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April 19, 2007

Ms. Patricia A. Meyer  
Executive Administrator and Coordinator  
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135 West Hanover Street, P.O. Box 627  
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**RE: Complaints filed by the Special Services School Districts of Burlington, Atlantic County, Cape May and Bergen Counties, and the Shamong Township Board of Education (1-07)**

Dear Ms. Meyer:

The New Jersey School Boards Association (hereinafter "NJSBA") respectfully submits this Letter Brief in support of its Request to Participate as Amicus Curiae in the above-captioned matter, to respond to the Attorney General's Motion to Dismiss and to provide additional substantive comments on the issue of whether the amendment to N.J.A.C. 6A:14-4.7(a)(2), which reduces the permitted age span in elementary special class programs, from four to three years, is an unfunded mandate whose enforcement should be enjoined.

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**PROCEDURAL HISTORY AND STATEMENT OF FACTS**

The NJSBA adopts the Procedural History and the Statement of Facts as set forth on page one of the Respondent Attorney General’s Letter Brief in Support of Respondent’s Motion to Dismiss on Behalf of the New Jersey Commissioner of Education and as further set forth in the March 1, 2007 and March 23, 2007 letters from the Council on Local Mandates (hereinafter “Council”) to the service list parties. To the extent that the Procedural History and Statement of Facts of the Respondent Attorney General may be inconsistent with that set forth in the Council’s letters, NJSBA leaves the resolution of those inconsistencies to the Council.

**LEGAL ARGUMENTS**

- A. THE INSTANT CASE RAISES AN ISSUE OF STATEWIDE IMPORTANCE TO BOARDS OF EDUCATION, MAKING PARTICIPATION BY THE NEW JERSEY SCHOOL BOARDS ASSOCIATION AS AMICUS CURIAE HELPFUL IN THE RESOLUTION OF THIS ISSUE.**

The instant request for Amicus Curiae participation is made pursuant to Rule 7 of the Council on Local Mandates Rules of Procedure. Said Rule provides that the request shall state:

... the identity of the group or individual seeking to appear, the issue it wishes to address, the nature of the public interest therein, the nature of the requester's interest, and the requester's involvement or expertise with respect to the issues involved.

N.J.S.A. 52:13H-12(c) further states:

The Council shall grant the request if it is determined by majority vote of the council's members that the request is timely, that participation by the group or individual will assist in the resolution of the matter and that no interested party will be prejudiced thereby.

In its March 1, 2007 letter to the service list parties, the Council specifically copied the NJSBA and the Garden State Coalition of Schools, the New Jersey Association of Counties, the New Jersey State League of Municipalities, and the New Jersey Conference of Mayors, noting that either organization could request Amicus Curiae status. NJSBA is responding to the Council's direct notice through this Request to Appear. In addition NJSBA has responded to the

Council's request for assistance in notifying members of the NJSBA that might be interested in individually filing for Amicus Curiae status. NJSBA published a notice to its board of education members in the March 15 and April 4 issues of its weekly publication, School Board Notes, advising them of this matter and the opportunity to request the ability to participate.

The movant, the NJSBA, is a statutorily created organization whose membership consists of all local boards of education in the State of New Jersey, including County Special Service School Districts. N.J.S.A. 18A:6-45. The NJSBA is empowered to:

. . . investigate such subjects relating to education in its various branches as it may think proper, and it shall encourage and aid all movements for the improvement of educational affairs of the State. N.J.S.A. 18A:6-47; See, New Jersey State AFL-CIO v. State Federation of District Boards of Education, 93 N.J. Super. 31 (Ch. Div. 1966).

NJSBA's participation would be useful in providing a comprehensive statewide perspective on the issues in this case. NJSBA has participated as Amicus Curiae before this Council in the matter of In re Monmouth-Ocean Educational Services Commission, the Rumson-Fair Haven Regional High School District and the Stafford Township Board of Education

(1-04)(August 20, 2004 decision.) Also, ample precedent exists for Amicus Curiae participation by the NJSBA before the State courts in cases of great importance to boards of education. See, e.g., Camden v. Alexander, 181 N.J. 187 (2004); Lonegan v. State of New Jersey, 174 N.J. 435 (2002), 341 N.J. Super. 465 (App. Div. 2001); Outland v. Monmouth-Ocean Education Services Commission, 154 N.J. 531 (1998); Abbott v. Burke, 149 N.J. 145 (1997); Nelson v. Board of Education of the Township of Old Bridge, 148 N.J. 358 (1997); Board of Education of the Township of Neptune v. Neptune Township Education Association, 144 N.J. 16 (1996); Impey v. Board of Education of the Borough of Shrewsbury, 142 N.J. 388 (1995); Scotch Plains-Fanwood Board of Education v. Education Association, 139 N.J. 141 (1995); Denney v. Passaic Valley Regional High School Board of Education, 131 N.J. 626 (1993); O'Shea v. West Milford Board of Education, (Docket No. A-2026-05T5) Superior Court of New Jersey, Appellate Division, 2007 N.J. Super. LEXIS 98, April 5, 2007; Joye v. Hunterdon Central Regional High School Board of Education, 353 N.J. Super. 600 (App. Div. 2002); P.B.K. v. Board of Education of the Borough of Tenafly, 343 N.J. Super. 419 (App. Div. 2001); State v. Ercolano, 335 N.J. Super. 236, (App. Div. 2000); Jackson Township Board of

Education v. Jackson Township Board of Education, 334 N.J. Super. 162 (App. Div. 2000). Several of these cases, like the matter currently before the Council, involved constitutional provisions, enabling legislation and statutory construction.

The NJSBA fully understands the role and function of an Amicus Curiae and will focus narrowly on the issues outlined below to present an analysis that does not duplicate the arguments made by the parties in this case.

The instant matter involves the question of whether the amendment to N.J.A.C. 6A:14-4.7(a)(2), which reduces the permitted age span in elementary special class programs from four to three years, is an unfunded mandate in violation of Article VIII, Section 2, Paragraph 5 of the New Jersey Constitution and its enabling legislation, the Local Mandates Act, N.J.S.A. 52:13H-1 et. seq. The complainant school districts, the Burlington, Atlantic, Cape May and Bergen County Special Services School Districts, and the Shamong Township Board of Education, maintain that N.J.A.C. 6A:14-4.7(a)(2) is an unfunded mandate and request that the Council issue a ruling enjoining its enforcement.

NJSBA was actively involved during the public comment stage of the adoption of the amendments to N.J.A.C. 6A:14, the New Jersey Administrative Code governing special

education. Prior to the 2006 amendments to the State special education code, the age span for all special class programs was four years (both elementary and secondary). Neither the federal IDEA nor any other federal law controls the age span permitted in classrooms; the age span is controlled exclusively by the State. During the 2006 code revision process, the DOE had proposed to change the age span to three for all special class programs. However, in response to the concerns expressed by a number of commenters including NJSBA, the DOE revised its proposal and returned it to four years at the secondary level, with a determination to further study the potential benefit as well as the impact on school districts and their ability to operate sufficient numbers of programs. However, the DOE did not revise its proposal for the elementary special class programs, and it remained at three years, to go into effect in 2007-08. <sup>1</sup>

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<sup>1</sup> By letter to Barbara Gantwerk dated 3/13/06, NJSBA opposed the proposed change in age span to N.J.A.C. 6A:14-4.7. Below is the relevant section of our letter:

*Age span, **N.J.A.C. 6A:14-4.7(a)2**. We wish to reiterate our concerns about age span for special class programs as set forth in N.J.A.C. 6A:14-4.7(a)2. The concerns that have been expressed to us primarily involve the difficulty of implementing this change in the high school setting.*

*The Lindenwold District has shared with us a compelling illustration of the kind of dilemmas this provision will create. The district opened up a new program for multiply disabled students at its high school to provide transition-to-work services for students through age 21. When the program opened, it had 4 students, ages 15 to 18. The district subsequently received a transfer student who was 19; as he was within the 4 year range, he joined that class. Had the code provision been in effect, the*

In the spirit of "picking its battles," NJSBA targeted most of its objections with respect to the proposal for reductions in permitted age span in special classes, to the proposed reduction on the secondary level, as we heard our members express the greatest concern about this. But the reduction on the elementary level will likewise have a significant fiscal and programming effect – without sufficient educational benefits to justify the harm – in a climate where financial, physical and educational resources are stretched. As NJSBA has been involved with this issue involving the administrative code during the readoption

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*district would have had to either provide a separate class for that student (or somehow split the 5 students into 2 classes) or send him out of district; neither of these would be desirable options. A program with just 1 or 2 students would not provide the kind of social or other skills that were the focus of the program; and sending him out of district would defeat the LRE goal of providing the new program in-district. The Director of Special Services believes that in such a setting, a 4-year age span allows programming in small district in a quality and cost-effective way that supports LRE. The Director of Special Services believes that the kinds of skills taught in this setting can be adequately programmed without any detriment to the quality of service delivery. All of the students in the class show fairly significant cognitive delay and needed same type of pre-vocational and job coaching experience. The maturity, interest and educational needs of students within that 4-year span were more similar than would they be for students in a general education program.*

*While the option of a waiver could provide some relief, applying for a waiver entails extra paperwork contrary to the paperwork reduction goals of IDEA. And the granting of a waiver is not guaranteed.*

process, it understands the issues and can assist the Council in making its decision.

Further, this Request is timely, as the Council has called for all Requests to Appear as Amicus Curiae to be filed by April 19, 2007. (By letter dated March 23, 2007, the Council extended the original filing date of April 12 to April 19, in conjunction with granting the Commissioner of Education an extension from March 22 to March 29 to file an answer and motion). NJSBA has met this time frame in filing. Therefore, participation by the NJSBA should not cause any appreciable delay in this proceeding, nor will it prejudice any party. Rather, NJSBA's participation will assist in the clarification and resolution of the issues at hand. Should participation be granted, the NJSBA will urge the Council to rule that N.J.A.C. 6A:14-4.7(a)(2) is an unfunded mandate and enjoin its enforcement.

**B. NJSBA POLICY SUPPORTS STATE FUNDING FOR EDUCATION MANDATES.**

The NJSBA is a policy-based organization. Association policy is established, primarily, through action taken at meetings of NJSBA's Delegate Assembly, regular meetings of which take place twice a year. The Delegate Assembly is made up of representatives from all the boards of education of New Jersey, one delegate from each board. The NJSBA has several policies that support its participation in this

Matter, set forth in its Manual of Positions and Policies on Education. NJSBA believes that while reductions in class size benefit children, "the state and federal government should provide school districts with adequate funds to ensure the facilities, equipment, technology and staffing necessary to reduce class size." NJSBA's beliefs about the State's school finance system include its belief that the finance system should: "provide funds to support and guarantee a thorough and efficient level of education to all public school children;" "provide state aid for the full excess cost of all mandated special education programs and services;" "provide state funding for the full cost of all other state mandates;" and "promote efficiency in the use of tax dollars." The NJSBA also believes that boards should periodically examine all policies and practices relating to class size, pull-out programs, and ability grouping to ensure that they produce effective learning methods. The NJSBA also believes that "neither the state nor federal government should mandate any new or expanded school curricula, activity, or program unless a compelling need, including its educational value, has been demonstrated."

Taken together, these policies express support for providing a thorough and efficient education to all students in a manner that ensures the most efficient use of tax dollars, and that ensures that new mandates are paid for by

the State and/or federal government entity that establishes the particular requirement. That philosophy is the essence of State mandate-State pay and is at the core of this case.

This case has clear statewide impact for all boards of education. There are significant cost implications for school districts that send their more severely disabled students to other schools, such as County Special Services School Districts, as these providers are likely to increase their tuition as a result of the reduction in permitted age span. There is no authorization of resources to offset the additional direct expenditures that these sending districts will incur.

There are also many individual school districts that offer special class programs in-district, and do not send their students out to the County Special School Districts or other providers. In fact, increasing the number of individual school districts that operate specialized programs on-site within the schools, would advance the State's performance goals as part of the continuum of least restrictive environment (LRE). See, Indicators #5 and #6 of OSEP's State Performance Plan (SPP), as resubmitted on February 1, 2007, (State's Exhibit A to Certification of Barbara Gantwerk) and OSEP's Annual Performance Report (APR)(State's Exhibit B to Certification of Barbara Gantwerk). The State has not authorized any specific

resources to offset the additional direct expenditures that local school districts providing in-house programs will incur, for the implementation of the regulation.

As just one example of how the amended regulation would affect the costs of school programs, consider a district that has a school serving kindergarten through fourth grade. (In fact, Claimant Shamong Twp. Board of Education has such a school.) Whereas under the regulation prior to amendment, the district could have students ages six, seven, eight, and nine placed in one classroom, under the amended regulation permitting an age span of only three years, the district would have to create an additional classroom to accommodate all of the students, whose ages span four years. Setting aside the separate and considerable problem of finding space to house another class, the cost of providing an additional class could be substantial, with the salary and benefits of another teacher as well as aides. An idea of the extent of those costs can be extrapolated from data collected by NJSBA, which identifies that the 2006-07 average annual salary for new teachers in New Jersey is \$41,955 (the average for all teachers being closer to \$60,000) and the annual average cost of all health insurance plans under the New Jersey State Health Benefits Plan is \$7675.00. The number of aides required in a classroom pursuant to N.J.A.C. 6A:14-4.7(e)) would depend on the number of students in the

class; an autism class with more than three students requires one aide; two aides are required for classes of seven students with severe disabilities. These new expenses, in a small district, could easily exhaust a large proportion of the 4% property tax levy cap that is now permitted under L. 2007 c. 62 (approved April 3, 2007). The problem is magnified when considered on a statewide scale. The impact of the requirement to add new classrooms will be especially pronounced in County Special School Districts that have large populations of students in self contained classrooms.

The reduction in the permitted age span exacerbates the dire financial situation that school districts already face in meeting their obligations to educate students. Many of the factors contributing to the financial crisis are set forth in the "findings and declarations" clause of L. 2005 c. 339, which established a Special Education Review Commission to study the delivery, quality and cost of special education services in the State. Among its "findings and declarations," the Legislature noted that the proportion of the total State public education enrollment that is classified for special education services has steadily increased over the past seven years. It also noted that while the cost of providing special education has increased since the 2001-02 school year, there has been no increase in

State aid for special education during this time. Also, there has been a dramatic increase in the number of special education students whose costs are in excess of \$40,000 but because there has been no increase in State aid for special education since the 2001-02 school year, the costs for special education are increasingly being borne by local school districts. The Legislature also noted that federal aid for special education is below the 40% commitment contained in the original federal legislation and that every dollar New Jersey receives is actually only worth about \$.67 with respect to the average per pupil expenditure in New Jersey. Further, the Legislature cited the impact and costs of implementing the federal "No Child Left Behind Act of 2001" and recent changes to the federal special education law, the "Individuals with Disabilities Education Act."

Concomitant with the increased special education population and the flat funding, the people of New Jersey have been experiencing increased property taxes which lead to the convening of the Joint Legislative Committee on Public School Funding Reform during the summer and fall of 2006. Legislation that ensued, L. 2007 c. 62 (approved April 3, 2007), which caps the property tax levy at 4%, makes the enforcement of the Local Mandates Act all the more important. Public schools will be forced to reduce staff and eliminate important programs that serve all students, unless

the government assures the availability of funding sources, other than property tax, for new mandated school programs. The burden of complying with N.J.A.C. 6A:14-4.7(a)(2) without the designation of funds to do so, makes this matter one of statewide importance, especially in the context of these financial realities.

NJSBA's policies support the underlying position taken by the Special Services School Districts of Burlington, Atlantic County, Cape May and Bergen Counties, and the Shamong Township Board of Education, that in the absence of State funding to cover the resultant cost of reducing the permitted age span in elementary special class programs, N.J.A.C. 6A:14-4.7(a)(2) should be deemed an unfunded mandate and should be enjoined from enforcement.

**C. THE ATTORNEY GENERAL'S ARGUMENTS ARE FLAWED; THEY SHOULD BE REJECTED AND THE MOTION TO DISMISS DENIED.**

In Point I of his Legal Argument, the Attorney General argues that N.J.A.C. 6A:14-4.7(a)(2) is not unconstitutional under Article VIII, section II, paragraph 5 of the New Jersey Constitution and the Local Mandates Act, N.J.S.A. 52:13H-1 to -22 since the County Districts may charge tuition to sending school districts in an amount to offset any additional direct expenditures resulting from the provision.

First, the Attorney General's discussion does not take into account that local school boards that maintain their own special class programs cannot pass their costs on. The Shamong Board of Education, one of the Claimants in this proceeding, is a local school district serving students aged pre-kindergarten through eight. The Shamong Board both maintains its own special class programs, and also sends several students with the most severe disabilities to outside schools including the Burlington County Special Services School District on a tuition basis. Like Shamong, there are numerous districts throughout the State that provide their own elementary special class programs in the local district, or/and that send their students to programs in County Special Services Districts or other providers for which they pay tuition. In fact, the Council received more recent additional filings by the local school boards in Maple Shade, Edgewater Park and Mount Holly Township who are affected N.J.A.C. 6A:14-4.7(a)(2), but has decided to hold them in abeyance so as not to delay the current proceeding.

Additionally, local districts that send their students to programs will be affected by tuition increases that can be expected to be passed on to them by the County Special Services Districts and other providers. Neither

N.J.A.C. 6A:14-4.7(a)(2) nor any other provision of law authorizes resources to offset the additional direct expenditures required for the implementation of the regulation. Thus, both local districts that provide their own elementary special class programs in the local district, and districts that provide the programs by sending students to other schools for tuition, will bear the expense of compliance with N.J.A.C. 6A:14-4.7(a)(2) without the identification of resources to offset those expenditures.

Finally, NJSBA respectfully maintains that, contrary to the AG's narrow assertions with respect to the County Special Services Districts, the ability to collect tuition as contained in separate sections of State statute and code, does not save N.J.A.C. 6A:14-4.7(a)(2) from being an unfunded mandate even with respect to those districts.

N.J.S.A. 52:13H-2 states:

Except as provided in section 3 of this act, any provision of a law enacted on or after January 17, 1996, or any part of a rule or regulation originally adopted after July 1, 1996 pursuant to a law regardless of when that law was enacted, which is determined in accordance with the provisions of this act to be an unfunded mandate upon boards of education, counties, or municipalities because *it* does not authorize resources to offset the additional direct expenditures required for the implementation of the law or the rule or regulation, shall cease to be mandatory in its effect and shall expire. A law or a rule or regulation which is determined to be an unfunded mandate shall not be considered to establish a standard of care for the purpose of civil liability.

The Department of Education relies on In re Ocean Township (August 2, 2002) for its suggestion that the County Special Services Districts' ability to collect tuition means that it is not "unfunded." However, the matter now before the Council is significantly distinguishable from In re Ocean Township (August 2, 2002). In Ocean Township, the Township claimed that the Legislature had enacted an unfunded mandate by passing a bill that would have amended the Municipal Land Use Law, N.J.S.A. 40:55D-18, to require action on zoning permits within 10 days. Both before and after it was amended by the bill, N.J.S.A. 40:55D-18 explicitly authorized the municipality to establish reasonable fees to cover administrative costs for the issuance of such permits, certificates and authorizations. In fact, the Council noted that the amended language was inserted in the statute in the same paragraph as the language authorizing municipalities to establish fees. Ocean Township, (page 10). In response to Ocean County's argument that the Legislature was required to authorize a new source of revenue to satisfy the mandate, the Council applied principles of statutory construction, noting "that a statute must be read in its entirety and, if possible, full effect should be given to every word of a statute" and that "(i)t makes little sense to restate in the next sentence what the Legislature has stated already in the immediately preceding

sentence." Id. The Council further remarked that "(t)he Legislature knew the language in the statute it amended and the language of the amendment." Id.

Unlike the amendment in question in Ocean Township, the language of N.J.A.C. 6A:14-4.7(a)(2) fails to address recoupment of the cost of implementation. It fails to do so now, and it failed to do so before the amendment. That there happen to exist unrelated provisions in separate parts of the education regulations and statute governing the charging of tuition by county special services school districts (N.J.S.A. 18A:46-31(b) and N.J.A.C. 6A:23-3.4) does not satisfy the requirement of the Local Mandates Act, N.J.S.A. 52:13H-2, which contemplates an awareness and consideration on the part of government of the financial ramifications of new mandates and an assurance that there is funding provided.

Moreover, NJSBA urges the presently constituted Council to adopt the approach taken by the dissenting members in Ocean Township with respect to the offset of expenditures. Those dissenters favored a practice whereby the authorization of the resource to offset a local mandate in all cases would be stated explicitly by the adopting body, rather than implicitly. NJSBA urges the Council to determine that a mandate does not pass muster unless the funding source is explicitly addressed. It would be an easy matter

for the implementing body, whether that body be the Legislature or an administrative agency, to demonstrate the body's express intent to rely on that funding source.

In fact, in Ocean Township, the two dissenting members stated:

We respectfully disagree with the Council's conclusion that the preexisting authority to levy a permit fee that was contained in N.J.S.A. 40:55D-18 before the adoption of A-2403 satisfies as a matter of law the Legislature's constitutional obligation to authorize a resource to offset any additional expenditures required for implementation of the law. Our disagreement with the Council is a narrow one. We believe it might frustrate the broad remedial purpose of the LMA to permit the Legislature to do no more than implicitly rearrange existing funding sources to pay for additional expenditures that may be required to implement a new law.

The dissent was reluctant to interfere with local fiscal autonomy by requiring the municipality to make the choice of either charging a permit fee, or absorbing the cost of the unfunded mandate. Concerns about impinging on local autonomy pertain equally to County Special School Districts, which face either passing the cost of the reduced age span on to the sending districts or bearing it themselves. To address these concerns, the dissenters suggested that after a full hearing, the Council could:

. . . potentially require. . . that the Legislature expressly specify a genuinely new source of revenue to offset its mandate. It could also follow from such a determination that the revenue authorized by the Legislature must be drawn from a State, rather than local, source.

Ultimately, the dissenting members suggested that after a full hearing, the Council:

. . . could decide to recommend that the Legislature follow a practice of explicitly authorizing the resource to offset a local mandate in all cases rather than implicitly doing so as argued here. If the Legislature's intent truly is the one that is attributed to it by the Council's analysis, it would be a simple matter to readopt the bill with clear and constitutional language. (emphasis added)

NJSBA urges the Council to take this approach, which fosters transparency to the voters of the governmental entity's intentions when it enacts a mandate.

In Point II of his Legal Argument, the Attorney General argues that N.J.A.C. 6A:14-4.7(a)(2) is required to meet eligibility standards for federal entitlements, and that as such, the provision is not considered an unfunded mandate. N.J. Const., Article VIII, section II, paragraph 5 (c)(1) and N.J.S.A. 52:13H-3 state that among the categories of laws and rules or regulations that shall not be unfunded mandates are:

"those which are required to comply with federal laws or rules or to meet eligibility standards for federal entitlements." (emphasis supplied)

Clearly, there is a difference between a regulation that is required to meet federal eligibility standards, and one that the adopting entity has crafted in its discretion along with other initiatives, as one possible approach to fulfilling

federal eligibility standards. In fact, the State itself acknowledges on page 9 of its brief, that the NCLB "provides states with discretion, subject to state plan approval, to design their implementation strategy, set standards and benchmarks for educational programs and establish eligibility criteria for grant awards." The State makes a similar acknowledgment on page 15 of its brief with regard to IDEA. NJSBA does not dispute the State's good intentions in implementing N.J.A.C. 6A:14-4.7(a)(2). However, the broad discretion provided in both NCLB and IDEA to a State in developing a plan to increase student achievement, to design its strategy, and to set standards and benchmarks, removes N.J.A.C. 6A:14-4.7(a)(2) from being among those categories of laws and rules or regulations that are not to be considered unfunded mandates, under N.J. Const., Art. VIII, section II, paragraph 5 (c)(1) and N.J.S.A. 52:13H-3.

This is not to say that the State is prohibited from reducing the age span if it believes that (despite testimony of professionals that such mandated reduction is not educationally justified) this would be an effective way to achieve its targeted goals. Rather, the State may do so, provided that it authorizes a funding source. In fact, the flexibility that NCLB affords to the States in designing their plans opens the door for an infinite range of measures that could potentially increase educational outcomes while

at the same time imposing significant costs upon school districts across the State. A logical extension of the State's argument is that the State can adopt any measure that it believes can assist it in meeting the goals that it set for itself, regardless of expense to school districts, without providing any additional funding source, under the justification that such measure is required to comply with eligibility standards. In fact, the flexibility provided to the States NCLB and IDEA, provides the State with an opportunity to fashion its plan in such a way that supports student achievement without imposing additional financial burdens upon the local school districts and taxpayers.

It is respectfully submitted that the State's argument is inconsistent with the spirit and intent of the voter-approved constitutional amendment on State mandate, State pay and its enabling legislation, the Local Mandates Act, N.J.S.A. 52:13H-1 et. seq. The voters adopted the constitutional amendment prohibiting unfunded mandates in reaction to the growing burden of local property taxes. As noted in the Legislature's findings and declarations, "the purpose of this constitutional provision is to prevent the State government from requiring units of local government to implement additional or expanded activities without

providing funding for those activities." N.J.S.A. 52:13H-1(1)(b).

In Point III of his Legal Argument, the Attorney General argues that N.J.A.C. 6A:14-4.7(a)(2) is not an unfunded mandate because it is imposed on both government and non-government entities in the same or substantially the same circumstances. N.J.S.A. 52:13H-3 provides, in pertinent part:

Notwithstanding the provisions of any other law to the contrary, the following categories of laws and rules or regulations shall not be unfunded mandates:

...

(b) those which are imposed on both government and non-government entities in the same or substantially similar circumstances.

The circumstances under which N.J.A.C. 6A:14-4.7(a)(2) is imposed on local school districts are significantly different than the way it is imposed on private schools for the handicapped that are fulfilling the IEPs of students placed there by public school districts for tuition. The private schools for the disabled are authorized to recoup their expenses through the tuition charge; local public school districts that provide special education programs have no way to recoup those additional expenses. The public and private sectors are not in "substantially similar circumstances," where the public school must absorb the

expense, and the private school can pass on its expense to the public school. Thus it is wrong to conclude that the mandate is imposed on governmental and non-governmental entities in substantially similar circumstances.

Furthermore, the code provision reducing the age span in special elementary classes does not apply to sectarian schools (i.e., non-governmental entities) that are "nonpublic" schools (defined at N.J.A.C. 6A:14-1.3). Students are sometimes unilaterally placed in "nonpublic" schools by parents who bypass the public schools (see, N.J.A.C. 6A:14-6.1). There is only a limited obligation to provide an opportunity for such students to participate in special education services and programs, and that obligation falls not on the nonpublic schools, but rather, on the public school district of attendance. Moreover, even this obligation is limited; the public school district makes the determination of what services to provide after consultation with the nonpublic school, and is only required to provide services up to the limited amount of "proportionate share" funds available under Part B of the IDEA, regardless of the number of students in the nonpublic school who would potentially be eligible for services and the extent of their potential needs. The nonpublic school itself is not required to provide the programs or services, and is under no mandate to comply with N.J.A.C. 6A:14-4.7(a)(2). There is also a

requirement under N.J.A.C. 6A:14-6.2, that the public school district in which the nonpublic school is located, provide programs and services (commonly referred to as "c. 192/193" services) limited to those that can be provided at a cost not to exceed the limited amount of State aid funds available under N.J.S.A. 18A:46A-1 et seq. and 18A:46-19.1 et seq. In light of the above, N.J.A.C. 6A:14-4.7(a)(2) is not imposed on governmental and nongovernmental entities in the same or substantially the same circumstances, and thus the Attorney General's argument in this respect must be rejected.

For the foregoing reasons, NJSBA believes that the Attorney General's arguments are flawed and should be rejected. The Motion to Dismiss should be denied.

**D. N.J.A.C. 6A:14-4.7(A)(2) IS AN UNFUNDED MANDATE UPON BOARDS OF EDUCATION AND THE COUNCIL SHOULD ENJOIN ITS ENFORCEMENT.**

Article VIII, section 2, paragraph 5 of the New Jersey Constitution and its enabling statute, the Local Mandates Act, N.J.S.A. 52:13H-1 et. seq., provide that any part of a rule or regulation adopted after July 1, 2006 which is determined by the Council on Local Mandates to be an unfunded mandate, shall cease to be mandatory in its effect

and shall expire. Specifically, N.J.S.A. 52:13H-2 provides, in pertinent part:

Except as provided in section 3 of this act [N.J.S.A. 52:13H-3], any provision of a law enacted on or after January 17, 1996, or any part of a rule or regulation originally adopted after July 1, 1996 pursuant to a law regardless of when that law was enacted, which is determined in accordance with the provisions of this act to be an unfunded mandate upon boards of education, counties, or municipalities because it does not authorize resources to offset the additional direct expenditures required for the implementation of the law or the rule or regulation, shall cease to be mandatory in its effect and shall expire.

The amendment to N.J.A.C. 6A:14-4.7(a)(2) reducing the age was adopted on August 4, 2006 to be effective September, 2007. The regulation did not authorize any additional resources to offset the additional direct expenditures required for its implementation. On its face, the regulation is an unfunded mandate for boards of education.

Nor does N.J.A.C. 6A:14-4.7(a)(2) fall under any of the categories that would deem it not to be an unfunded mandate under N.J.S.A. 52:13H-3. These include:

- a. those which are required to comply with federal laws or rules or to meet eligibility standards for federal entitlements.

This category does not apply for the reasons set forth in Section C of this Legal Argument.

- b. those which are imposed on both government and non-government entities in the same or substantially similar circumstances.

This category does not apply for the reasons set forth in Section C of this Legal Argument.

- c. those which repeal, revise or ease an existing requirement or mandate or which reapportion the costs of activities between boards of education, counties and municipalities.

This provision does not apply as the regulation does not repeal or ease a mandate, but rather, makes it more stringent. Nor does it "revise" the mandate for the purposes of the Local Mandates Act, as the term "revise" has been interpreted by this Council. In re Highland Park Board of Education and Borough of Highland Park, (page 7)(May 11, 2000), and In re Highland Park Board of Education and Borough of Highland Park (pages 24-25)(August 5, 1999), establish that where a regulation increases the cost of the mandate, the regulation does not "revise" the existing mandate---and the term "revise" in the context of the statute should be read to be consistent with the terms "repeal and ease an existing . . . mandate " applying the principle of *ejusdem generis* (when general words follow an enumeration of more specific things, the general words should be construed as being of the same class as those enumerated.) This Council noted that a contrary interpretation, if taken to the extreme, could justify virtually any change made under color of a statute or regulation, regardless of its impact on a local board or municipality. In re Highland Park Board of Education and Borough of Highland Park,(page 24)(August 5, 1999).

- d. those which stem from failure to comply with previously enacted laws or rules or regulations issued pursuant to a law.

There is no suggestion that there was any failure to comply with the earlier regulation.

- e. those which implement the provisions of the New Jersey Constitution.

This subsection does not apply and there are no arguments or proofs made to that effect. As the Council determined in In re Highland Park Board of Education and Borough of Highland Park, (August 5, 1999)(pages 22-23), when the Thorough and Efficient Education (T&E) Clause, N.J. Const. Art. VIII, section 4, par. 1, is invoked to excuse an unfunded mandate, the Legislature either must state explicitly that it is implementing that clause, or the State bears the burden of making a specific, precise, fact-based showing that the unfunded mandate implements the T&E clause within terms previously defined by the Legislature or the courts. See also, In re Complaints filed by the Monmouth-Ocean Education Services Comm'n (August 20, 2004) (page 14).

- f. laws which are enacted after a public hearing, held after public notice that unfunded mandates will be considered, for which a fiscal analysis is available at the time of the public hearing and

N.J.A.C. 6A:14-4.7(a)(2) was not so enacted.

#### **CONCLUSION**

For the reasons set forth herein, NJSBA respectfully submits that the NJSBA should be permitted to appear as

Amicus Curiae in this matter. The instant case raises an issue of statewide importance to boards of education, making participation by the NJSBA as Amicus Curiae helpful in the resolution of this issue. NJSBA policy supports State funding for mandated educational programs. The Attorney General's arguments as to why N.J.A.C. 6A:14-4.7(a)(2) is an unfunded mandate are flawed and should be rejected. The Motion to Dismiss should be denied. The Council on Local Mandates should find that N.J.A.C. 6A:14-4.7(a)(2) is an unfunded mandate on boards of education. The regulation did not authorize resources to offset the additional direct expenditures required for its implementation by boards of education and it does not fall under any of the unfunded mandate exceptions. The Council should enjoin its enforcement.

Respectfully submitted,

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Date: April 19, 2007