

CHAPTER 6A
SPECIAL EDUCATION PROGRAM

Authority

N.J.S.A. 5:14F-5(e), (f) and (g).

Source and Effective Date

R.1995 d.176, effective February 27, 1995.
See: 27 N.J.R. 4(a), 27 N.J.R. 1179(a).

Executive Order No. 66(1978) Expiration Date

Chapter 6A, Special Education Program, expires on February 27, 2000.

Chapter Historical Note

Chapter 6A, Special Education Program, became effective January 3, 1983 as R.1982 d.462. See: 14 N.J.R. 930(a), 15 N.J.R. 25(b). Amendments became effective March 21, 1983 as R.1983 d.88. See: 15 N.J.R. 2(a), 15 N.J.R. 437(a). Further amendments became effective June 20, 1983 as R.1983 d.253. See: 15 N.J.R. 451(a), 15 N.J.R. 1015(a). Further amendments became effective September 6, 1983 as R.1983 d.358. See: 15 N.J.R. 978(a), 15 N.J.R. 1467(a). Further amendments became effective February 6, 1984 as R.1984 d.9. See: 15 N.J.R. 1402(a), 16 N.J.R. 238(a). Further amendments became effective May 21, 1984 as R.1984 d.203. See: 16 N.J.R. 408(a), 16 N.J.R. 1196(a). Amendments became effective June 18, 1984 as R.1984 d.258. See: 16 N.J.R. 780(a), 16 N.J.R. 1468(a). Further amendments became effective October 15, 1984 as R.1984 d.476. See: 16 N.J.R. 1408(a), 16 N.J.R. 2777(a). Further amendments became effective November 4, 1985 as R.1985 d.539. See: 17 N.J.R. 2073(a), 17 N.J.R. 2606(a). Further amendments became effective April 7, 1986 as R.1986 d.85. See: 17 N.J.R. 2586(a), 18 N.J.R. 634(b). Further amendments became effective June 2, 1986 as R.1986 d.195. See: 18 N.J.R. 584(a), 18 N.J.R. 1192(a).

Chapter 6A was repealed and a new chapter became effective May 4, 1987 (operative July 1, 1987) as R.1987 d.200. See: 18 N.J.R. 728(a), 18 N.J.R. 1728(a), 19 N.J.R. 715(a). Chapter 6A was extensively revised by R.1990 d.169, effective March 19, 1990. See: 21 N.J.R. 2693(a), 22 N.J.R. 916(a).

Pursuant to Executive Order No. 66 (1978), Chapter 6A was readopted as R.1995 d. 176. See: Source and Effective Date. See, also, section annotations.

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SUBCHAPTER 1. APPLICABILITY

1:6A-1.1 Applicability

(a) The rules in this chapter shall apply to the notice and hearing of matters arising out of the Special Education

Program of the Department of Education, pursuant to N.J.A.C. 6:28. Any aspect of notice and hearing not covered by these special hearing rules shall be governed by the Uniform Administrative Procedure Rules (U.A.P.R.) contained in N.J.A.C. 1:1. To the extent that these rules are inconsistent with the U.A.P.R., these rules shall apply.

(b) These rules are established in implementation of Federal law, at 20 U.S.C.A. 1415 et seq. and 34 CFR 300 et seq. These rules do not duplicate each provision of Federal law, but highlight some of the key Federal provisions which form the source or authority for these rules. Where appropriate, the Federal source or authority for a rule or Federal elaboration of a rule will be indicated in brackets following the rule. In any case where these rules could be construed as conflicting with Federal requirements, the Federal requirements shall apply.

(c) Since these rules are established in implementation of Federal law, they may not be relaxed except as specifically provided herein or pursuant to Federal law.

SUBCHAPTERS 2 THROUGH 3. (RESERVED)

SUBCHAPTER 4. AGENCY RESPONSIBILITY BEFORE TRANSMISSION TO THE OFFICE OF ADMINISTRATIVE LAW

1:6A-4.1 Notice of available legal service

(a) In its acknowledgement of a hearing request, the Department of Education shall inform the parties of any free or low-cost legal and other relevant services available, including:

1. The Division of Advocacy for the Developmentally Disabled in the Department of the Public Advocate;
2. The New Jersey State Bar Association and county bar association lawyer referral services;
3. The Association of Trial Lawyers—New Jersey lawyer referral service; and
4. The Legal Aid and Legal Services offices in New Jersey (34 CFR 300.506(c)).

Case Notes

Parent of handicapped child with no indicated need for special education did not have claim for transportation costs. A.A. on Behalf of A.A., Jr. v. Cooperman, 218 N.J.Super. 32, 526 A.2d 1103 (App.Div. 1987).

1:6A-4.2 Conference by the Department of Education

(a) Within seven days of receipt of any hearing request, the Department of Education shall conduct a conference at a time and place convenient to both parties.

(b) The purpose of the conference is to assist the parties in defining issues, identifying evidence, exchanging information, stipulating facts and listing possible witnesses for a hearing. Mediation will be available at the conference if both parties agree to participate.

(c) If a settlement is reached, the terms shall be reduced to writing and signed by the parties and the representative of the Department of Education.

(d) If a settlement is not reached, the Department of Education representative shall prepare a written document at the conference that specifies the issues in dispute, any stipulations, and evidence and witness lists for each party. This document shall be included with the transmittal form and shall be immediately forwarded to the Office of Administrative Law. Copies of the written document and of the transmittal form shall be sent to the parties. Any exhibits that both parties agree are admissible may be attached to the document.

(e) The Department of Education shall include with the transmittal any unsettled jurisdictional matters, notice problems, or other preliminary motions from the parties.

(f) The board of education or public agency shall insure that a representative attends the conference. Participation by the parents or by an adult pupil is voluntary. However, if the parents or adult pupil do not attend the conference, they shall provide the Department of Education with a telephone number where they can be contacted at the time of the conference, so that dates for the hearing may be scheduled.

Amended by R.1990 d.405, effective August 6, 1990.
See: 22 N.J.R. 1295(a), 22 N.J.R. 2262(b).

In (f): Added language specifying that parents shall provide the Department with a telephone number for contact.

Case Notes

Federal law did not preempt regulation prohibiting lay person with special knowledge or training in the education of handicapped children from receiving fees for legal representation. *Arons v. New Jersey State Bd. of Educ.*, C.A.3 (N.J.)1988, 842 F.2d 58, certiorari denied 109 S.Ct. 366, 488 U.S. 942, 102 L.Ed.2d 356.

Act permitting parents to be accompanied and advised by specially qualified individuals did not permit those individuals to render legal services at the hearings. *Arons v. New Jersey State Bd. of Educ.*, C.A.3 (N.J.)1988, 842 F.2d 58, certiorari denied 109 S.Ct. 366, 488 U.S. 942, 102 L.Ed.2d 356.

Rule prohibiting fees to nonlawyers for legal representation does not deny nonlawyers equal protection. *Arons v. New Jersey State Bd. of Educ.*, C.A.3 (N.J.)1988, 842 F.2d 58, certiorari denied 109 S.Ct. 366, 488 U.S. 942, 102 L.Ed.2d 356.

Lay person is not precluded from receiving fees for work done as an expert consultant or witness at hearing held to determine appropriateness of education being provided to handicapped children. *Arons v. New Jersey State Bd. of Educ.*, C.A.3 (N.J.)1988, 842 F.2d 58, certiorari denied 109 S.Ct. 366, 488 U.S. 942, 102 L.Ed.2d 356.

1:6A-4.3 Ongoing settlement efforts

(a) The scheduling of a hearing shall not preclude voluntary ongoing efforts by the parties to settle the matter before or at the hearing.

(b) Any ongoing settlement efforts by the parties shall not delay, interfere with, or otherwise impede a request for a hearing or the progress thereof, nor be grounds for adjournment of a hearing, unless a party requests an adjournment and the judge approves the adjournment to a specific date. Any such adjournment shall extend the deadline for decision, as established in N.J.A.C. 1:6A-18.1, Deadline for decision, by an amount of time equal to the adjournment.

SUBCHAPTER 5. REPRESENTATION

1:6A-5.1 Representation

(a) At a hearing, any party may be represented by legal counsel or accompanied and advised by individuals with special knowledge or training with respect to handicapped pupils and their educational needs, or both. Parents and children may be represented by individuals with special knowledge or training with respect to handicapped pupils and their educational needs.

(b) A non-lawyer seeking to represent a party shall comply with the application process contained in N.J.A.C. 1:1-5.4 and shall be bound by the approval procedures, limitations and practice requirements contained in N.J.A.C. 1:1-5.5.

Amended by R.1995, d.176, effective March 20, 1995.
See: 27 N.J.R. 4(a), 27 N.J.R. 1179(a).

SUBCHAPTERS 6 THROUGH 8. (RESERVED)

SUBCHAPTER 9. SCHEDULING

1:6A-9.1 Scheduling of hearing by Office of Administrative Law

(a) If the matter is not fully resolved at the conference, the representative of the Department at the conference shall, either in the presence of the parties or through telephone conference call to the parents pursuant to N.J.A.C. 6:28-2.7(b), telephone the Clerk of the Office of Administrative Law and the Clerk shall assign a peremptory hearing date. The hearing date shall, to the greatest extent possible, be convenient to all parties but shall be no later than 14 days from the date of the conference, unless a later date is approved by a judge. If the parents or adult pupil are not available for scheduling, either at the conference or by telephone conference call, a hearing date shall be assigned by the Clerk. If a later date is approved by a judge, the deadline for decision, as established in N.J.A.C. 1:6A-18.1, shall be extended by a time equal to the amount of delay.

(b) The Commissioner of Education shall, no later than three days after the conference, transmit the matter to the Office of Administrative Law. Copies of all notices, requests, pleadings, filings, stipulations of issues and facts, evidence and witness lists compiled at the conference and a description of the positions of each party shall be included with the standard Office of Administrative Law transmittal form required by N.J.A.C. 1:1-8.2.

Amended by R.1990 d.405, effective August 6, 1990.

See: 22 N.J.R. 1295(a), 22 N.J.R. 2262(b).

Revised section into subsections (a) and (b).

Deleted "agreed upon by all parties" referring to later date scheduling.

Added sentence; "If the parents . . . by the clerk."

1:6A-9.2 Adjournments

(a) The judge may grant an adjournment at the request of either party. Any adjournment shall be for a specific period of time. When an adjournment is granted, the deadline for a decision will be extended by an amount of time equal to the adjournment.

(b) No adjournment or delay in the scheduling of the hearing shall occur except at the request of a party.

New Rule, R.1992 d.331, effective September 8, 1992.
See: 24 N.J.R. 1936(a), 24 N.J.R. 3091(a).

SUBCHAPTER 10. DISCOVERY

1:6A-10.1 Discovery

(a) All requests for information, records or other discovery shall be made before or at the conference. All responses to these requests shall be completed no later than five days before the date of the hearing.

(b) Each party shall disclose to the other party any documentary evidence and summaries of testimony intended to be introduced at the hearing.

(c) Upon application of a party the judge shall exclude any evidence at hearing that has not been disclosed to that party at least five days before the hearing, unless the judge determines that the evidence could not reasonably have been disclosed within that time.

(d) Discovery shall, to the greatest extent possible, consist of the informal exchange of questions and answers and other information. Discovery may not include requests for formal interrogatories, formal admissions or depositions.

SUBCHAPTER 11. (RESERVED)

SUBCHAPTER 12. MOTIONS

1:6A-12.1 Emergency relief pending settlement or decision

(a) As part of a hearing request, or at any time after a hearing is requested, the affected parent(s), guardian, board or public agency may apply in writing for emergency relief pending a settlement or decision on the matter. An emergency relief application shall set forth the specific relief sought and the specific circumstances which the applicant contends justifies under (e) below the relief sought. Each application shall be supported by an affidavit prepared by an affiant with personal knowledge of the facts contained therein and, if an expert's opinion is included, the affidavit shall specify the expert's qualifications.

(b) Prior to the transmittal of the hearing request to the Office of Administrative Law, applications for emergency relief shall be addressed to the Department of Education, attention Division of Special Education, with a copy to the other party. The Department shall forward to the Office of Administrative Law by the end of the next business day all emergency relief applications that meet the procedural requirements in (a) above and which set forth on the face of the application and affidavits circumstances which would justify emergency relief under this section. Emergency relief applications which show no right to emergency relief or fail to comply with the procedural requirements shall be processed by the Department in accordance with N.J.A.C. 1:6A-4.2.

(c) After transmittal, applications for emergency relief must be made to the Office of Administrative Law, with a copy to the other party.

(d) The Office of Administrative Law shall schedule an emergency relief application hearing on the earliest date possible and shall notify all parties of this date. Except for extraordinary circumstances established by good cause, no adjournments shall be granted but the opponent to an emergency relief application may be heard by telephone on the date of the emergency relief hearing. If emergency relief is granted without all parties being heard, provision shall be made in the order for the absent parties to move for dissolution or modification on two days' notice. Such an order, granted without all parties being heard, may also provide for a continuation of the order up to 10 days.

(e) At the emergency relief hearing, the judge may allow the affidavits to be supplemented by testimony and/or oral argument. The judge may order emergency relief if the judge determines from the proofs that:

1. The applicant has a reasonable probability of ultimately prevailing on the merits;
2. Either serious physical harm will result to a student or students if the relief is not granted, or the student's education program will be terminated or interrupted; and
3. The relief requested is narrowly defined to prevent the specific harm from occurring and will not cause unreasonable expense and substantial inconvenience.

(f) Judges may decide emergency relief applications orally on the record and may direct the prevailing party to prepare an order embodying the decision. If so directed, the prevailing party shall promptly mail the order to the judge and shall mail copies to every other party in the case. Unless a party notifies the judge and the prevailing party of his or her specific objections to the order within five days after such service, the judge may sign the order.

(g) After granting or denying the requested emergency relief, the judge shall either return the parties to the Department of Education for a conference under N.J.A.C. 1:6A-4.2 or schedule hearing dates if a conference has already been conducted.

SUBCHAPTER 13. PREHEARING CONFERENCES

1:6A-13.1 Prehearing conferences

Prehearing conferences shall not be scheduled in special education hearings.

SUBCHAPTER 14. CONDUCT OF CASES

1:6A-14.1 Procedures for hearing

(a) To the greatest extent possible, the hearing shall be conducted at a time and place convenient to the parent(s) or guardian.

(b) At the hearing, parents shall have the right to open the hearing to the public, and to have the child who is the subject of the hearing present.

(c) A verbatim record shall be made of the hearing.

(d) The judge's decision shall be based on the preponderance of the credible evidence, and the proposed action of the board of education or public agency shall not be accorded any presumption of correctness.

Amended by R.1992 d.331, effective September 8, 1992.
See: 24 N.J.R. 1936(a), 24 N.J.R. 3091(a).

Deleted (c); redesignated (d)-(e) as (c)-(d).

1:6A-14.2 Interpreters

Where necessary, the judge may require the Department of Education to provide an interpreter at the hearing or written translation of the hearing, or both, at no cost to the parent(s) or guardian.

1:6A-14.3 Independent educational evaluation

(a) For good cause and after giving the parties an opportunity to be heard, the judge may order an independent educational evaluation of the pupil. The evaluation shall be conducted in accordance with N.J.A.C. 6:28-1 by an appropriately certified or licensed professional examiner(s) who is not employed by and does not routinely provide evaluations for the board of education or public agency responsible for the education of the pupil to be evaluated. The independent evaluator shall be chosen either by agreement of the parties or, where such agreement cannot be reached, by the judge after consultation with the parties. The judge shall

order the board of education or public agency to pay for the independent educational evaluation at no cost to the parent(s) or guardian. (34 CFR 300.503)

(b) Where an independent educational evaluation is ordered, the judge upon the request of a party may adjourn the hearing for a specified period of time and the deadline for decision, as established in N.J.A.C. 1:6A-18.1, will be extended by an amount of time equal to the adjournment.

1:6A-14.4 Transcripts

(a) In addition to any stenographic recording, each hearing shall be sound recorded by tape recording. A parent may receive a copy of the tape recording at no cost by making a request to the Clerk.

(b) Transcripts of any hearing may be obtained pursuant to the procedures in N.J.A.C. 1:1-14.11.

New Rule, R.1992 d.331, effective September 8, 1992.
See: 24 N.J.R. 1936(a), 24 N.J.R. 3091(a).

SUBCHAPTERS 15 THROUGH 17. (RESERVED)

SUBCHAPTER 18. DECISION AND APPEAL

1:6A-18.1 Deadline for decision

Subject to any adjournments pursuant to N.J.A.C. 1:6A-9.2, a written decision shall be issued by the judge and mailed by the Office of Administrative Law no later than 45 days from the date of the hearing request.

Amended by R.1992 d.331, effective September 8, 1992.
See: 24 N.J.R. 1936(a), 24 N.J.R. 3091(a).
Revised text.

1:6A-18.2 Confidentiality

(a) In a written decision, the judge shall use initials rather than full names when referring to the child and the parent(s) or guardian, and may take other necessary and appropriate steps, in order to preserve their interest in privacy.

(b) Records of special education hearings shall be maintained in confidence by the Office of Administrative Law pursuant to Federal regulations, 34 CFR 300.500 et seq. The Clerk of the Office of Administrative Law, 185 Washington Street, Newark, NJ 07102, (201) 648-6006, shall maintain these records.

1:6A-18.3 Appeal, use of hearing record, obtaining copy of record, and contents of record

(a) Any party may appeal the decision of the judge either to the Superior Court of New Jersey, pursuant to the Rules Governing the Courts of the State of New Jersey, or to a district court of the United States, pursuant to 20 U.S.C.A. 1415(e)(2).

(b) A party intending to appeal the administrative law judge's decision or an authorized representative is permitted to use, or may request a certified copy of, any portion or all of the original record of the administrative proceeding, provided a copy remains on file at the Office of Administrative Law. The requesting party shall bear the cost of any necessary reproduction provided, however, that requesting parents shall not be charged or assessed costs. Written requests for this material should be directed to the Clerk, Office of Administrative Law, 185 Washington Street, Newark, New Jersey 07102.

(c) The record shall consist of all documents transmitted by the Department of Education to the Office of Administrative Law; correspondence; any documents relating to motions; briefs; exhibits; transcripts, if any; the administrative law judge's decision; and any other material specifically incorporated into the record by the judge.

Administrative correction: 20 U.S.C.A. 1415(e)(3) changed to 20 U.S.C.A. 1415(e)(2).
See: 22 N.J.R. 3478(a).
Amended by R.1992 d.331, effective September 8, 1992.
See: 24 N.J.R. 1936(a), 24 N.J.R. 3091(a).
Revised (b).

1:6A-18.4 Stay of implementation

(a) Unless the parties otherwise agree, the educational placement of the pupil shall not be changed prior to the issuance of the decision in the case, pursuant to 34 C.F.R. 300.513.

(b) Where a party appeals any portion of the decision not involving a change in the pupil's educational placement, and upon request by any party, the judge may stay implementation of the decision if immediate implementation would be likely to result in serious harm to the pupil or other pupils in the event that the decision is rejected or modified upon appeal.

Case Notes

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. *M.H. v. East Windsor Regional School District*, 9 N.J.A.R. 159 (1986).

1:6A-18.5 (Reserved)

Repealed by R.1992 d.331, effective September 8, 1992.
See: 24 N.J.R. 1936(a), 24 N.J.R. 3091(a).
Section was "Motion to reopen hearing".