

PUBLIC NOTICE

EDUCATION

STATE BOARD OF EDUCATION

Notice of Receipt 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 requests the State Board adopt amendments to N.J.A.C. 6A:23A-18.3(m), which allows 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 requests 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 states 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 states 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 states 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 asserts 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 asserts 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 asserts 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 states 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 asserts 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 states 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 states 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 states 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 contends 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 contends 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.

In accordance with N.J.A.C. 1:30-4.2, the Department shall subsequently mail to the petitioner, and file with the Office of Administrative Law, a notice of action on the petition.