515(a).

Amended by R.1994 d.127, effective April 4, 1994.

See: 25 N.J.R. 5734(a), 26 N.J.R. 1495(b).

**Case Notes**

Reimbursement to parents of private school expenses denied. *Wexler v. Westfield Bd. of Ed.*, 784 F.2d 176 (3rd Cir.1986), certiorari denied 107 S.Ct. 99, 479 U.S. 825, 93 L.Ed.2d 49.

Attorney fees incurred in mediation; compensability. *E.M. v. Millville Bd. of Educ.*, D.N.J.1994, 849 F.Supp. 312.

Attorney fees recoverable under IDEA after resolution of complaint through mediation. *E.M. v. Millville Bd. of Educ.*, D.N.J.1994, 849 F.Supp. 312.

Parent could recover attorney fees recoverable following resolution of her special education complaint even though parent was allegedly to blame for forcing mediation. *E.M. v. Millville Bd. of Educ.*, D.N.J.1994, 849 F.Supp. 312.

Parent was "prevailing party" in mediation and entitled to award of attorney fees. *E.M. v. Millville Bd. of Educ.*, D.N.J.1994, 849 F.Supp. 312.

Use of expert was not "necessary" and court would award only \$100 of witness' \$500 fee. *E.M. v. Millville Bd. of Educ.*, D.N.J.1994, 849 F.Supp. 312.

Claim that aide at residential facility was educationally necessary was not the same as issue decided in first hearing concerning validity of settlement agreement; res judicata did not bar educational necessity claim. *D.R. by M.R. v. East Brunswick Bd. of Educ.*, D.N.J.1993, 838 F.Supp. 184, on remand 94 N.J.A.R.2d (EDS) 145.

Parents do have right to question whether program in settlement agreement meets requirements of statute if there has been change in circumstances. *D.R. by M.R. v. East Brunswick Bd. of Educ.*, D.N.J.1993, 838 F.Supp. 184, on remand 94 N.J.A.R.2d (EDS) 145.

Settlement agreement was unambiguous. *D.R. by M.R. v. East Brunswick Bd. of Educ.*, D.N.J.1993, 838 F.Supp. 184, on remand 94 N.J.A.R.2d (EDS) 145.

Competition in track meets was not available to handicapped student without required certificate. *C.W. v. Southern Gloucester Board*, 95 N.J.A.R.2d (EDS) 155.

Residential school's requirement that one-to-one aide be provided handicapped student for student to remain in program did not entitle parents to reopen settlement agreement. *D.R. v. East Brunswick Board of Education*, 93 N.J.A.R.2d (EDS) 31.

Implementation ordered of Stipulation of Settlement providing for mainstreaming of emotionally handicapped student at public high school. J.J. v. Atlantic City Board of Education, 92 N.J.A.R.2d (EDS) 251.

### 6:28-2.7 Due process hearings

(a) A due process hearing may be requested in regard to the identification, classification, evaluation or educational placement of a pupil age three through 21 and/or the provision of a free, appropriate public education to that pupil. For pupils above the age of 21, any disputes regarding the provision of programs and services to these pupils shall be handled as a contested case before the Commissioner of Education pursuant to N.J.A.C. 6:24.

(b) The parent(s) or adult pupil may request a hearing after receiving written notice of a proposed or denied action or after 30 calendar days have elapsed from the date of a written request by the parent(s) or adult pupil for a change with regard to the pupil.

(c) The district board of education or public agency responsible for the development of the pupil's individualized education program may request a hearing when it is unable to obtain required consent to a proposed action and shall request a due process hearing if it denies the parent(s) or adult pupil's request for an independent evaluation.

(d) Due process hearings shall be conducted in the following manner:

1. A request for a due process hearing shall be made in writing to the Director of the Division of Special Education, Department of Education with a copy to the other party.

2. The Department of Education shall acknowledge receipt of the request and provide information regarding free and low cost legal services to the parent(s).

3. Upon receiving the Department of Education's acknowledgment, the parties shall begin to exchange relevant records and information according to the time limits in N.J.A.C. 1:6A.

4. Within seven calendar days of receipt of the written request, the Department of Education shall conduct a conference.

- i. The purpose of the conference is to assist the parties in defining issues, identifying evidence, exchanging facts, stipulating facts and listing possible witnesses. Mediation will be available at the conference if both parties agree to participate.

- ii. The district board of education shall ensure that the chief school administrator or his or her designee with the authority of the chief school administrator attends the conference.

- iii. The conference shall be scheduled at a time and place reasonably convenient to the parties. Participation by the parent(s) is voluntary. Parent(s) may participate through the use of individual or conference calls.

- iv. The conference may result in either settlement, withdrawal or transmittal to the Office of Administrative Law according to N.J.A.C. 1:6A.

- v. If the conference results in settlement, the settlement shall be written and in compliance with New Jersey statute and rule.

- vi. If the conference results in transmittal, the Department of Education representative will prepare a written document at the conference that specifies the issues in dispute, stipulations, evidence list and witness list for each party. This document shall be immediately forwarded to the Office of Administrative Law. A copy of this document and the transmittal form shall be sent to the parties. The Department of Education representative shall telephone the clerk of the Office of Administrative Law and schedule a hearing date which shall be no later than 14 calendar days from the date of the conference, unless a later date is granted by a hearing officer at the request of either party. If the parent or adult pupil does not attend the conference and is not available by individual or conference call to schedule a hearing date, a date shall be assigned within the required timelines.

- (e) Subject to adjournments granted by the hearing officer, a final decision shall be rendered not later than 45 days after the receipt of the request for a hearing.

- (f) The decision of the administrative law judge is final, binding on both parties and to be implemented without undue delay, unless stayed according to N.J.A.C. 1:6A-5.4.

- (g) Either party may apply in writing for emergency relief as part of a request for a hearing, or at any time after such request according to N.J.A.C. 1:6A. The request shall be supported by an affidavit. The applicant shall provide copies of the request to the other party.

1. Prior to transmittal of the hearing request to the Office of Administrative Law, application for emergency relief shall be made to the Director of the Division of Special Education, Department of Education. After transmittal of a request for a due process hearing, any application for emergency relief shall be made directly to the Office of Administrative Law.

- (h) If the public agency responsible for implementing the individualized education program fails to implement a hearing decision of the Office of Administrative Law, a request for enforcement may be made by the parent(s). The request shall be made in writing to the Director of the Division of Special Education, Department of Education. On receipt of this request, implementation of the decision shall be assured according to Department of Education procedures.

(i) Pending the outcome of a due process hearing or any administrative or judicial proceeding, no change shall be made to the pupil's classification, program or placement unless both parties agree or emergency relief as part of a request for a due process hearing is granted by the Office of Administrative Law according to (g) above.

Amended by R.1989 d.239, effective May 15, 1989.  
See: 21 N.J.R. 239(a), 21 N.J.R. 1385(a).

Defined types of matters which are cause for due process hearing; at (b) detailed nature and steps of conference; recodification and new (f) added.

Amended by R.1990 d.450, effective September 4, 1990.  
See: 22 N.J.R. 1412(a), 22 N.J.R. 2683(b).

In (a), added text regarding due process hearing for children under three; in (b), deleted "district board of education" and added "adult pupil" and criteria for requesting a hearing; in new (c), stated when a public agency may request a hearing. Added new (d), (e) and (f), and redesignated existing (c) through (f) as (g) through (j), with revisions to (h), (i), and (j).

Amended by R.1992 d.280, effective July 6, 1992.  
See: 24 N.J.R. 1150(a), 24 N.J.R. 2434(a).

At (j) changed to comply with 34 CFR 300.513(a).  
Amended by R.1993 d.393, effective August 2, 1993.

See: 25 N.J.R. 1318(a), 25 N.J.R. 3515(a).  
Amended by R.1994 d.127, effective April 4, 1994.  
See: 25 N.J.R. 5734(a), 26 N.J.R. 1495(b).

#### Law Review and Journal Commentaries

Education—Administrative Law—Disabilities. Judith Nallin, 134 N.J.L.J. No. 15, 70 (1993).

#### Case Notes

New Jersey limitations did not bar parents from seeking retroactive reimbursement. *Bernardsville Bd. of Educ. v. J.H.*, D.N.J.1993, 817 F.Supp. 14.

Parents did not waive right to reimbursement by unilaterally placing student in private school and failing to initiate review proceedings. *Bernardsville Bd. of Educ. v. J.H.*, D.N.J.1993, 817 F.Supp. 14.

Parents exhausted administrative remedies. *Woods on Behalf of T.W. v. New Jersey Dept. of Educ.*, D.N.J.1992, 796 F.Supp. 767.

Stipulation of settlement reached in suit under IDEA seeking residential placement did not bar action for funding of residential placement and for compensatory education. *Woods on Behalf of T.W. v. New Jersey Dept. of Educ.*, D.N.J.1992, 796 F.Supp. 767.

Parents of emotionally disturbed student were "prevailing parties" entitled to recover attorney fees; services performed at administrative level. *Field v. Haddonfield Bd. of Educ.*, D.N.J.1991, 769 F.Supp. 1313.

Administrative law judge lacked jurisdiction to conduct "due process" hearing to determine financial responsibility of State Department of Human Services for special education costs of blind, retarded child. *L.P. v. Edison Bd. of Educ.*, 265 N.J.Super. 266, 626 A.2d 473 (L.1993).

Superior Court, Law Division did not have jurisdiction to conduct "due process" hearing to determine financial responsibility for special education costs of blind, retarded child. *L.P. v. Edison Bd. of Educ.*, 265 N.J.Super. 266, 626 A.2d 473 (L.1993).

School district has burden of proving that proposed individualized education program is appropriate. *Lascari v. Board of Educ. of Ramapo Indian Hills Regional High School Dist.*, 116 N.J. 30, 560 A.2d 1180 (1989).

Parents awarded private education reimbursement following improper placement by child study team entitled to interest on expenses from date of disbursement; counsel fee award not permitted (citing former N.J.A.C. 6:28-1.9). *Fallon v. Bd. of Ed., Scotch Plains-Fanwood*

*School District, Union Cty.*, 185 N.J.Super. 142, 447 A.2d 607 (Law Div.1982).

State-operated school offering special education was not proper party in due process hearing regarding implementation of individualized education program (IEP). *A.B. v. Jersey City Board of Education and Office of Education*, 96 N.J.A.R.2d (EDS) 295.

Untimely request precluded reimbursement due process hearing for unilateral enrollment of child in private school. *J.F. v. West Windsor-Plainsboro Board of Education*, 96 N.J.A.R.2d (EDS) 119.

Special education student subject to regular school disciplinary process if different standard not applicable. *M.G. v. Brick Township Board of Education*, 96 N.J.A.R.2d (EDS) 82.

School district may evaluate potentially educationally disabled student over parent's objection. *Morris School District v. V.S.*, 96 N.J.A.R.2d (EDS) 37.

Father's unexcused failure to appear following notice required dismissal of request for due process hearing on disciplined student's individualized education program. *G.M. v. Vineland Board*, 95 N.J.A.R.2d (EDS) 233.

Inappropriate, aggressive and hostile behavior necessitated an order permitting school district to test and evaluate child despite lack of consent from parents. *Jersey City Board v. T.W.*, 95 N.J.A.R.2d (EDS) 211.

Child study team evaluation requested by one parent was not required for progressing student in joint custody after divorce when opposed by other parent. *R.F. v. Saddle Brook Board*, 95 N.J.A.R.2d (EDS) 187.

Student with serious behavioral and educational problems required evaluation without parental consent. *Jersey City Board v. C.F.*, 95 N.J.A.R.2d (EDS) 113.

Absence of evidence that student would regress; speech and language therapy summer session. *K.K. v. Washington Township Board of Education*, 94 N.J.A.R.2d (EDS) 171.

12-year old student was given an emergency relief due process hearing and ordered to undergo a Child Study Team Evaluation. *Quinton Township Board of Education v. S.W.*, 94 N.J.A.R.2d (EDS) 130.

Petitioner's claim barred; settlement agreement. *J.L. v. Elizabeth Board of Education*, 94 N.J.A.R.2d (EDS) 119.

Application by parents for emergent relief to return their emotionally disturbed daughter to high school transitional program pending hearing was denied. *S.H. v. Lenape*, 93 N.J.A.R.2d (EDS) 87.

Mother's changing her residence precluded entitlement to due process hearing challenging refusal to place son as tuition student. *N.A. v. Willingboro Board of Education*, 92 N.J.A.R.2d (EDS) 19.

#### 6:28-2.8 Disciplinary action

(a) Pupils with educational disabilities are subject to the same district board of education discipline policies or procedures as nondisabled pupils, unless the pupil's individualized education program includes exemptions to those policies or procedures. The individualized education program shall be implemented in accordance with (b) through (h) below.

(b) Pupils with educational disabilities may be suspended for up to 10 consecutive or nonconsecutive school days without initiating action by the child study team.

(c) Prior to effecting any discipline which would result in a significant change in placement, the child study team shall conduct a reevaluation according to N.J.A.C. 6:28-3.7.

(d) The following standards shall be used to determine whether a proposed discipline constitutes a significant change in placement:

1. If the proposed discipline involves expulsion or suspension for an indefinite period of time or for more than 10 consecutive school days, the expulsion or suspension constitutes a significant change in placement.

2. If the proposed discipline involves suspension of more than 10 non-consecutive school days, the suspension shall be reviewed to determine if it creates a pattern of exclusion which constitutes a significant change in placement.

(e) When a pupil with an educational disability is suspended, the principal shall forward, at the time of suspension, written notification and a description of the reasons for such action to the parent(s) with a copy to the case manager. Such notification shall occur prior to suspension if this action would result in the pupil being excluded for more than 10 days in the school year. The case manager shall review the status of the pupil in order to:

1. Determine if the suspension results in a significant change in placement;
2. Document the review and the determination made; and
3. If the suspension or expulsion would result in a significant change in placement, the case manager shall:
  - i. Immediately advise the principal that a reevaluation shall be conducted prior to the suspension; and
  - ii. Initiate a reevaluation.

(f) On completion of the reevaluation, the child study team shall determine if the pupil's behavior was primarily caused by his or her educational disability and, if so, whether the pupil's current educational placement is appropriate.

1. If the child study team determines that the pupil's behavior was primarily caused by the pupil's educational disability, the district may not suspend or expel the pupil. However, the child study team may propose a change in the pupil's placement.

2. If the child study team determines that the pupil's behavior was not primarily caused by his or her educational disability, the district may suspend or expel the pupil. However, at no time shall the district board of education cease educational services to that pupil.

(g) Upon making each of the determinations specified in (d), (e) and (f) above, the child study team shall prepare and forward to the principal and the parent(s) or adult pupil a written statement setting forth their conclusions and recommendations, if any, and a statement that mediation or a due process hearing may be requested according to N.J.A.C. 6:28-2.6 or 2.7.

(h) If there is ongoing peril of physical harm to self or others or of substantial disruption to the educational process, and the suspension would result in a significant change in placement, the pupil may be temporarily suspended while the district immediately seeks emergency relief.

Amended by R.1989 d.239, effective May 15, 1989.

See: 21 N.J.R. 239(a), 21 N.J.R. 1385(a).

Added new (d) prohibiting suspension for more than 10 school days unless emergency relief is granted.

Amended by R.1990 d.450, effective September 4, 1990.

See: 22 N.J.R. 1412(a), 22 N.J.R. 2683(b).

In (a), "district board of education . . . policies"; replaced (a)1. and 2. with text regarding "individualized education program"; replaced text in (b) through (e) with new evaluation standards; added new (f) and redesignated old (f) as (g); deleted old (g).

Amended by R.1992 d.280, effective July 6, 1992.

See: 24 N.J.R. 1150(a), 24 N.J.R. 2434(a).

Term "educationally handicapped pupil" replaced by "pupil with an educational disability".

Amended by R.1995 d.634, effective December 4, 1995.

See: 27 N.J.R. 3263(a), 27 N.J.R. 4887(a).

#### Case Notes

Juvenile was not denied effective assistance of counsel in delinquency adjudication for serious offenses where evidence of guilt was overwhelming. State in Interest of S.T., 233 N.J.Super. 598, 559 A.2d 861 (A.D.1989).

Teacher's petition to bring expulsion proceedings against student who assaulted her was dismissed where assault arose from student's handicap. Barna v. Irvington Board of Education, 96 N.J.A.R.2d (EDU) 598.

Request to return suspended kindergartener to classroom pending completion of evaluation was denied due to student's continued aggressive behavior. M.J. v. Norwood Board of Education, 96 N.J.A.R.2d (EDS) 193.

School board was entitled to emergency relief to continue student's suspension pending further hearing on the matter. Brick Township Board of Education v. R.I., 96 N.J.A.R.2d (EDS) 107.

Student suspended for posing threat to others could not return without reevaluation. Englewood Board v. C.M., 95 N.J.A.R.2d (EDS) 112.

Handicapped student's suspension upheld. Deptford Township Board of Education v. E.S., 95 N.J.A.R.2d (EDS) 21.

Fight leading to disciplinary suspension not related to student's educational disability. Deptford v. E.S., 95 N.J.A.R.2d (EDS) 21.

Expulsion; initial evaluation by child study team. Edison Board of Education v. R.H., 94 N.J.A.R.2d (EDS) 35.

Disciplinary record required child study team evaluation over refusal of parents to give consent. Ewing Township v. J.R., 93 N.J.A.R.2d (EDS) 94.

#### 6:28-2.9 Pupil records

(a) All pupil records shall be maintained according to N.J.A.C. 6:3-6.

(b) The parent(s), adult pupil or their designated representative shall be permitted to inspect and review the contents of the pupil's records maintained by the district board of education under N.J.A.C. 6:3-6 without unnecessary delay and before any meeting regarding the individualized education program.

(c) Any consent required for pupils with educational disabilities under N.J.A.C. 6:3-6 shall be obtained according to N.J.A.C. 6:28-1.3 "Consent" and 2.3(a).

Amended by R.1989 d.239, effective May 15, 1989.  
See: 21 N.J.R. 239(a), 21 N.J.R. 1385(a).

Old (b)1.-3. deleted pertaining to steps in appealing contents of records.

Amended by R.1990 d.450, effective September 4, 1990.  
See: 22 N.J.R. 1412(a), 22 N.J.R. 2683(b).

New (c) added referencing "consent" rules.  
Amended by R.1992 d.280, effective July 6, 1992.  
See: 24 N.J.R. 1150(a), 24 N.J.R. 2434(a).

Term "educationally handicapped pupil" replaced by "pupil with an educational disability".

Amended by R.1994 d.127, effective April 4, 1994.

See: 25 N.J.R. 5734(a), 26 N.J.R. 1495(b).

#### Case Notes

Due process hearing held to contest child study team's proposal to remove child from residential school into home and local school programs; determination of appropriate placement. *Geis v. Bd. of Ed., Parsippany-Troy Hills, Morris Cty.*, 589 F.Supp. 269 (D.N.J.1984), affirmed 774 F.2d 575 (3rd Cir.1985).

Federal due process requirements (citing former N.J.A.C. 6:28-1.9). *Levine v. State Dept. of Institutions and Agencies*, 84 N.J. 234, 418 A.2d 229 (1980).

No parental right to pupil records under Right to Know Law absent governing regulations from State Board of Education (citing former N.J.A.C. 6:28-2.4). *Robinson v. Goodwin*, 1975 S.L.D. 6.

i. The comprehensive health appraisal shall include, but not be limited to, an assessment of prenatal, perinatal and postnatal factors, as well as developmental and early childhood illnesses and injuries and a review of health screenings.

ii. The physician employed by the district board of education shall examine the pupil, including all body systems, and write a summary indicating the effect of any current health problem or medical treatment on the pupil's learning.

iii. If the parent(s) of the pupil chooses to employ a private physician, a report of this comprehensive health appraisal shall be completed on a form developed by the school physician.

iv. The school nurse shall review and summarize all other available health information regarding the pupil and transmit it to the child study team.

2. A psychological assessment shall be the responsibility of a school psychologist employed by the district board of education and shall include an appraisal of the current cognitive, social, adaptive and emotional status of the pupil.

3. An educational assessment shall be the responsibility of a learning disabilities teacher-consultant employed by the district board of education and shall include an evaluation and analysis of the pupil's academic performance and learning characteristics.

4. A social assessment shall be the responsibility of a school social worker employed by the district board of education and shall include an evaluation of the pupil's adaptive social functioning and emotional development and of the family, social and cultural factors which influence the pupil's learning and behavior in the educational setting. The social assessment shall include communication with the pupil and his or her parent(s).

5. For children ages three to five, a speech and language assessment shall be the responsibility of a speech correctionist or speech-language specialist employed by the district board of education. The assessment shall include observation of the pupil, communication with the parent(s) and an evaluation and analysis of speech and language development.

(f) The child study team members shall prepare written reports of the results of each of their assessments. The reports must include a statement regarding relevant behavior noted during the observation of the pupil and the relationship of that behavior to the pupil's academic functioning.

(g) Evaluation by additional specialists may be required as listed in N.J.A.C. 6:28-3.5(d).

(h) The requirements for evaluation by the child study team do not apply to a pupil confined at home or to a

hospital for 60 calendar days or less by a physician or to a pupil with a speech or language problem when the nature of that problem does not warrant a comprehensive evaluation by a child study team.

(i) If the reports and evaluations of other New Jersey public school district child study team members, Department of Education approved clinics or agencies, Educational Services Commissions or Jointure Commissions or professionals in private practice are accepted by members of the child study team, such acceptance shall be noted in writing and shall become part of the report(s) of the child study team member(s). If a report or evaluation is rejected, a written rationale shall be provided.

(j) By June 30 of a pupil's last year in a program for the preschool handicapped, the child study team shall reevaluate and, if appropriate, classify according to N.J.A.C. 6:28-3.5.

Amended by R.1987 d.36, effective January 5, 1987.  
See: 18 N.J.R. 1771(a), 19 N.J.R. 76(a).

(j)4 added.

Amended by R.1989 d.239, effective May 15, 1989.  
See: 21 N.J.R. 239(a), 21 N.J.R. 1385(a).

Old (c) deleted, remaining text recodified and requirement added at (d)5. regarding speech language assessment of three to five year olds.  
Amended by R.1990 d.450, effective September 4, 1990.

See: 22 N.J.R. 1412(a), 22 N.J.R. 2683(b).

Revisions made to (a), (f) and (h).

Amended by R.1992 d.280, effective July 6, 1992.

See: 24 N.J.R. 1150(a), 24 N.J.R. 2434(a).

At (d) expanded requirements regarding the use of functional and standardized tests in child study team evaluations; at (f) amended to comply with 34 CFR 300.543.

Amended by R.1994 d.127, effective April 4, 1994.

See: 25 N.J.R. 5734(a), 26 N.J.R. 1495(b).

#### Case Notes

Equal educational opportunity to institutionalized persons. *Levine v. State Dept. of Institutions and Agencies*, 84 N.J. 234, 418 A.2d 229 (1980).

Nonconsensual special education evaluation was appropriate where first grade student had difficulty finishing tasks and had engaged in inappropriate behavior since entering kindergarten. *Wayne Township v. T.F. and M.F.*, 96 N.J.A.R.2d (EDS) 336.

Student's failing grades, trancies, and disciplinary suspensions supported special education evaluation. *C.B. v. Jackson Township Board of Education*, 96 N.J.A.R.2d (EDS) 333.

Noncustodial parent lacked authority to consent to special education evaluation. *K.W. v. Sparta Board of Education*, 96 N.J.A.R.2d (EDS) 286.

Initial comprehensive special education evaluation of high school student suffering from anorexia nervosa was appropriate where student would otherwise be too old to register for high school courses. *J.C. v. Elmwood Park Board of Education*, 96 N.J.A.R.2d (EDS) 208.

Child study team evaluation of student failing all classes and exhibiting behavioral problems was ordered despite lack of parental consent. *Freehold Regional Board of Education v. M.DeL.*, 96 N.J.A.R.2d (EDS) 191.

Evaluation of student as perceptually impaired with Attention Deficit Disorder was appropriate. *Millville Board of Education v. J.J.*, 96 N.J.A.R.2d (EDS) 182.

Poor academic performance and consistent misbehavior warranted comprehensive evaluation of child over parent's consent to determine

value of special education classification. Voorhees Township Board In Interest of S.H., 95 N.J.A.R.2d (EDS) 228.

Intervention in form of an evaluation by child study team was necessary for child with possible educational disability notwithstanding parent's lack of consent. Parsippany-Troy Hills Board v. B.H., 95 N.J.A.R.2d (EDS) 225.

Child's possible educational disability warranted comprehensive evaluation by child study team despite parent's failure to appear. Union Township Board v. T.K.J., 95 N.J.A.R.2d (EDS) 224.

Inappropriate, aggressive and hostile behavior necessitated an order permitting school district to test and evaluate child despite lack of consent from parents. Jersey City Board v. T.W., 95 N.J.A.R.2d (EDS) 211.

Lack of parental consent did not preclude evaluation of failing student for special education services. South Brunswick Board v. J.R., 95 N.J.A.R.2d (EDS) 161.

Parent could not further delay in arranging neurological examination for impaired child. Upper Freehold Regional v. T.S., 95 N.J.A.R.2d (EDS) 123.

Student with serious educational and behavioral problems with sexual overtones required emergent relief to complete child study team evaluations. Dumont Board v. G.C., 95 N.J.A.R.2d (EDS) 119.

Student with serious behavioral and educational problems required evaluation without parental consent. Jersey City Board v. C.F., 95 N.J.A.R.2d (EDS) 113.

Evaluation was required of student over parents' refusal upon arrest for possession of weapon. State Operated School v. H.J., 95 N.J.A.R.2d (EDS) 84.

Child's emotional and cognitive difficulties required evaluation over parents' refusal. Ewing Township v. G.R., 95 N.J.A.R.2d (EDS) 75.

Parents' costs for untimely assessment of neurologically impaired child were reimbursable. A.S. v. Teaneck Board, 95 N.J.A.R.2d (EDS) 45.

Mother's cooperation in evaluation of child for placement in special education class was required. School District v. M.B., 95 N.J.A.R.2d (EDS) 8.

Referral to child study team for evaluation as to placement in special education class was necessary for student with learning disability. Board of Education v. T.W., 95 N.J.A.R.2d (EDS) 6.

Student with drug problem not permitted to matriculate; Child Study Team given opportunity to conduct evaluation. P.F. v. North Hunterdon Board of Education, 94 N.J.A.R.2d (EDS) 213.

School Board's implementation of Independent Education Program for child classified as mildly retarded was proper. Caldwell-West Caldwell Board of Education v. M. B. 94 N.J.A.R.2d (EDS) 93.

Placement of neurologically impaired 6th-grader back in all special education 5th-grade classes was unnecessary. A.B. v. Westfield Board of Education, 94 N.J.A.R.2d (EDS) 85.

Classification of child as multiply handicapped and placement of child in a special education program. Orange Board of Education v. M.W., 94 N.J.A.R.2d (EDS) 18.

Child's poor school record and mother's failure to cooperate required evaluation without parental consent. Caldwell-West Caldwell v. M.B., 93 N.J.A.R.2d (EDS) 230.

Disruptive and threatening behavior justified referral of student with suspect disability for evaluation. State-Operated School District v. D.A., 93 N.J.A.R.2d (EDS) 151.

Student's continued poor progress required evaluation for handicap. Marlboro v. A.P., 93 N.J.A.R.2d (EDS) 149.

Disciplinary record required child study team evaluation over refusal of parents to give consent. Ewing Township v. J.R., 93 N.J.A.R.2d (EDS) 94.

Immediate evaluation of ten-year-old student ordered; student displayed educational deficiencies, poor behaviors and increased distractibility; complete absence of parental cooperation. East Brunswick Board of Education v. K.P., 93 N.J.A.R.2d (EDS) 77.

Child study team evaluation ordered for illiterate former street urchin. Middletown Township Board of Education v. H.L., 93 N.J.A.R.2d (EDS) 19.

Evaluation by child study team warranted for 10-year-old student exhibiting aggressive behavior. Somerville Board of Education v. L.M., 92 N.J.A.R.2d (EDS) 255.

Eighth-grade student referred to child study team for evaluation and possible classification. East Brunswick Board of Education v. K.L., 92 N.J.A.R.2d (EDS) 248.

Board authorized to evaluate student for purposes of determining special education needs; no parental cooperation. North Brunswick Board of Education v. S.S., 92 N.J.A.R.2d (EDS) 155.

Necessity of determining whether inappropriate classroom behavior was result of handicapped condition warranted completion of Child Study Team evaluation; parental opposition. Lodi Board of Education v. N.W., 92 N.J.A.R.2d (EDS) 108.

Record warranted order requiring evaluations of brother-and-sister twins. North Bergen Board of Education v. N.M. and A.M., 92 N.J.A.R.2d (EDS) 107.

Child Study Team evaluation was appropriate; absence of parental cooperation. Elizabeth Board of Education v. S.S., 92 N.J.A.R.2d (EDS) 103.

Student's inappropriate classroom behavior warranted Child Study Team evaluation to determine whether such behavior was result of handicapped condition. Lodi Board of Education v. N.W., 92 N.J.A.R.2d (EDS) 101.

Necessity for child study team evaluation demonstrated; absence of parental cooperation. Board of Education of Township of Bedminster v. J.T., 92 N.J.A.R.2d (EDS) 7.

Classification issues explained. R.D.H. v. Bd. of Ed., Flemington-Raritan Regional School District, Hunterdon Cty., 1975 S.L.D. 103, 1975 S.L.D. 111, 1976 S.L.D. 1161.

Classification and psychiatric evaluation. D.I. v. Neumann, 1974 S.L.D. 1006.

### 6:28-3.5 Determination of eligibility

(a) When an initial evaluation is completed, a meeting according to N.J.A.C. 6:28-2.3(h) shall be convened. The child study team shall attend. The purpose of the meeting shall be to:

1. Determine whether the pupil is eligible for special education and/or related services; and

2. If eligible, determine a single classification category as defined in (c) below.

- i. For pupils age five through 21, when a pupil's assessment data suggest multiple handicapping conditions but do not meet the criteria for the classification of multiply handicapped, the classification category that best describes the pupil's educational status and needs shall be assigned. Additional behavior or conditions and individual program and/or service needs shall be included in the individualized education program.

ii. For pupils age three through five who have an identified handicapping condition and/or a measurable developmental impairment who require and would benefit from special education and related services, the classification of preschool handicapped shall be assigned.

(b) When a speech-language evaluation is completed, a meeting shall be held to determine eligibility for speech-language services. Participants in the meeting shall be the speech correctionist or speech-language specialist, the parent(s) and at least one of the following:

1. A teacher having knowledge of the pupil's educational performance;
2. Another speech correctionist or speech-language specialist; or
3. Other school personnel qualified to provide or supervise special education.

(c) Whether or not a pupil is determined eligible for special education and/or related services, the parent(s) and the staff member identifying the potentially educationally disabled pupil shall be given a written summary, signed by the child study team, of all decisions and any recommended course(s) of action.

1. When the pupil has been classified as perceptually impaired according to (d)8ii below the summary shall include a statement of whether the pupil has a specific learning disability and the basis for making that determination. The summary shall include a statement that the perceptual impairment is not the result of environmental, cultural or economic disadvantage.

(d) Classification of pupils determined to be eligible for special education and/or related services shall be determined collaboratively by the child study team, a teacher having knowledge of the pupil's educational performance, parent(s) and, if they choose to participate, the school principal and staff members identifying the potentially educationally disabled pupil. Classification according to the following definitions shall be based on all evaluations conducted:

1. "Auditorily handicapped" means an inability to hear within normal limits due to physical impairment or dysfunction of auditory mechanisms characterized by (c)1i and ii below. Evaluations by a specialist qualified in the field of audiology and a speech and language evaluation by a certified speech correctionist or speech-language specialist are required.

i. The pupil is impaired in processing linguistic information through hearing, with or without amplification; and

ii. The loss of hearing may be permanent or fluctuating and adversely affects the pupil's education.

2. "Autistic" means a pervasive developmental impairment characterized by (c)2i, ii, and iii below. An evaluation by a certified speech correctionist or speech-language specialist and an evaluation by a physician trained in neurodevelopmental assessment is required.

i. Social-emotional and communication development impaired in ways that are not merely predictable from cognitive and/or sensory impairment(s);

ii. Extreme aberrant responses to one or more aspects of the environment, such as insistence on sameness, resistance to change, stereotypic behaviors, lack of responsiveness to others or repetitive movements; and

iii. Onset in infancy or childhood.

3. "Chronically ill" means a health condition such as tuberculosis, cardiac condition, leukemia, asthma, seizure disorder or other medical disability which makes it impractical to receive adequate instruction through a regular school program. Evaluation by the school physician or his or her review and written acceptance of the medical report of another physician is required. The school nurse shall assist in the accumulation of the data necessary to determine eligibility.

4. "Communication handicapped" means impaired native speech or language which is outside the range of acceptable variation, adversely affects a pupil's educational performance and is not due primarily to hearing impairment as defined under "auditorily handicapped." It is characterized by (d)4i or ii below. An evaluation by a certified speech correctionist or speech-language specialist is required.

i. "Communication handicapped" means a severe speech or language disorder which interferes with the ability to use oral language to communicate;

ii. "Eligible for speech-language services" means a mild to moderate disorder in language, articulation, voice or fluency which requires instruction by a speech correctionist or speech-language specialist. The evaluation shall be conducted according to N.J.A.C. 6:28-3.4(h).

5. "Emotionally disturbed" means the exhibiting of seriously disordered behavior over an extended period of time which adversely affects educational performance and shall be characterized by (d)5i or ii below. An evaluation by a psychiatrist experienced in working with children is required.

i. An inability to build or maintain satisfactory interpersonal relationships;

ii. Behaviors inappropriate to the circumstances, a general or pervasive mood of depression or the development of physical symptoms or irrational fears.

6. "Mentally retarded" means cognitive, social and academic functioning which is seriously below age expecta-

tions. Such functioning is comprehensive in nature being demonstrated in home, school and community settings, and characterized by one of the following:

i. "Educable" means a level of cognitive development and adaptive behavior in home, school and community settings that are moderately below age expectations with respect to all of the following:

- (1) The quality and rate of learning;
- (2) The use of symbols for the interpretation of information and the solution of problems;
- (3) Performance on an individually administered test of intelligence that falls within a range of two to three standard deviations below the mean.

ii. "Trainable" means a level of cognitive development and adaptive behavior that is severely below age expectations with respect to all of the following:

- (1) The ability to use symbols in the solution of problems of low complexity;
- (2) The ability to function socially without direct and close supervision in home, school and community setting;
- (3) Performance on an individually administered test of intelligence that falls three standard deviations or more below the mean.

iii. "Eligible for day training" means a level of functioning profoundly below age expectations whereby on a consistent basis the pupil is incapable of giving evidence of understanding and responding in a positive manner to simple directions expressed in the child's primary mode of communication and cannot in some manner express basic wants and needs.

7. "Multiply handicapped" means the presence of two or more educationally disabling conditions which interact in such a manner that programs designed for the separate disabling conditions will not meet the pupil's educational needs. All evident educational disabilities shall be documented. Eligibility for speech-language services as defined in this section shall not be one of the disabling conditions which forms the basis for the classification of a pupil as "multiply handicapped." Evaluation by all specialists required in this subsection for the separate disabling conditions being considered for the determination of "multiply handicapped" are required.

8. "Neurologically or perceptually impaired" means impairment in the ability to process information due to physiological, organizational or integrational dysfunction which is not the result of any other educationally disabling condition or environmental, cultural or economic disadvantage and is characterized by (d)8i or ii below.

i. "Neurologically impaired" means a specific impairment or dysfunction of the nervous system or traumatic brain injury which adversely affects the education of a pupil. An evaluation by a physician trained in neuro-developmental assessment is required.

ii. "Perceptually impaired" means a specific learning disability manifested by a severe discrepancy between the pupil's current achievement and intellectual ability in one or more of the following areas:

- (1) Basic reading skills;
- (2) Reading comprehension;
- (3) Oral expression;
- (4) Listening comprehension;
- (5) Mathematic computation;
- (6) Mathematic reasoning; and
- (7) Written expression.

9. "Preschool handicapped" means those children age three through five who have an identified disabling condition and/or a measurable developmental impairment who require and would benefit from special education and related services.

10. "Orthopedically handicapped" means a condition which, because of malformation, malfunction or loss of bones, muscle or body tissue, necessitates special education and/or related services. An evaluation by a physician qualified to conduct an orthopedic evaluation is required.

11. "Socially maladjusted" means a consistent inability to conform to the standards for behavior established by the school. Such behavior is seriously disruptive to the education of the pupil or other pupils and is not due to emotional disturbance as defined in (d)5 above. If determined necessary by the child study team, an evaluation by a psychiatrist experienced in working with children is to be obtained.

12. "Visually handicapped" means an inability to see within normal limits as characterized by (d)12i or ii below. An evaluation by a specialist qualified to determine visual disability is required. Visually handicapped pupils eligible for special education and/or related services shall be reported to the Commission for the Blind and Visually Impaired.

i. "Blind" means a loss of acuity or field restriction so great that a pupil cannot rely on sight to learn.

ii. "Partially sighted" means a field restriction or loss of visual acuity which adversely affects a pupil's education, but which does not warrant classification of a pupil as "blind." A partially sighted pupil is able to use sight to learn.

Public Notice: The Superior Court, Appellate Division invalidated N.J.A.C. 6:28-3.5(d) and (e)8.

See: 17 N.J.R. 2464(b).

Amended by R.1987 d.36, effective January 5, 1987.

See: 18 N.J.R. 1771(a), 19 N.J.R. 76(a).

Deleted (d) and amended (e)8 and recodified (d)8 to comply with decision in *In re Repeal of N.J.A.C. 6:28, 204 N.J. Super. 158 (App.Div. 1985)* invalidating former (d) and (e)8.

Amended by R.1989 d.239, effective May 15, 1989.

See: 21 N.J.R. 239(a), 21 N.J.R. 1385(a).

Added requirement at (a)2., i, ii that single classification must be made and at new (c) determination must be made collaboratively; changed references from "speech correction" to "speech language services".

Amended by R.1990 d.450, effective September 4, 1990.

See: 22 N.J.R. 1412(a), 22 N.J.R. 2683(b).

Revised definitions of "chronically ill" and "eligible for day training".

Amended by R.1991 d.337, effective July 1, 1991.

See: 23 N.J.R. 1053(b), 23 N.J.R. 2032(b).

Definition of "Autistic" added.

Amended by R.1992 d.280, effective July 6, 1992.

See: 24 N.J.R. 1150(a), 24 N.J.R. 2434(a).

At new (b) at least three participants at eligible meetings in compliance with federal mandate; (c)8i added traumatic brain injury; (d)8ii amended to comply with 34 CFR 300.54 and 300.543.

Amended by R.1994 d.127, effective April 4, 1994.

See: 25 N.J.R. 5734(a), 26 N.J.R. 1495(b).

#### Case Notes

Recommended placement in new public school program did not violate the Individuals with Disabilities Education Act. *Fuhrmann on Behalf of Fuhrmann v. East Hanover Bd. of Educ., C.A.3 (N.J.)1993, 993 F.2d 1031, rehearing denied.*

Recommended placement in preschool handicapped program satisfied requirement for an "appropriate" education. *Fuhrmann on Behalf of Fuhrmann v. East Hanover Bd. of Educ., C.A.3 (N.J.)1993, 993 F.2d 1031, rehearing denied.*

Reimbursement to parents of private school expenses denied. *Wexler v. Westfield Bd. of Ed., 784 F.2d 176 (3rd Cir.1986), certiorari denied 107 S.Ct. 99, 479 U.S. 825, 93 L.Ed.2d 49 (1986).*

Juvenile's confession was not rendered inadmissible; police interrogation was not interpreted for Spanish-speaking guardian. *State in Interest of J.F., 286 N.J. Super. 89, 668 A.2d 426 (A.D.1995).*

Former N.J.A.C. 6:28-3.5(e)8 defining "pre-school handicapped" set aside as impermissibly narrowing statutory language and frustrating statutory policy. *In re: Repeal of N.J.A.C. 6:28, 204 N.J. Super. 158, 497 A.2d 1272 (App.Div.1985).*

Special education high school student would not be reclassified from neurologically impaired to autistic. *R.S. v. Ridgewood Board of Education, 96 N.J.A.R.2d (EDS) 299.*

Failure of mentally retarded student to progress supported nonconsensual classification as full-time special education student and placement in moderate cognitive program. *Elizabeth Board of Education v. L.H., 96 N.J.A.R.2d (EDS) 297.*

Classification of student as perceptually impaired was ordered over parental objection where three child study teams agreed on student's status as disabled. *Marlboro Township Board of Education v. R.F., 96 N.J.A.R.2d (EDS) 184.*

Emotionally disturbed student was entitled to special education classification and home study. *R.S. v. East Brunswick Board of Education, 96 N.J.A.R.2d (EDS) 177.*

Reimbursement of evaluation and counseling costs for nonclassified student were denied since nonclassified students are not covered under Individuals with Disabilities Education Act. *M.C. v. Franklin Board of Education, 96 N.J.A.R.2d (EDS) 175.*

Student previously classified as neurologically impaired would be reclassified as educable mentally retarded after her consistently low test scores were found not to be solely due to her hyperactivity and distractibility during test taking. *A.E. v. Jersey City Board of Education, 96 N.J.A.R.2d (EDS) 89.*

Student not eligible for special education services when no disability found to justify such services. *F.C. v. Palmyra Board of Education, 96 N.J.A.R.2d (EDS) 39.*

Multi-handicapped student was placed in private academy where placement in public high school would likely result in failure. *C.D. v. West Windsor-Plainsboro Board of Education, 96 N.J.A.R.2d (EDS) 22.*

Residential placement for handicapped child denied when current day placement provided fair and appropriate education and residential placement not made for education reasons. *B.L. v. Board of Education of the Borough of Berlin, 96 N.J.A.R.2d (EDS) 12.*

Poor academic performance and behavior necessitated child's classification, program and placement even though parent was inaccessible and unresponsive. *M.F. v. Piscataway Board, 95 N.J.A.R.2d (EDS) 206.*

Student whose behavior was due directly to heavy marijuana use was not eligible for special education services. *J.M. v. Freehold Township, 95 N.J.A.R.2d (EDS) 133.*

Discrepancy between academic performance and cognitive abilities did not warrant special education classification. *N.C. v. Englewood Board, 95 N.J.A.R.2d (EDS) 99.*

Emotionally disturbed student; special education. *South Orange-Maplewood Board of Education v. A.I., 94 N.J.A.R.2d (EDS) 168.*

Parents of rebellious student; no determination was made that student was educationally disabled. *B.B. v. Hillsborough Board of Education, 94 N.J.A.R.2d (EDS) 71.*

Placement in full-time residential educational facility was not warranted absent an adequate measurement of mentally disabled student's potential. *J.C. v. Department of Human Services, 93 N.J.A.R.2d (EDS) 267.*

Costs of private schooling for handicapped child whose communication difficulty was mild were not reimbursable. *A.M. v. Board of Education, 93 N.J.A.R.2d (EDS) 133.*

Record supported classification of child as neurologically-impaired; placement in one ½ day kindergarten class and one ½ day neurologically-impaired class. *D.M. v. Union City Board of Education, 92 N.J.A.R.2d (EDS) 143.*

Student's asthma did not adversely affect him so as to prevent him from receiving adequate instruction in regular school program; not chronically ill. *Hopewell Valley Board of Education v. S.L., 92 N.J.A.R.2d (EDS) 91.*

Chronically ill student not special education student entitled to related service of transportation. *R.F. v. Hackensack Board of Education, 92 N.J.A.R.2d (EDS) 59.*

Recovering anorexic was no longer "emotionally disturbed" or "chronically ill". *J.C. v. Elmwood Park Board of Education, 92 N.J.A.R.2d (EDS) 25.*

Ten-year-old student perceptually impaired; implementation of individualized educational program ordered. *In Matter of S.R., 92 N.J.A.R.2d (EDS) 4.*

Vision and hearing difficulties did not render student classifiable as handicapped. *A.K. v. Clinton Town Board of Education, 92 N.J.A.R.2d (EDS) 1.*

Former regulations silent on reimbursement to parents. *Holmdel Bd. of Ed. v. G.M., 6 N.J.A.R. 96 (1983).*

Proper classification under former N.J.A.C. 6:28-1.2(g) of multiply handicapped pupil. *A.N. v. Clark Bd. of Ed., 5 N.J.A.R. 152 (1983).*

New York resident's child, domiciled in New Jersey, not entitled to New Jersey free education. *V.R. v. Bd. of Ed., Hamburg Boro., Sussex Cty.*, 2 N.J.A.R. 283 (1980).

Expulsion for disorderly and disruptive behavior. *J.P. v. Bd. of Ed., Matawan-Aberdeen Regional School District*, 1979 S.L.D. 382, 1979 S.L.D. 389.

Treatment of mainstreaming concept under former N.J.A.C. 6:28-2.1. *O'Lexy v. Bd. of Ed., Deptford Twp., Gloucester Cty.*, 1972 S.L.D. 641.

### 6:28-3.6 Individualized education program

(a) The individualized education program shall be written upon completion of the child study team's evaluation according to the timelines in N.J.A.C. 6:28-2.1(c), and prior to the pupil's placement in a special education program.

(b) The individualized education program shall be developed with the participation of the parent(s) and members of the district board of education child study team who have participated in the evaluation and any additional persons required to attend the meeting according to N.J.A.C. 6:28-2.3(h).

(c) When a pupil has been classified as eligible for speech-language services or the school physician has determined a pupil with an educational disability needs home instruction, the individualized education program meeting shall be as follows:

1. For pupils classified eligible for speech-language services, the meeting shall include the same participants as required by N.J.A.C. 6:28-3.5(b). When appropriate, the pupil shall attend the meeting.

2. Other certified school personnel and the principal or designee may participate in the meeting.

3. When a pupil with an educational disability has been determined by the school physician to need home instruction, a meeting shall be conducted to review and revise the individualized education program according to (j) below.

(d) With the exception of an individualized education program for a pupil classified as eligible for speech-language services, the individualized education program shall include, but not be limited to:

1. A statement of the pupil's eligibility for special education and/or related services;

2. A statement of current educational status, which describes the pupil's present levels of educational performance and adaptive behavior, including academic achievement, cognitive functioning, personal and social development, physical and health status, and where appropriate, language proficiency, communication style, physical education and recreation needs, prevocational, vocational and self-help skills;

3. A statement of annual goals which describes the educational performance expected to be achieved under the pupil's individualized education program. Annual goals shall be related to the special education and/or regular education curriculum;

4. A statement of objectives which describes specific measurable steps between the current educational status and the annual goals; and

5. A description of the pupil's educational program which includes:

- i. A rationale for the type of educational program and placement selected;

- ii. An explanation of why the type of program and placement is the least restrictive environment appropriate in light of the pupil's needs;

- iii. A description of the extent to which the pupil will participate in regular educational programs. The participation of a pupil with an educational disability in regular school programs or activities shall be based on the nature and extent of the pupil's educational needs. Appropriate curricular or instructional modifications to the regular education program shall be stipulated. Precautionary arrangements shall be made to protect the safety and well-being of the pupil;

- iv. A description of exemptions from regular education program options including testing programs, core course proficiencies and State and local graduation requirements which includes a rationale for the exemptions;

- v. Reasons why the individualized education program goals and objectives do not include the proficiencies measured by the High School Proficiency Test and the requirement to demonstrate mastery of curriculum proficiencies for pupils exempted from these requirements;

- vi. A statement of the alternate requirement for each exemption from State and local high school graduation requirements. The individualized education program shall identify which alternative requirements must be achieved by the pupil with an educational disability to qualify for the State endorsed diploma issued by the school district;

- vii. For pupils with educational disabilities age 14 and over, or younger, if deemed appropriate, annual goals and objectives shall be related to the post/secondary outcomes. Transition services shall be based on the individual pupil's needs, taking into account the pupil's preferences and interests and shall include:

- (1) Instruction;

- (2) Community experiences;

- (3) The development of employment and other post-school adult living objectives; and

4. Speech and language services for a pupil classified as other than "eligible for speech-language services", may be provided as a related service. Additional classification as "eligible for speech-language services" is not required.

5. Transportation shall be provided in the following manner:

i. The district board of education shall provide transportation as required in the individualized education program or as prescribed by the school physician. Such services shall include special transportation equipment, transportation aides and special arrangements for other assistance to and from and in and around the school;

ii. When out-of-district placement for educational reasons is made by a district board of education, transportation shall be provided consistent with the school calendar of the receiving school;

iii. When necessary, the case manager shall provide the transportation coordinator and the bus driver with specific information including safety concerns, mode of communication, health and behavioral characteristics of a pupil assigned; and

iv. For handicapped pupils below the age of five, safety belts or restraint systems are required; and

6. Other related services as specified in the pupil's individualized education program.

(b) School personnel may give advice to parents regarding additional services which are not required by this chapter. Such advice places no obligation on the district board of education to provide or fund such services.

Amended by R.1989 d.239, effective May 15, 1989.  
See: 21 N.J.R. 239(a), 21 N.J.R. 1385(a).

Recodified from N.J.A.C. 6:28-3.7, added references to "speech-language services".

Amended by R.1992 d.280, effective July 6, 1992.  
See: 24 N.J.R. 1150(a), 24 N.J.R. 2434(a).

Term "educationally handicapped pupil" replaced by "pupil with an educational disability".

#### Case Notes

Parent of disabled child was not entitled to reimbursement for private physical therapy where sufficient progress had been made in school therapy. C.F. v. West Milford Board of Education, 96 N.J.A.R.2d (EDS) 186.

School board was not required to provide nurse to change student's tracheotomy tube during school as related service under Individuals with Disabilities Education Act (IDEA), as that service fell within Act's medical services exclusion. A.F. v. Toms River Board of Education, 96 N.J.A.R.2d (EDS) 116.

Availability of comparable services at public school precludes school district's financial support of sign language interpreter at private school attended by auditory handicapped student. M.S. v. Washington Township Board of Education, 96 N.J.A.R.2d (EDS) 28.

Neighborhood school with separated first grade classes was most appropriate placement for perceptually impaired student whose attention was easily distracted. I.M. v. Atlantic City Board, 95 N.J.A.R.2d (EDS) 250.

School district was under continued obligation to provide transportation as a related service to handicapped student even though costs had escalated. D.P. v. Mantua Township Board, 95 N.J.A.R.2d (EDS) 218.

Free and appropriate education in public school precluded tuition and transportation for non-approved private school. A.S. v. Hasbrouck Heights, 95 N.J.A.R.2d (EDS) 162.

Student with breathing difficulties in cold weather not entitled to transportation during winter months. A.G. v. Glen Ridge Board, 95 N.J.A.R.2d (EDS) 144.

Transportation from home to private sectarian school which disabled students attended by parental choice was not available. A.K. v. Teaneck Board, 95 N.J.A.R.2d (EDS) 116.

School aide not necessary for neurologically impaired student. N.B. v. West Orange Board of Education, 94 N.J.A.R.2d (EDS) 205.

Demand that the Board of Education pay the cost of one-to-one aides for a 20-year old student with cerebral palsy and mental retardation was dismissed. D.R. v. East Brunswick Board of Education, 94 N.J.A.R.2d (EDS) 145.

Private nursing care; not a related service under the Individuals with Disabilities Act. L.M. v. East Brunswick Township Board of Education, 94 N.J.A.R.2d (EDS) 79.

"Repositioning" following surgery was "related service" for 6-year-old child suffering from cerebral palsy. M.S. v. Barnegat Township Board of Education, 93 N.J.A.R.2d (EDS) 16.

Summer placement at private school was necessary related service for 18-year-old student. C.M. v. Cherry Hill Board of Education, 92 N.J.A.R.2d (EDS) 156.

Board of education not required to provide outside psychotherapy; counseling could be provided within school during school day. Clifton Board of Education v. M.L., 92 N.J.A.R.2d (EDS) 60.

#### 6:28-3.9 Services to pupils in programs operated by the State of New Jersey

(a) For a pupil classified as eligible for day training attending an approved day program, the district board of education shall provide the services according to N.J.A.C. 6:28-3.2 through 3.7.

(b) For a pupil in residence in a State facility, the responsible district board of education shall:

1. Maintain the educational records sent by the State facility according to N.J.A.C. 6:3-6; and

2. Facilitate the entry of the pupil into the local district program, as appropriate.

(c) For a pupil in a program operated by or under contract with the Department of Education, the district board of education retains responsibility for the provision of programs and services under this chapter.

Amended by R.1989 d.239, effective May 15, 1989.  
See: 21 N.J.R. 239(a), 21 N.J.R. 1385(a).

Recodified from N.J.A.C. 6:28-3.8.  
Amended by R.1990 d.450, effective September 4, 1990.  
See: 22 N.J.R. 1412(a), 22 N.J.R. 2683(b).

N.J.A.C. reference corrected in (a).  
Amended by R.1994 d.127, effective April 4, 1994.  
See: 25 N.J.R. 5734(a), 26 N.J.R. 1495(b).

## SUBCHAPTER 4. PROGRAMS

## 6:28-4.1 General requirements

(a) Each district board of education shall provide educational programs and related services for pupils with educational disabilities required by the individualized education programs of those pupils for whom the district board of education is responsible.

(b) Special education programs shall be consistent with the special education plan submitted by the district board of education and approved by the Department of Education.

(c) A district board of education proposal to establish, change or eliminate special education programs or services shall be approved by the Department of Education through its county office.

(d) Appropriate written curricula shall be developed and appropriate materials shall be provided for pupils with educational disabilities.

(e) The length of the school day and the academic year of programs for pupils with educational disabilities shall be at least as long as that established for all pupils.

1. Programs for the preschool handicapped shall be in operation five days per week, one day of which may be used for parent training and at least four days of which shall provide a minimum total of 10 hours of pupil instruction.

2. An extended academic year program shall be comparable to the special education program offered during the regular academic year.

3. Educational programs for pupils classified as eligible for day training shall operate extended school year programs.

(f) If a classroom aide is employed, he or she shall work under the direction of a principal, special education teacher, general education teacher or other appropriately certified personnel in a special education program. The job description of a classroom aide shall be approved by the Department of Education through its county office.

(g) Physical education services, specially designed if necessary, shall be made available to every pupil with an educational disability age five through 21, including those pupils in separate facilities.

(h) When a pupil with an educational disability transfers from one New Jersey school district to another, or when a pupil classified as educationally disabled by a State or local school district outside of New Jersey transfers into a New Jersey school district, and immediate review of the classification and individualized education program cannot be conducted, the pupil shall be immediately placed in a program consistent with the goals and objectives of the current individualized education program for a period not to exceed 30 calendar days.

(i) When the individualized education program of a pupil with an educational disability does not describe any restrictions, the pupil shall be included in the regular school program provided by the district board of education.

1. When instruction in health, physical education, industrial arts, fine arts, music, home economics, and other regular education programs, intramural and interscholastic sports, nonacademic and extracurricular activities is provided to groups consisting solely of pupils with educational disabilities, the size of the groups and the age range shall conform to the requirements for special class programs described in this subchapter.

(j) Each district board of education, through appropriate personnel, shall establish and implement a plan to evaluate special education programs and services according to N.J.S.A. 18A:7A-4 through 16 and this chapter.

(k) Each district board of education shall ensure that all pupils with educational disabilities have available to them the variety of educational programs and services available to nondisabled pupils.

Amended by R.1989 d.239, effective May 15, 1989.

See: 21 N.J.R. 239(a), 21 N.J.R. 1385(a).

Requirement for physical education services added; at (h) instructions for immediate placement of transfers added; limit of group size in classes in fine arts, music, home economics, sports etc. and new (k) added ensuring variety of programs.

Amended by R.1990 d.450, effective September 4, 1990.

See: 22 N.J.R. 1412(a), 22 N.J.R. 2683(b).

Reference to vocational education deleted in (i)1.

Amended by R.1992 d.280, effective July 6, 1992.

See: 24 N.J.R. 1150(a), 24 N.J.R. 2434(a).

Term "educationally handicapped pupil" replaced by "pupil with an educational disability".

Amended by R.1993 d.393, effective August 2, 1993.

See: 25 N.J.R. 1318(a), 25 N.J.R. 3515(a).

Administrative Correction.

See: 25 N.J.R. 4743(b).

## Case Notes

Former standard of service for local school bds. incorporated into the Federal Education of the Handicapped Act. Bd. of Educ. of E. Windsor Regional School v. Diamond, 808 F.2d 987 (3rd Cir.1986).

Regulatory description of appropriate educational program being one in the least restrictive environment found to mean least even in which educational progress rather than regression can take place. Bd. of Educ. of E. Windsor Regional School District v. Diamond, 808 F.2d 987 (3rd Cir.1986).

Focus in determining appropriateness of program is on program offered. Lascari v. Board of Educ. of Ramapo Indian Hills Regional High School Dist., 116 N.J. 30, 560 A.2d 1180 (1989).

Petition regarding responsibility for costs of special education student's academic program was dismissed for lack of jurisdiction; allocation of costs was provided for in contract, and Commissioner of Education cannot decide issues of contract law. Cherry Hill v. Borough of Haddonfield, 96 N.J.A.R.2d (EDU) 1032.

Failure to show that special education student had substantially regressed during the summer supported denial of extended school year services. S.T. v. Ewing Board of Education, 96 N.J.A.R.2d (EDS) 283.

Adverse outcome of prior federal lawsuit brought by handicapped former student against school board for failure to comply with IEP barred current action by student against board. *E.A. v. Willingboro Township Board of Education*, 96 N.J.A.R.2d (EDS) 113.

Child with increasing difficulties in reading and spelling required perceptually impaired classification to provide him with necessary support in a special education program. *Spring Lake Board v. P.M.*, 95 N.J.A.R.2d (EDS) 267.

Perceptually impaired child was entitled to an extended school year in form of five hours per week of summer tutorial assistance with reasonable and necessary travel expenses. *C.G. v. Old Bridge Board*, 95 N.J.A.R.2d (EDS) 221.

Educational placement out of district was appropriate for perceptually impaired student's educational needs despite parent's noncooperation. *P.M. v. Brick Township Board*, 95 N.J.A.R.2d (EDS) 201.

Residential placement for multiply handicapped child with various diagnosed disorders ranging from loving to potentially injurious was only appropriate placement in least restrictive environment. *Z.D. v. Fort Lee Board v.* 95 N.J.A.R.2d (EDS) 193.

Services of education expert for special education child with maladaptive behavior were no longer necessary. *Services of B.L. v. Englewood City Board*, 95 N.J.A.R.2d (EDS) 125.

Student with multiple disabilities required extra year of special education due to chronic absenteeism. *G.K. v. Roselle Borough*, 95 N.J.A.R.2d (EDS) 86.

Placement out-of-district was not appropriate for handicapped child when opportunities in district were equal. *L.A. v. Union County*, 95 N.J.A.R.2d (EDS) 78.

Provision of all special education services based upon 180-day school year. *S.M. v. Township Board of Education*, 94 N.J.A.R.2d (EDS) 176.

Residential school placement; behavioral problems manifested only in the home environment. *R.W. v. Howell Township Board of Education*, 94 N.J.A.R.2d (EDS) 39.

Multiply handicapped student; transportation by bus company other than one retained by school board. *N.S. v. Trenton Board of Education*, 94 N.J.A.R.2d (EDS) 36.

Removal of an emotionally disabled child from a private school and placing him in public school was not detrimental. In the Matter of *J.C.*, 94 N.J.A.R.2d (EDS) 15.

Placement of an emotionally handicapped and learning disabled child in a special education program was warranted. *Ewing Township Board of Education v. J.R.*, 94 N.J.A.R.2d (EDS) 11.

Constant attention by a registered or licensed practical nurse required by a severely handicapped student was a medical need. *C.F. v. Roxbury Township Board of Education*, 94 N.J.A.R.2d (EDS) 6.

School board would not be liable for expenses of student's attendance at private unapproved placement. *C.D. v. Wanaque Board of Education*, 93 N.J.A.R.2d (EDS) 304.

Program provided by school board; appropriate for child's learning disability. *J.M. v. Manville Bd. of Educ.*, 93 N.J.A.R.2d (EDS) 100.

Board of education had appropriately addressed visually impaired 19-year-old's educational, occupational therapy, mobility and other needs; no obligation to provide special education services following graduation. *L.I. v. Montville Board of Education*, 93 N.J.A.R.2d (EDS) 1.

Changing placement of 10-year-old Downs Syndrome student to in-district special education class was not warranted. *Lakewood Board of Education v. M.C.*, 92 N.J.A.R.2d (EDS) 244.

Petitioners' action to require local school board to pay residential costs and tuition retroactively denied. *M.B., Through His Parents, R.B. and J.B. v. Bernards Twp. Bd. of Educ.*, 9 N.J.A.R. 179 (1985).

Regulations contain standards for provision of remedial and auxiliary services to non-public school students; future contract for such services forbidden due to contractor's financial standing and fiscal practices. *New Jersey Education Assn. v. Essex Cty. Educational Services Commission*, 5 N.J.A.R. 29 (1981).

#### 6:28-4.2 Program options

(a) A full continuum of alternative placements shall be available to meet the needs of pupils with educational disabilities ages three through 21. Educational program options include the following:

1. Instruction in a regular class with all necessary and appropriate supports including, but not limited to, the following:

- i. Curricular or instructional modifications;
- ii. Supplementary instruction;
- iii. Speech-language services;
- iv. Resource center programs;
- v. Assistive technology including environmental adaptations;
- vi. Specialized instructional strategies;
- vii. Teacher aides; and
- viii. Related services.

2. A special class program in the pupil's local school district;

3. A special education program in the following settings:

- i. Another local school district;
- ii. A vocational and technical school;
- iii. A county special services school district;
- iv. An educational services commission; and
- v. A jointure commission;

4. Programs in hospitals, convalescent centers or other medical institutions;

5. A program operated by a department of New Jersey State government;

6. Vocational rehabilitation facilities;

7. An approved private school for the handicapped in the continental United States, when it is not appropriate to provide services according to (a)1 through 6 above. Placement in an approved private school for the handicapped shall only be made with the prior written approval of the Department of Education through its county office;

8. Individual instruction at home or in other appropriate facilities, with the prior written approval of the Department of Education through its county office, only when it is not appropriate to provide a special education

program for a pupil with an educational disability according to N.J.A.C. 6:28-4.5;

9. An accredited nonpublic school which is not specifically approved for the education of pupils with educational disabilities according to N.J.A.C. 6:28-6.5;

10. Instruction in other appropriate settings according to N.J.A.C. 6:28-1.1(d) and (e); and

11. An early intervention program (which is under contract with the Department of Health) in which the child has been enrolled for the balance of the school year in which the child turns age three.

Amended by R.1989 d.239, effective May 15, 1989.

See: 21 N.J.R. 239(a), 21 N.J.R. 1385(a).

Referenced "private school for handicapped", deleted "privately operated special class".

Amended by R.1990 d.450, effective September 4, 1990.

See: 22 N.J.R. 1412(a), 22 N.J.R. 2683(b).

New (a)9 added, an accredited nonpublic school.

Amended by R.1991 d.337, effective July 1, 1991.

See: 23 N.J.R. 1053(b), 23 N.J.R. 2032(b).

Added new (b); the three program options available for preschool handicapped pupils.

Amended by R.1992 d.280, effective July 6, 1992.

See: 24 N.J.R. 1150(a), 24 N.J.R. 2434(a).

Changes to reflect the change from "resource room" to "resource center program".

Amended by R.1993 d.393, effective August 2, 1993.

See: 25 N.J.R. 1318(a), 25 N.J.R. 3515(a).

Amended by R.1994 d.127, effective April 4, 1994.

See: 25 N.J.R. 5734(a), 26 N.J.R. 1495(b).

Amended by R.1995 d.228, effective May 1, 1995.

See: 27 N.J.R. 416(c), 27 N.J.R. 1792(a).

#### Case Notes

Former N.J.A.C. 6:28-4.3 upheld. *D.S. v. Bd. of Ed., East Brunswick Twp.*, 188 N.J.Super. 592, 458 A.2d 129 (App.Div.1983), certification denied 94 N.J. 529, 468 A.2d 184 (1983).

Jurisdiction of Juvenile and Domestic Relations Court to place a pupil in an appropriate educational program. *State in Interest of F.M.*, 167 N.J.Super. 185, 400 A.2d 576 (J.D.R.Ct.1979).

Autistic preschooler was not ready to be mainstreamed for nonacademic courses. *C.L. v. State Operated School District*, 96 N.J.A.R.2d (EDS) 331.

Special education student was entitled to remain at out-of-state extended year program he had attended previous year, even though program lacked state approval. *G.B. v. South Brunswick Board of Education*, 96 N.J.A.R.2d (EDS) 284.

Emergency relief request for summer school for disabled preschooler was denied on grounds that it merely represented extension of ten-month school year. *N.R. v. Kingwood Township Board of Education*, 96 N.J.A.R.2d (EDS) 270.

Emergency relief request for summer in-home tutor was denied absent evidence of probable regression or lack of appropriate education. *C.N. v. Kingwood Township Board of Education*, 96 N.J.A.R.2d (EDS) 259.

Request for summer instruction was granted for classified student whose test scores showed regression. *S.M. v. Ocean Gate Board of Education*, 96 N.J.A.R.2d (EDS) 207.

Escalating misconduct warranted home instruction pending out-of-district placement for behavioral modification. *West Windsor v. J.D.*, 95 N.J.A.R.2d (EDS) 146.

Behavioral difficulties of disabled student precluded mainstreaming in regular school setting. *J.T. v. Collingswood Board*, 95 N.J.A.R.2d (EDS) 129.

Residential costs of impaired student in private placement pursuant to civil commitment were not responsibility of school board. *M.M. v. Kinnelon Board*, 95 N.J.A.R.2d (EDS) 120.

Student with attention deficit disorder was more appropriately placed in private school. *R.S., A Minor v. West Orange Board*, 95 N.J.A.R.2d (EDS) 59.

Structured, self-contained environment was more appropriate for student with psychiatric problems and truancy. *M.M. v. Dumont Board*, 95 N.J.A.R.2d (EDS) 50.

Trainable mentally retarded student was more appropriately placed in vocational as opposed to regular school. *B.M. v. Vineland Board*, 95 N.J.A.R.2d (EDS) 43.

Residential placement of handicapped student not necessary. *J.M. v. Morris Board of Education*, 95 N.J.A.R.2d (EDS) 10.

Current placement in public school system, rather than residential placement, was more appropriate for multiply handicapped child. *J.M. v. Board of Education*, 95 N.J.A.R.2d (EDS) 10.

Seeking to send their students to a district outside the state was not arbitrary, capricious or unreasonable. *Campbell v. Montague Township Board of Education*, 94 N.J.A.R.2d (EDU) 443.

Autistic child was ordered to continue in his in-home educational program. *M.A. v. Voorhees Board of Education*, 94 N.J.A.R.2d (EDS) 133.

Placement of Down's Syndrome child in private school was inappropriate. *C.S. v. Middletown Board of Education*, 94 N.J.A.R.2d (EDS) 97.

Disabled child was not entitled to reimbursement for private school placement. *M.K. v. Caldwell-West Caldwell Board of Education*, 94 N.J.A.R.2d (EDS) 55.

Educational needs of 4-year-old autistic child were met by placement in preschool handicapped program. *K.M. v. Franklin Lakes*, 93 N.J.A.R.2d (EDS) 213.

Placement in 24-hour residential program was required for 19-year-old multiply handicapped student. *J.S. v. High Point*, 93 N.J.A.R.2d (EDS) 192.

Transfer to middle school to provide handicapped child with appropriate education in less restrictive environment was justified. *P.G. and E.G. v. Upper Pittsgrove*, 93 N.J.A.R.2d (EDS) 189.

Personalized educational program and support services were sufficient to allow handicapped student to make significant educational progress. *J.J.K. v. Union County Board*, 93 N.J.A.R.2d (EDS) 161.

Significant regression required extension of school year for multiply handicapped student. *J.C. v. Wharton*, 93 N.J.A.R.2d (EDS) 152.

Student's explosive and violent behavior required placement in structured educational environment. *Ocean City v. J.W.* 93 N.J.A.R.2d (EDS) 147.

Appropriate education was provided in mainstreamed school, thus precluding placement of deaf student in segregated school. *S.M. v. Bergenfield*, 93 N.J.A.R.2d (EDS) 115.

Application by parents for emergent relief to return their emotionally disturbed daughter to high school transitional program pending hearing was denied. *S.H. v. Lenape*, 93 N.J.A.R.2d (EDS) 87.

Board of education could have provided appropriate placement for 12-year-old student; no reimbursement for parents' unilaterally enrolling student in private school. *J.S. v. Blairstown Board of Education*, 93 N.J.A.R.2d (EDS) 81.

In-district placement of 15-year-old neurologically impaired student was appropriate; no reimbursement for unilateral placement out-of-district. *T.G. v. Middletown Township Board of Education*, 93 N.J.A.R.2d (EDS) 66.

Appropriate placement for neurologically impaired seven-year-old student was at in-district school even if not placement preferred by parents. *A.E. v. Caldwell-West Caldwell Board of Education*, 93 N.J.A.R.2d (EDS) 62.

County region school district failed to establish that self-contained Trainable Mentally Retarded program at in-district school was appropriate educational program for Downs Syndrome student. *A.R. v. Union County Regional High School District*, 93 N.J.A.R.2d (EDS) 48.

Appropriate placement for three-year-old child having developmental disorder was in local school district program. *W.B. v. Metuchen Board of Education*, 93 N.J.A.R.2d (EDS) 35.

Placement in out-of-district facility offering behavioral modification, rather than readmission to public school, was appropriate for suspended high school student. *V.D. v. North Hunterdon Board of Education*, 93 N.J.A.R.2d (EDS) 21.

Day placement was appropriate for 19-year-old multiply handicapped student with obsessive compulsive disorder. *T.W. v. Monroe Township Board of Education*, 93 N.J.A.R.2d (EDS) 14.

Neurologically impaired self-contained class, with appropriate mainstreaming, at public high school was appropriate and least restrictive placement for student. *J.F. v. Riverdale Regional High School*, 93 N.J.A.R.2d (EDS) 7.

Residential placement of 16-year-old multiply handicapped student at group-home facility not educationally necessary. *M.L. v. Summit Board of Education*, 92 N.J.A.R.2d (EDS) 239.

Appropriate placement for 12-year-old multiply handicapped student was Township public school system; appropriate individualized educational program could be developed. *T.H. v. Wall Township Board of Education*, 92 N.J.A.R.2d (EDS) 227.

No private school reimbursement; board of education offered free and appropriate education for communication handicapped student. *V.G. v. Jefferson Township Board of Education*, 92 N.J.A.R.2d (EDS) 212.

Record established that current day placement was least restrictive and appropriate education for emotionally disturbed 11-year-old boy. *R.R. v. Mt. Olive Board of Education*, 92 N.J.A.R.2d (EDS) 205.

Record established that multiply handicapped student's educational needs could not be met by perceptually impaired class offered by board of education. *Alloway Township Board of Education v. M.P.*, 92 N.J.A.R.2d (EDS) 202.

Placement of attention deficit disorder student in regional school district program was most appropriate and least restrictive placement. *T.P. v. Delaware Valley Board of Education*, 92 N.J.A.R.2d (EDS) 175.

Record supported classification of child as neurologically-impaired; placement in one ½ day kindergarten class and one ½ day neurologically-impaired class. *D.M. v. Union City Board of Education*, 92 N.J.A.R.2d (EDS) 143.

Appropriate placement of 6-year-old, neurologically impaired student was in self-contained neurologically impaired special education class at in-district school. *A.F. v. Roselle Board of Education*, 92 N.J.A.R.2d (EDS) 118.

Mainstreaming sixth grade student for remainder of school year not shown to be appropriate. *D.E. v. Woodcliff Lake Board of Education*, 92 N.J.A.R.2d (EDS) 116.

Out-of-state residential school appropriate placement for 16-year-old boy who was auditorily and emotionally impaired. *J.P. v. Metuchen Board of Education*, 92 N.J.A.R.2d (EDS) 110.

Placement of child was inappropriate to meet his educational needs; parents entitled to private school tuition reimbursement. *J.S. v. Livingston Board of Education*, 92 N.J.A.R.2d (EDS) 94.

Individualized Education Plan recommending that perceptually impaired student be educated at public middle school was appropriate. *Passaic Board of Education v. E.G.*, 92 N.J.A.R.2d (EDS) 86.

Morning preschool handicapped class placement sufficient. *M.G. v. East Brunswick Board of Education*, 92 N.J.A.R.2d (EDS) 84.

Day placement, not residential placement, was appropriate for multiply handicapped student. *J.B. v. Township of Montville Board of Education*, 92 N.J.A.R.2d (EDS) 65.

Placement of hearing-impaired child; local elementary school appropriate. *A.M. v. Madison Board of Education*, 92 N.J.A.R.2d (EDS) 51.

Record established that placement in program offered by school district was appropriate; no placement in out-of-state school. *H.S. v. Bloomfield Board of Education*, 92 N.J.A.R.2d (EDS) 39.

Unilateral decision to place the child in a private school; no tuition reimbursement. *C.R. v. Delaware Valley Regional School District*, 92 N.J.A.R.2d (EDS) 31.

Private school, and not proposed public school placements, provided appropriate education in least restrictive environment for severely mentally retarded student classified as educable mentally retarded. *Jo.M. and S.M. on Behalf of Their Daughter, J.M. v. Monmouth Regional Board of Education*, 92 N.J.A.R.2d (EDS) 9.

Although petitioners sought private school placement for their seven year old, classified as emotionally disturbed, the OAL judge determined that a self-contained, age appropriate, emotionally disturbed placement in respondent's school system was the appropriate placement for the child. *B.P. and E.P. Parents of J.P. v. City of Newark Bd. of Educ.*, 9 N.J.A.R. 190 (1986).

Petitioners' action to require local school board to pay residential costs and tuition retroactively, for out-of-state placement in a private residential school for their 13 year old son, classified as neurologically impaired, denied; finding that local board had attempted to provide a free appropriate education, with personalized instruction and sufficient support services to allow the child to benefit educationally. *M.B., Through His Parents, R.B. and J.B. v. Bernards Twp. Bd. of Educ.*, 9 N.J.A.R. 179 (1985).

Residential program for multiply handicapped pupil determined to be least restrictive appropriate placement under former N.J.A.C. 6:28-2.2. *A.N. v. Clark Bd. of Ed.*, 5 N.J.A.R. 152 (1983).

Parents not entitled to reimbursement for private school tuition following unilateral withdrawal of pupil from special education program. *Robinson v. Goodwin*, 1975 S.L.D. 6.

### **6:28-4.3 Program criteria: supplementary instruction, speech-language services and resource center programs**

(a) Supplementary instruction and speech-language services provided to a pupil with an educational disability shall be in addition to the regular instructional program and shall meet the following criteria:

1. Speech-language services shall be given individually or in groups not to exceed three pupils;
2. Supplementary instruction shall be given individually or in groups not to exceed five pupils;
3. A teacher providing supplementary instruction shall be appropriately certified for the subject or level in which instruction is given according to the requirements of N.J.A.C. 6:11;
4. Supplementary and resource room instruction shall not be provided to pupils by the same teacher during the same instructional period; and
5. Speech-language services shall be provided by a certified speech correctionist or speech-language specialist.

(b) Resource center programs shall offer individual and small group instruction and shall meet the following criteria:

1. A pupil with an educational disability in a resource center program shall be enrolled on a regular class register with his or her chronological peers. Instructional responsibility for such a pupil shall be shared between the resource center program teacher and the regular class teacher(s) as described in the individualized education program.

2. The resource center teacher shall hold certification as teacher of the handicapped. If the resource center program solely serves pupils who are classified as visually handicapped, the teacher must be certified as a teacher of blind or partially sighted. If the resource center program solely serves pupils who are classified as auditorily handicapped, the teacher must be certified as a teacher of deaf and/or hard of hearing.

3. Resource center programs shall provide two types of instruction or service:

i. Instruction which replaces that provided in the regular class;

ii. Instruction which supports or supplements instruction initially provided by the regular class teacher; and

iii. Support and replacement instruction shall not be provided to pupils by the same teacher during the same instructional period.

4. Resource center program instruction may be provided in the pupil's regular class or in an approved separate resource room according to N.J.A.C. 6:22-5.4 and 5.5 as appropriate and indicated in the pupil's individualized education program.

5. Group sizes for pupils who receive support instruction in resource center programs shall not exceed the following:

i. In an approved separate resource room—five pupils;

ii. In the regular class, when the resource center teacher is present each instructional period that the subject is being taught;

(1) Preschool or elementary—eight pupils;

(2) Secondary—10 pupils;

iii. In the regular class, when the resource center teacher is present for some, but not all of the instructional periods that the subject is being taught—five pupils.

6. Support instruction provided in the pupil's regular class shall be at the same time and in the same activities as the rest of the class.

7. Group size for classified pupils who receive replacement instruction in class shall not exceed three pupils.

8. Group size for classified pupils who receive replacement instruction in an approved separate resource center shall be as follows:

i. For a single content area:

(1) Preschool or elementary—six pupils; and

(2) Secondary—nine pupils.

(3) The group sizes in (b)8i(1) and (2) above may be increased by one-third with the addition of a classroom aide by obtaining the written approval of the Department of Education through its county office.

ii. For multiple (not more than three) content areas—four pupils.

9. The age span in an approved separate resource center program shall not exceed four years.

10. Replacement instruction in the regular class shall be for pupils normally enrolled in the class being served. Only a single content area shall be taught to the group. A pupil receiving in-class instruction shall be included in activities such as group discussion, special projects, field trips and other regular class activities as deemed appropriate in the pupil's individualized education program.

11. A resource center program teacher shall be provided time for consultation with appropriate regular education teaching staff.

12. A pupil may be provided resource center instruction according to the following limits:

i. Replacement or support instruction in a separate approved resource room shall be for not more than one half of the pupil's instructional day; and

ii. Replacement or support instruction in the regular class may be for up to the pupil's entire school day.

13. For State aid funding purposes, district boards of education shall count pupils with educational disabilities in resource center programs as resource room pupils according to N.J.S.A. 18A:7D-16.

Amended by R.1989 d.239, effective July 15, 1989.

See: 21 N.J.R. 239(a), 21 N.J.R. 1385(a).

Titled and recodified from N.J.A.C. 6:28-4.2(b)1. and 2., set maximum number of students for resource room teachers with other instructional duties.

Amended by R.1992 d.280, effective July 6, 1992.

See: 24 N.J.R. 1150(a), 24 N.J.R. 2434(a).

New subsection (b) regarding resource rooms and programs added; recodified (b) to (c) and established June 30, 1993 expiration date for resource room programs at (c). New subsection (d) added establishing resource center programs.

Amended by R.1993 d.393, effective August 2, 1993.

See: 25 N.J.R. 1318(a), 25 N.J.R. 3515(a).

Amended by R.1994 d.127, effective April 4, 1994.

See: 25 N.J.R. 5734(a), 26 N.J.R. 1495(b).

Amended by R.1994 d.334, effective July 5, 1994.

See: 26 N.J.R. 1422(a), 26 N.J.R. 2787(a).

#### Case Notes

Reimbursement of parent for costs of private tutoring for neurologically impaired child denied. N.B. West Orange Board of Education, 94 N.J.A.R.2d (EDS) 86.

Reimbursement of past contributions toward costs of residential placement of autistic child and set-aside of lien filed against property for additional unpaid amounts was not appropriate. S.P. v. Division of Youth and Family Services, 94 N.J.A.R.2d (DYF) 5.

School district was not liable for tutoring expenses for special education student. L.M. v. Cranbury Board of Education, 94 N.J.A.R.2d (EDS) 4.

Third-grade student would be classified as perceptually impaired, and Individualized Education Program retaining her in regular classes with two hours of resource room would be implemented. North Brunswick Board of Education v. S.S., 93 N.J.A.R.2d (EDS) 27.

#### 6:28-4.4 Program criteria: special class programs, secondary, vocational and vocational rehabilitation

(a) Special class programs shall meet the following criteria:

1. A pupil with an educational disability in a special class program shall be enrolled on a special class register;

2. Pupils shall be the primary instructional responsibility of a full-time special education teacher assigned to that class. Such teachers shall work with other teachers to whom the pupil with an educational disability may be assigned for portions of his or her educational program;

3. Depending on the educational disability(ies) of the pupils assigned to the special class program, the special class teacher shall hold certification as teacher of the handicapped, teacher of blind or partially sighted, and/or teacher of deaf or hard of hearing;

4. The age span in special class programs shall not exceed four years;

5. A special class program may not be approved as a kindergarten;

6. A special class program shall serve pupils who have the same classification. Class size shall not exceed the following:

- i. Auditorily handicapped—eight pupils;
- ii. Autistic—elementary—six pupils per classroom with a pupil to staff ratio of three to one (classroom aide required when the class size exceeds three);
- iii. Autistic—secondary—nine pupils per classroom with a pupil to staff ratio of three to one (two classroom aides required for a class size of nine pupils);
- iv. Chronically ill—15 pupils;
- v. Communication handicapped—eight pupils;
- vi. Emotionally disturbed—eight pupils;
- vii. Mentally retarded, educable—12 pupils;
- viii. Mentally retarded, trainable—10 pupils;
- ix. Mentally retarded, eligible for day training—nine pupils (pupil to staff ratio of three to one);
- x. Multiply handicapped—eight pupils;
- xi. Neurologically impaired—eight pupils;
- xii. Orthopedically handicapped—10 pupils;
- xiii. Perceptually impaired—12 pupils;
- xiv. Preschool handicapped—eight pupils (classroom aide required);
- xv. Socially maladjusted—12 pupils; and
- xvi. Visually handicapped—eight pupils; and

7. With the exception of classes for autistic pupils and eligible for day training pupils, the above maximum class sizes may be increased no more than one-third with the addition of a classroom aide or a second classroom aide where one is already required by obtaining prior written approval from the Department of Education through its county office. No exceptions according to N.J.A.C. 6:28-4.6 shall be granted regarding class size for pupils classified as eligible for day training.

(b) Secondary special class programs shall meet the following criteria:

1. Programs shall be in schools in which any combination of grades six through 12 are contained;

2. A pupil with an educational disability enrolled on the register of a secondary special class program shall receive a minimum of three instructional periods with the certified teacher(s) of the handicapped who maintains primary instructional responsibility for the pupil;

3. In secondary special class programs where the organizational structure is departmentalized for general education pupils:

i. Enrollment in secondary special class programs may be increased by one-half the maximum class size for pupils with the same classification as noted in (a)6 above;

ii. For instructional purposes:

(1) In all class groups comprised of pupils with a single classification, class sizes shall be according to (a)6 and 7 above; and

(2) In all class groups comprised of pupils with mixed handicaps, the group shall be limited to eight pupils with educational disabilities;

4. In addition to the requirement of (b)2 above, instruction may be provided in the following settings, as appropriate:

i. A class consisting solely of pupils with educational disabilities instructed by a regular education teacher where an adapted general education curriculum is used.

(1) In class groups comprised of pupils with a single classification, class sizes shall be according to (a)6 and 7 above.

(2) In class groups comprised of pupils with mixed handicaps, the group shall be limited to eight pupils with educational disabilities.

ii. A regular education class instructed by a subject area teacher.

(1) The number of pupils with educational disabilities enrolled on a special class register who can attend any given instructional period in such classes shall be limited to four if program modification is required; and

5. For class groups comprised of pupils with mixed handicaps, the maximum class size may be increased by no more than one-third with the addition of an aide.

(c) Secondary resource center programs shall be in schools in which any combination of grades six through 12 are contained and where the organizational structure is departmentalized for general education pupils.

(d) Vocational education programs shall meet the following criteria: