

## **Public Notice**

### **Education**

#### **State Board of Education**

#### **Notice of Action on Petition for Rulemaking**

#### **Special Education**

#### **Fiscal Accountability, Efficiency, and Budgeting Procedures**

#### **Student Transportation**

#### **School District Operations**

#### **Student Records**

**N.J.A.C. 6A:14-3.7; 6A:23A-3.1, 5.2, 6.4, 6.6, 6.9, and 8.2; 6A:27-7.9; and 6A:32-3.2, 7.3, 7.4, 7.5, 7.8, and 7.9**

Petitioner: Robert J. Chester, Esq.

**Take notice** that on August 28, 2020, the New Jersey State Board of Education (State Board) received a petition for rulemaking from the above petitioner, requesting the State Board of Education amend or add new rules at N.J.A.C. 6A:14, 23A, 27, and 32, related to student records. As the petition originally filed lacked the specific amendments and new rules sought, the petitioner provided the amendments and new rules on September 1, 2020.

The petitioner sought amendments and new rules related to how school districts maintain student records, what constitutes student records, and how student records are redacted and made available under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 et seq. The petitioner also sought other requirements related to security of student records, data breaches, individualized education program (IEP) meetings, and school buses. The petitioner further

sought to add provisions related to district board of education members asserting the educational rights of their children.

A notice acknowledging receipt of the petition was published in the October 5, 2020, New Jersey Register at 52 N.J.R. 1862(a). A notice of action indicating that additional time was needed for the Department of Education (Department) to deliberate about this petition was published in the December 7, 2020, New Jersey Register at 52 N.J.R. 2130(a). Executive Order No. 127 (2020) extended the deadlines pursuant to N.J.S.A. 52:14B-4(f) and N.J.A.C. 1:30-4.1, 4.2, and 4.3 for any Executive Branch department or agency to act on any currently pending petition for rulemaking or on any petition for rulemaking filed during the Public Health Emergency originally declared in Executive Order No. 103 (2020). Deadlines that would otherwise occur sooner are extended until 90 days after the last day of the Public Health Emergency originally declared in Executive Order No. 103 (2020).

The Department shares the petitioner's view that N.J.A.C. 6A:32 should be amended to address that the New Jersey Supreme Court held, in *L.R. v. Camden City Public School District*, 238 N.J. 547, that existing State rules do not incorporate the concept of personally identifiable information or include a procedure whereby student records may be disclosed following the redaction of personally identifiable information. The Department intends to amend N.J.A.C. 6A:32. However, the Department has determined that the petitioner's requested amendments are not the most appropriate way to address the issue.

The Department is considering, instead, to amend N.J.A.C. 6A:32 to incorporate definitions at 34 CFR Part 99, which are the Federal regulations that implement the FERPA, 20 U.S.C. § 1232g, and N.J.S.A. 18A:36-35. The Department is also considering amendments to clarify that a district board of education may release student records when responding to a request

under OPRA, from any party, after the district board of education has redacted all personally identifiable information and made a reasonable determination that a student's identity is not personally identifiable. The Department expects to present amendments to the State Board in the very near future.

Under the petitioner's request, the umbrella of "student records" would include records that are not educationally related or relevant. As stated at N.J.A.C. 6A:32-7.1(c), "[s]tudent records shall contain only such information as is relevant to the education of the student and is objectively based on the personal observations or knowledge of the certified school personnel who originate(s) the record."

The Department also has determined that the provisions in the petitioner's request fall into one or more of the following categories: is already addressed by State statute or the New Jersey Administrative Code; is contrary to State or Federal law, regulation, or case law; is outside of the Department's authority and/or under the authority of another State agency or commission; would place undue administrative, fiscal, and/or logistical burdens on school districts; would pose serious privacy or security concerns; or would create unsound education policy.

For example, the petitioner requested a new regulation at N.J.A.C. 6A:14-3.7(n) to require all IEP meetings to be recorded and for the recordings to be maintained as part of the student's record. The requested regulation also would require a school district to provide the student's parent(s) and/or guardian(s) with a written transcript of all relevant IEP meetings at no charge in the event of a due process or other dispute. The Department maintains that the requested regulations would present unreasonable administrative, fiscal, and logistical burdens on school districts. Existing N.J.A.C. 6A:14-2.3(k)8 allows participants to audio record an IEP

meeting, as long as notice is given to the other meeting participants prior to the meeting's start. Moreover, the IEP itself is considered a student record and is available to the student's parent/guardian as part of a duly submitted request for student records.

The petitioner requested new N.J.A.C. 6A:23A-3.1(g) to require all employment contracts and proposed contracts to be prominently posted on the school district's website. The requested rule has the potential to conflict with privacy afforded to personnel matters and contract negotiations. OPRA generally exempts most personnel records from public access. The Department's user-friendly budget required pursuant to N.J.S.A. 18A:22-8a already requires that a summary of the contract information be posted for superintendents, assistant superintendents, and school business administrators. This summary information is collected in the annual budget software and posted on the school district's website, if one exists, and in the State summary on the Department's website. The summary provides public information about the details of contracted payments without risking privacy concerns for the employees.

The petitioner requested new regulations at N.J.A.C. 6A:23A-5.2 and 6.9 to require invoices, work orders, professional services and public relations contracts, and other business-related records to be posted on a school district's website. The requested provisions would impose undue administrative, fiscal, and/or logistical burdens on school districts. School districts are not required to create or maintain a website, and doing so could present a cost to school districts in terms of personnel and service fees. Furthermore, school district contracts and related materials constitute an immeasurable number of complex documents and, in many cases, would require an individualized review of the materials for privilege and privacy concerns before posting to a website. School districts would likely incur expenses to hire personnel and obtain equipment to convert large volumes of paper documents to an electronic format for posting

online. The effort and cost that would be required to ensure the posting of the documents on school districts' websites is unreasonable given that school district business practices are highly regulated pursuant to N.J.A.C. 6A:23A. Likewise, OPRA already provides a mechanism for an interested member of the public to request access to the records. Requiring all work orders to be posted on a school district's website could also pose a security risk as work on school district facilities and security systems could allow outside individuals to identify and take advantage of weaknesses in school building security.

The petitioner requested a new regulation at N.J.A.C. 6A:23A-6.6 to require a school district's current and future standard operating procedure (SOP) manuals to be posted prominently on the school district's website. This request would pose a safety and security risk to school districts since financial SOP manuals set forth detailed and technical information about district business processes that could reveal sensitive system information and place the school district at risk for a cyberattack or financial crimes.

The petitioner requested amendments at N.J.A.C. 6A:27-7.9, which requires school bus owners to retain all records of inspection and maintenance reports for the life of the vehicle and to make the records available for review by the New Jersey Motor Vehicle Commission (NJMVC). The requested amendments would require the records to be posted on the school district's website and discoverable under OPRA. The petitioner also requested new regulations to require all school buses to have an OBD-II/GPS tracker, front-facing video, and student-facing video with audio and to require school districts to post on their websites the safety reports listing all such unsafe driving and traffic violations for each school bus and school bus driver, as well as all complaints regarding school buses and school bus drivers. The petitioner's request appears to presume that all vehicles used for transporting students are owned and maintained by district

boards of education and that all school bus drivers are school district employees. However, many school districts contract with private school bus contractors for student transportation and, therefore, do not have direct control over the records of school bus inspections and maintenance, or school bus driver records when they do not implicate criminal history review. Furthermore, the records of school bus inspections are already available on the NJMVC's webpage. Moreover, school districts that do not own vehicles used for student transportation do not have control over school bus inspection and maintenance reports, which are maintained by the NJMVC and the public and private contractors that own the vehicles.

The petitioner requested a new regulation at N.J.A.C. 6A:32-3.2(c) to prohibit a district board of education member from being penalized in any way for asserting their child's educational rights or from being forced to step down for asserting such rights, including in due process and or other proceedings of a similar nature. The Department lacks the authority to impose the requested regulation and contends it would result in the creation of unsound policy. Furthermore, the proposed regulation is inconsistent with the Commissioner's and Supreme Court's interpretation of N.J.S.A. 18A:12-2 and 18A:12-24.j, as set forth in *Bd. of Educ. of Sea Isle City v. Kennedy*, 196 N.J. 1 (2007).

The petitioner also requested amendments at N.J.A.C. 6A:32-7.3(a), which sets forth mandated student records, to add 20 items as mandated student records as they relate to a student, whether individually and/or collectively. The requested items to be mandated as student records included email, texts, other communications, and social media posts by teachers, administrators, and staff; press releases; audio and video recordings in general and from cameras placed in all general education and special education classrooms that would be required under the petitioner's request; yearbooks; and pictures. The Department contends that the majority of

the requested items is not educationally related and the requested amendments would lead to the creation of unsound policy, present serious privacy issues and likely violate State and Federal privacy laws, and/or place unreasonable administrative, fiscal, and logistical burdens on school districts. Other parts of the requested amendments, such as the inclusion of student disciplinary records, already are deemed student records (see N.J.A.C. 6A:16-7.9 and N.J.S.A. 18A:36-25.1.b).

The petitioner requested an amendment at N.J.A.C. 6A:32-7.5(c), which allows the district board of education to charge a reasonable fee for reproduction of student records, not to exceed the schedule of costs set forth at N.J.S.A. 47:1A-5, provided that the cost does not effectively prevent the parents or adult students from exercising their rights pursuant to N.J.A.C. 6A:32-7 or other Federal and State rules and regulations regarding students with disabilities, including N.J.A.C. 6A:14. The petitioner sought to prohibit the assessment of charges for “special service costs,” electronic records, or redactions costs and to allow parents to provide storage media for use to avoid cost. The petitioner also requested a new section at N.J.A.C. 6A:32-7.9 to govern the redaction of student records and to allow parents, guardians, and students to petition the Office of Special Education Programs and/or the Department for the appointment of a special master to review challenged redactions. The Department does not have the authority to adopt such rules. OPRA governs the access to public records and sets forth the processes by which a requestor can challenge redactions to records or denial of access. Furthermore, allowing parent-provided storage media to be used would pose security risks and raise privacy concerns.

For all of the reasons stated above, the petitioner’s request is hereby denied.