

PUBLIC NOTICE

EDUCATION

STATE BOARD OF EDUCATION

Notice of Action of Petition for Rulemaking

Fiscal Accountability, Efficiency, and Budgeting Procedures

Tuition Rate Procedures

N.J.A.C. 6A:23A-18.3

Petitioner: Gerard Thiers, Executive Director, ASAH.

Take notice that on May 29, 2018, the New Jersey State Board of Education (State Board) received a petition for rulemaking from the above petitioner requesting the State Board amend N.J.A.C. 6A:23A-18.3(m) to require the final tuition rate charged by an approved private school for students with disabilities (APSSD) to each sending district board of education to be paid within two years following an independent auditor's certification of the actual cost per student for the year in question.

The petitioner specifically requested the State Board adopt amendments to N.J.A.C. 6A:23A-18.3(m) that allow an APSSD to charge each sending district board of education all or part of the difference owed if the tentative tuition rate for the school year established by written contractual agreement pursuant to N.J.A.C. 6A:23A-18.3(h) is less than the final tuition rate charged for the school year, but the same final tuition rate must be charged to each sending district board of education. N.J.A.C. 6A:23A-18.3(m) also requires a sending district board of education to pay the difference on a mutually agreed upon date during the second school year following the year for which the actual certified cost per student is approved by the Commissioner, or his or her designee.

The petitioner requested an amendment to the second sentence of N.J.A.C. 6A:23A-18.3(m) to replace “approved by the Commissioner, or his or her designee” with “certified by the APSSD’s independent auditor and filed with the Commissioner, or his or her designee.”

The petitioner stated each APSSD is required to perform an annual audit by an independent auditor in a Department-prescribed format and certifying what exactly are the “actual costs” for the programs and services as contemplated by statute. The petitioner also stated the rules in effect prior to 2017 provided that sending school districts had two years following an independent auditor’s certification to reimburse an APSSD for the actual costs of the programs and services delivered in the time frame covered by the audit.

The petitioner stated the current rule fundamentally changes the statutory structure to delay the reimbursement of the actual costs required by statute until the Department has approved the amount certified by an independent auditor. The petitioner asserted the Department’s review of the certified tuition amount set forth in an independent audit is currently taking an average of two to three years following the independent audit’s submission. The petitioner also asserted this means the Department is giving sending school districts four to five years to pay for programs and services that have been fully provided by an APSSD. The petitioner further asserted that delaying payment for such a long period of time will require APSSDs, in the short term, to cut back on the staff and resources necessary to serve their students and, in the long term, will inevitably lead to the closure of APSSDs.

The petitioner stated this regulatory structure cannot be construed to be consistent with the role of APSSDs in the placement continuum contemplated by statute or with the simple reimbursement mechanism established therein. The petitioner asserted that establishing a five-year process for the payment of tuition is nothing more than a regulatory attempt to eliminate the

private school option developed by the Legislature and embodied in its statutory intent to limit reimbursement to actual costs.

The petitioner stated that the authority exercised by the Department in connection with APSSDs rests on four words of N.J.S.A. 18A:46-21 limiting tuition to an amount not exceeding the “actual cost per pupil.” The petitioner also stated it is the Department’s responsibility to facilitate reimbursement to APSSDs for the actual sums spent to educate students placed in APSSDs, but the Department has given its own meaning to “actual cost” over time and using just four words of statutory authority. The petitioner further stated the Department has constructed an 89-page regulatory scheme by which it sets forth what may constitute an “actual cost” and through which the Department attempts to control in minute detail the governance and operations of the independent schools. The petitioner contended the Legislature has recognized the essential role of the APSSDs in providing programs and services to students with profound disabilities who are unable to be served in the traditional school setting and has established, in statute, the limited role of the Department to simply monitor that reimbursements do not exceed actual costs. The petitioner further contended the Department's intention in constructing a confiscatory regulatory scheme is apparently to severely restrict, or totally eliminate, the use of private schools in delivering special education programs and services.

The rules at N.J.A.C. 6A:23A-18, Tuition for Private Schools for Students with Disabilities, are well within the statutory authorization for APSSDs and the Department’s authority to regulate the tuition charged by APSSDs to school districts. The subchapter’s authorizing law, N.J.S.A. 18A:46-21, states: “Any board of education, jointure commission, or private school for the handicapped which receives pupils from a sending district under this chapter shall determine a tuition rate to be paid by the sending board of education, but in no case shall the tuition rate exceed

the actual cost per pupil as determined under rules prescribed by the commissioner and approved by the State Board of Education.”

N.J.A.C. 6A:23A-18 contains the rules for the Commissioner to determine the actual cost per pupil mentioned in the statute. The rules have always, and continue to, set forth a process for determination of the actual cost per pupil and approval of the rate. The process requires APSSDs to do the following: (1) follow appropriate accounting requirements; (2) charge for reasonable costs that meet the needs of students’ individualized education programs (IEPs) and are allowable; (3) submit an independent audit with a final tuition rate certified by the auditor; and (4) have the rate approved by the Commissioner through a review of the audit by Department staff. Following Department approval of the final tuition rate, school districts must pay the final tuition rate within two years.

The State Board adopted amendments to the subchapter that were effective July 3, 2017. The adopted amendments made no changes to the system for approval of final tuition rates; the amendments revised allowable costs and other items that are inputs into the final tuition rates prior to the Commissioner’s review. N.J.A.C. 6A:23A-18.3(k) previously provided “[t]he Commissioner will issue notification certifying that the final tuition rates charged are based on the certified actual cost per student” and, in practice, the final tuition rate has always depended on Commissioner approval. Existing N.J.A.C. 6A:23A-18.3(k) through (m) merely clarify and describe the same process using “approval,” which is clearer language than “certify.” Therefore, the Department maintains the petitioner’s statement that “the current rule fundamentally changes the statutory structure to delay the reimbursement of the actual costs required by statute until the Department has approved the amount certified by an independent auditor” is inaccurate. The current rules provide for the exact same process as in the prior version.

Numerous provisions in the rules address petitioner's concern that delay "will require APSSDs, in the short term, to cut back on the staff and resources necessary to serve their students and, in the long term, will inevitably lead to the closure of APSSDs." As already discussed, the process for Department approval of the final tuition rate has not changed, and the Department has not observed any closures due to the circumstances described by the petitioner. While awaiting Department approval, APSSDs may charge a tentative rate of the prior years' rate, inflated by the higher of either four percent or the Consumer Price Index (CPI), pursuant to N.J.A.C. 6A:23A-18.3(i), and may seek approval for a higher tentative rate for undue financial hardship, pursuant to N.J.A.C. 6A:23A-18.3(j). The Department is aware of APSSDs that utilize short-term loans during periods when current expenditures exceed current tuition receipts. As long as APSSDs abide by the rules governing the calculation of tuition, the Department will approve the final tuition rate and the school districts will pay the difference between the tentative and the final tuition rates within two years after approval.

In response to comments made during the rulemaking process for the 2017 amendments, the Department disagreed that a timeline for the Department's approval of final tuition rates is necessary. The Department stated in its response that it makes every effort to provide APSSDs with responses to requests for approval within a reasonable time, considering the nature and complexity of the particular issue and available Department resources. The Department further responded as follows: "To receive a prompt response, APSSDs can ensure that their submissions to the Department contain all required and necessary information, and can remain available for follow-up questions. The Department expects that the clarifications and streamlining in the amendments and new rules will facilitate compliance determinations for both APSSDs and the

Department. Moreover, the Department is available to offer guidance and technical assistance to APSSDs that require clarification or other information to facilitate this process.”

The previous response illustrates that the Department has already considered concerns about the timeframe of final tuition rate approval. The timely approval of final tuition rates depends on a collaborative process where APSSDs ensure they do not incur non-allowable costs and provide complete submissions to the Department. The Department also encourages APSSDs to seek assistance from the Department before making questionable expenditures to prevent regulatory findings at audit, and has provided such information when requested. Moreover, the Department, on June 11, 2018, launched its budget software system for APSSDs. The Department expects the use of the software by APSSDs will facilitate compliance determinations for both APSSDs and the Department by providing access to better information at budget and before desk reviews begin for audit. The Department anticipates launching the audit system at the end of summer 2018, which also will ease compliance.

In conclusion, the rules governing APSSD tuition are well within the statutory authority established in N.J.S.A. 18A:46-21, which specifically mentions rules for the determination of the actual cost per pupil. Contrary to petitioner’s statements, the requirement for the Commissioner approve the tuition rates as determined by the independent auditor is long-standing and does not reflect a change in the framework for the determination of the tuition at APSSDs. Any possible financial burden caused by a delay in the approval of the final tuition rate can be alleviated through the current rules and prompt and adequate responses to the Department.

Therefore, the petitioner’s request is hereby denied.