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Donna Arons
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Dear Ms. Arons:

Comments on Evaluation of the Performance of School Districts Proposed Commissioner Regulations, N.J.S.A.C. 6A:30

The New Jersey School Boards Association acknowledges and thanks the Department of Education for consideration of all the many comments we have made concerning N.J.A.C. 6A:30. (For your information, we have included a copy of our June 1, 2006 letter to Penelope Lattimer, since we refer to it in several sections of this document.) We have further reviewed the Commissioner Regulations and wish to make the following concerns known to you:

N.J.A.C. 6A:30 – 1.1

We appreciate your response to our requests in our prior communications concerning this section, which were in the September 5 published proposal and remain as part of the Commissioner regulations. Our general comment and recommendation raised in earlier comments that, “The board of education should play a greater role in the NJQSAC process, particularly in the circumstance where the board is not the underlying cause of problems in the school district,” remains valid.

N.J.A.C. 6A:30-1.2

- Definition of “three-year comprehensive review,” which had previously replaced “annual review”, has now been replaced by “**comprehensive review.**” The new definition references “weighted quality performance indicators developed by the department” rather than “District Performance Reviews” completed by school districts. While the definition of “Quality Performance Indicators” includes a reference to incorporation in Appendix A, a good thing, the definition for “comprehensive review” does not. It should include a reference to Appendix A.

- Thank you for providing the definition of “**district performance review,**” and amending it to include incorporation of the regulations in Appendix A.
- “**Highly skilled professionals**” criteria references have been deleted. It is even more unclear now how an HSP will be selected and what the criteria for selection may be. Department employees have been added to the list of eligible HSP’s. How would ethical conflicts be addressed if certain department employees become HSP’s involved in the evaluation process?

Responses to Comments 6, 7, 8 and 13 in the June 1 Lattimer letter remain valid. (see attached).

N.J.A.C. 6A: 30-2.2

- Thank you for addressing our concerns in the areas of weighted performance indicators, the adoption process for the indicators and the period for public comment.

N.J.A.C. 6A:30-3.1

- Intervening years between each district’s three year review will now see the Commissioner assessing the public school district’s performance to determine “whether conditions exist in the district that “significantly and negatively impact upon the educational program or operations of the district.” This language parrots the QSAC statutory amendments and replaces language that stated that the “Commissioner shall assess the public school district’s performance against a series of benchmarks to be determined by the Commissioner.” While we had concerns about the “benchmarks,” particularly as to how they were to be developed and approved, at least we had a measuring device that no longer exists. Please provide clarification as to how the Commissioner will make these determinations and what criteria will be used now that the term “benchmarks” has been removed. The purpose of code is to clarify the statutory language and provide guidance where the statute is silent. We believe that this section in its current form does neither.
- Please provide clarification on the “initial transition” timeline?
- What constitutes “timely notification” to school districts of the procedures for comprehensive review? 90 days? 30 days? 5 days? Please specify.

N.J.A.C. 6A:30-3.2

- Language regarding convening of the DPR committee has been revised and needs clarification in some areas. In revised language from the September published proposal, which has been retained in the Commissioner regulations, the CSA is given the ability to determine the total number of people on the committee but board of education approval is necessary to include other persons on the committee. This appears to be a response to our Comment 21 in the June 1 Lattimer letter, however it appears contradictory and needs to be made clear.
- Thank you for being responsive to our concern regarding community representatives and parents. While they can still be part of the committee, board of education approval is now required.
- Also, we appreciate the addition of the word “member” so that section v. now reads “member representatives.”
- *Comment 13 of the June 1 Lattimer letter still remains relevant, with the caveats set forth above.*

N.J.A.C. 6A:30-3.3

- Upon completion of the initial review, the county superintendent should notify, not only the CSA, but the board as well, of areas of the DPR that require additional clarification. The necessary clarification may have been the reason that the board objected to the section of the review. Additionally, the county superintendent may need additional information from the board as to its objections to the review. How can the board provide the information if it is not asked? Who can guarantee that the CSA will pass the information along, especially if the relationship is contentious? We ask the department to please address these concerns.
- Subparagraph (c) presents a due process concern. If the board disagrees with the county superintendent's recommendation as to placement on the continuum, the board should, at a minimum, be able to submit comments before the Commissioner decides placement on the performance continuum. It would make sense to allow comments on the front end of the process, rather than wait until a later determination and subsequent appeal. Timelines need to be established for this process, including the subsequent appeals to the Commissioner and the State Board. It would be helpful to establish a comment period after the county superintendent recommends placement on the performance continuum and an appeal process to the State Board.

N.J.A.C. 6A:30-3.4

- We commend and thank the department on this new section that wraps the QSAC process around the NCLB District in Need of Improvement (DINI) corrective action plan.
- Subparagraph (c) presents a due process concern. The board should be notified of the evaluation team's recommendation. The code is silent in this area. If the board disagrees with the evaluation team's recommendation as to placement on the performance continuum, the board should, at a minimum, be able to submit comments before the Commissioner decides placement. Again, as discussed in *N.J.A.C. 6A:30-3.3*, it would make sense to allow comments on the front end of the process, rather than wait until a later determination and subsequent appeal. Timelines need to be established for this process, including the subsequent appeals to the Commissioner and the State Board.

N.J.A.C. 6A:30-4.1

- In subparagraph (a), the Commissioner is given the ability to designate a different time than "on or before January 30" to issue a final determination as to a district's placement on the performance continuum, based on the comprehensive review. How would a district know of the "such other time as the Commissioner may designate"? What notice should be required? The statutory Commissioner notification to districts of changes in the election or budget calendar may be a model to follow here.

N.J.A.C. 6A:30-5.3

- We support and thank the department for the changes allowing the Commissioner the flexibility to not do an in-depth evaluation when a district satisfies less than 50 percent of the weighted quality performance indicators in one or more of the five key components of school district effectiveness if a comprehensive evaluation had been done in the last year.
- In subparagraph (c) how does the Commissioner select "appropriate persons or entities" to conduct the in-depth evaluation? How would you measure whether someone would be "qualified

by training and experience” to be a team member? Does the word “entities” suggest that the Department will be subcontracting out the evaluation process to private entities? What would be the criteria for becoming a private provider of this service? Knowledge of the New Jersey education system environment would be a key component of any criteria.

- In subparagraph (f), please advise, where the board of education is in all of this? It is absent from the process as written. Is the public meeting in (5) a board of education meeting, and if so, who runs the meeting? The code suggests that the meeting will be “arranged” by the CSA but does not identify whose meeting it is. We strongly believe the board should be part of this process, including notice and participation.
- In subparagraphs (g) through (i) we have several due process concerns: What happens to the evaluation review team report before it is submitted to the Commissioner? Does the board get an opportunity to confront and respond to its accuser? Is there an opportunity to provide comments? If so, when? If not, why not? What about the final Commissioner report? Presumably, final determinations made by the Commissioner would be appealable to the State Board. If replacement on the continuum occurs, it would appear that the placement would be appealable as well. Please provide clarification. Procedures for such appeals need to be set forth in code.

N.J.A.C. 6A:30-5.4

- *Comment 41 in the June 1 Lattimer letter remains relevant. (see attached).*
- In subparagraph (e) the Department heard our concerns regarding the lack of board of education participation in the process. We thank you for adding one or more members of the board of education to the NJQSAC district improvement plan team, deleting community members and parents.
- In subparagraphs (f) and (g) the department may provide technical assistance to develop and implement the NJQSAC improvement plan. Who pays for the technical assistance? Subparagraph (e) of *N.J.A.C. 6A:30-5.7* indicated that where technical assistance is provided by DOE employees that the DOE will assume the total cost of the compensation. Paragraphs (f) and (g) of *N.J.A.C. 6A:30-5.4* should reflect that fact.

N.J.A.C. 6A:30-5.5

- What if the board of education disagrees with the NJQSAC district improvement plan? While the process has been improved by adding one or more board of education members to the improvement plan team, it is still a minority interest on the team. The situation is similar to what was the case in the earlier version of DPR approval in *N.J.A.C. 6A:30-3.2*. Prior to the current version which allows the board to disapprove part or all of the DPR we had suggested the need for a vehicle that would allow the board, where necessary and appropriate, to petition the Commissioner to appoint a person other than the CSA to administer the DPR process. While that seems no longer necessary for the DPR process, given the change in the code proposal, it may still be applicable here with the district improvement plan.
- Subparagraph (d) calls for the Commissioner to “ensure that sufficient resources are allocated within the district budget to implement the plan.” What if more money is needed? Additional state aid? Where would it come from? One of our districts, Freehold Boro, recently received a CAPA team visit which resulted in numerous recommendations for one of its schools. The price tag on those recommendations was around \$1 million. Is it the expectation that all of the plan’s implementation will be done within existing resources in the district? Is so, that expectation is unrealistic.

N.J.A.C. 6A:30-5.6

- *Comments 41 and 43 from the June 1 Lattimer letter remain relevant. (see attached).*

N.J.A.C. 6A:30-5.7

- In the September proposal we applauded the addition of highly skilled professional criteria in the code and the criteria for determining eligibility of service as Highly Skilled Professionals being sent to the State Board for approval by resolution. The eligibility criteria and approval language for the HSP has been deleted. We are dismayed by this action, since these are critical, and we request that eligibility criteria be placed back in the code section.
- Thank you for adding language regarding NCLB DINIs as part of the HSP process.
- This version of the code has deleted the prohibition that HSPs not serve in more than one role in the district. We are concerned that the conflict of interest language is still there but multiple assignments are no longer precluded. If the HSP has too many assignments, his presence will not be a meaningful experience for the district, and ask that you consider this in your deliberations.

N.J.A.C. 6A:30-6.3 and -6.6

- We commend the department on including the plenary hearing.

N.J.A.C. 6A:30-6.4 and -6.7

- We note that the code refers to the cost of the HSP being shared equally between the department and the public school district. The QSAC statute sometimes refers to “compensation” and sometimes refers to “salaries”. We all know that compensation can include more than salary. In this case of partial state intervention the statute refers to “salaries” not “compensation”. In contrast, HSP’s in the district improvement plan refers to “compensation”, not “salaries”. The same is true in full state intervention: improvement plan- compensation, intervention with direct oversight – salaries. Please provide clarification in the use of these two terms as the price tag for school districts would appear to be different, depending on the relevant section.

N.J.A.C. 6A:30-6.8

- Comment 49 from the June 1 Lattimer letter remains relevant. (See attached).

N.J.A.C. 6A:30-8.2

- The proposal indicates that the Commissioner will establish a schedule for phase in for Level I school districts. Please indicate where is the school district input? Education group input? Other factors for the Commissioner to consider?

N.J.A.C. 6A:30-8.3

- It is NJSBA’s understanding that school districts under federal corrective action would also be part of the initial phase of QSAC. Please advise.

- The procedures set forth herein are very similar to those in the general evaluation process. The concerns regarding due process, board member participation, board comment periods and the ability to react to findings all pertain here.

General Comments and Questions on the DPR checklists

We call your attention to our letter of April 5, 2006 to Commissioner Davy and incorporate our comments by reference. Many of the items in the NJQSAC DPR checklists are requirements that will be evaluated; however, they are neither in statute nor code.

There are several areas in the NJQSAC DPR checklist where the board is required to have policy and will be evaluated on that policy, notwithstanding the fact that there is no statutory or administrative code requirement that the board have that policy. On what legal authority can the DPR checklist require board policy that is not required by statute or code?

Clarification is necessary on numerous sections of the DPR checklists. Items are specifically identified in commentary under each section. Evaluation requirements should be clear, quantifiable and measurable. How the board can demonstrate compliance is not always clear. Will there be a NJQSAC DPR Manual or Guidebook provided to the districts for direction? More importantly, how will this critical information be imparted to the board members? Training is critical for the success of board self-assessment in the district performance review. We reiterate our commitment to partner with the Department of Education in designing appropriate training guidelines and materials for board of education members.

Governance

A. Student Achievement

1. We support the concept of district mission statement, but raise a cautionary question: How can a board be evaluated on something which it is not required by statute or code to have? What does the state assessment and district report card have to do with whether the board has a mission statement?
4. What does “appropriate action” mean? Documentation for purchase of materials and curriculum development are needed. The documentation only relates to professional development, not curriculum nor materials. Please clarify.

B. Board Training, Disclosure and Operation

1. What happens if the board violates a rule or regulation of the State Board inadvertently? What if the CSA or principal fails to comply with a regulation? Is the board held responsible? Should the independent actions of a single board member or even a minority group of board members reflect on the whole board in the evaluation process? Aren't these individual responsibilities that will be individually penalized by the School Ethics Commission and the Commissioner? Where does it come into play as to whether the district is operating effectively?
2. Why should the board be penalized if a board member does not go to training? Isn't that an individual responsibility that will be individually penalized by the School Ethics Commission and the Commissioner?

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4. Do we have travel regulations in place today?
5. Missing three consecutive meetings without good cause authorizes possible removal by the board. If the board appropriately removes the absentee board member, should the board be further penalized?

C. Ethics Compliance

- 1, 2. These sections refer to School Ethics Act behavior under the Code of Conduct. Again, should the board be held hostage when certain individual board members behave badly? Aren't they already being punished by the SEC? Should there be a similar rule to the audit section? If the problem is corrected, good. If the problem repeats itself, then punish. Sometimes SEC violations are found due to inadvertent acts; an inappropriate vote occurs through a block voting scenario. Sometimes violations occur in areas where the law is unclear, such as involvement in superintendent evaluations. What happens if the board member or administrator violates the School Ethics Act? What does it say about school district operations? We also note that this section says nothing about violations of the Code of Ethics for School Board Members or *N.J.S.A. 18A:12-2* conflict of interest. What if the board files the Ethics complaint against one of its own members, notwithstanding indemnification concerns? Should that be considered in determining board accountability?
4. Doctrine of Necessity resolutions have nothing to do with whether a board member recuses himself from a vote. In fact the doctrine of necessity does not come into play unless you have a majority of the board in conflict that precludes board action; something not mentioned as an indicator.
5. This section requires boards to have a nepotism policy in place, a requirement not present in statute or code except for Abbott districts (31). Where are these requirements listed for non-Abbotts? Please specify.

D. Policies, Procedures and Bylaws

- 1, 2. Consider the issue of policies, procedures and the difference between the two. Sometimes the board is required to adopt policies, sometimes both. Generally, policies are adopted by the board and procedures by administration. It appears that the provision is either extremely limited to those situations where the board is required to adopt procedures. Is this a correct assumption? Please respond.
3. Bylaws are simply policies for board operation. What is the difference between 1 and 3?
5. Citation appears to be incorrect. It is *N.J.S.A. 18A:15-1* for election of president and vice president. Perhaps the statutory cite for the reorganization meeting would be appropriate.

E. Standard Board Practices

- 2, 4. These are citations to the Code of Ethics for School Board Members under the School Ethics Act. See C Ethics Compliance, Comment 1,2.

3. There are times where it is not inappropriate for a board to waive its by-laws. *Matawan-Aberdeen Regional Teachers Assn. v. Matawan-Aberdeen Regional Bd. of Ed.*, 212 N.J. Super. 328 (Law Div. 1986). The key is when rights of the public may be affected.
5. OPMA does not indicate a specific time for minutes to be available to the public, only that they must be made “promptly available.” The *Matawan- Aberdeen* decision requires that board minutes be available within two weeks or by the next board meeting. In the *Matawan-Aberdeen* case the board met every two weeks. Recent decisions of the Government Record Council indicate that minutes do not become publicly available until the board of education approves them; a requirement not found in OPMA, but in Robert’s Rules of Order, if the board has adopted Robert’s Rules. The DPR’s suggest 10 days. On what authority is this based? Does it apply to closed session minutes as well?

F. Annual Evaluative Process

- 1, 2, 3. Needs reference to the code section on CSA evaluation.
6. Self evaluation by the board is valuable, however, where does it say in statute or code that this should occur and where does it say that student achievement should be the highest priority? How can you legally measure something that is technically not required?
7. How does the professional development plan for board members relate to the travel regulations and administrative cost limits? Who measures compliance with the plan?

G. School Board/Administration Collaboration

1. A functional organization chart is not required in Statute or Code. Maybe 15 years ago or so, there was a requirement within the school business administrator regulations that a board have an organizational chart. That requirement is long gone. This, therefore requests measuring compliance on an item that is not currently required. Please explain.
3. Where is the requirement that a board act within 60 days of the CSA’s recommendation?
- 4, 5, 6. More Code of Ethics for School Board Members items. See C. Ethics compliance, Comments 1,2.

H. Budget priorities

What documentation is required? Please specify.

I. Communications

1. There are no current requirements under OPMA that the board of education have a period of public comment at their meetings, so why is a policy required? Please explain.
- 2, 3. More Code of Ethics for School Board Members items. See C. Ethics Compliance, Comments 1,2.
4. Where is it required that a board have a policy on OPRA?

- 5, 6. While there may be some policies that require public comment and input, like Family Life, it is not a general requirement. The way a board develops policy is governed by policy.
7. This is a School Ethics Act requirement, governed by the School Ethics Commission. See C. Ethics Compliance.

Personnel

The following concerns were raised in discussion between Jessica DeKoninck and Esther Strassman of our Labor Relations Department in June of last year. It is our hope that what follows will expand the Department's understanding of how the proposed DPR's will substantially impact boards' bargaining obligations. We have indicated our concerns in each case.

1. Indicator A.3 c. This indicator would look at whether a district “develops and implements a plan that includes strategies to recruit and retain teaching staff members in areas of need.” Such strategies span a broad range of activities, starting with expanded and effective recruiting efforts. However, as an effective follow-through, these strategies frequently also include incentives to encourage not only an enlarged pool of applicants but also *incentives* that can effectively influence the most desired candidate to accept an offer of employment and/or to retain proven effective teachers. These incentives could include: sign-on bonuses; advanced placement or movement on the salary guide to boost salaries; extra off-guide stipends; housing or moving subsidies; extra time-off; etc. ***These incentives, financial or otherwise, have and would continue to be seen as a term and condition of employment that would be subject to collective bargaining.***

Thus, a district's ability to actually implement an effective and necessary plan would be dependent upon the union's willingness to agree to offer incentives that could possibly represent a deviation from previously negotiated terms and grant some members of the bargaining unit benefits that are not available to all employees. Should the cost of achieving an effective system be too high for the district to absorb, then the district's options in developing and implementing the plan required by the indicator would be severely limited.

The DOE must be aware of this union impact on any plan that is designed to attract and retain qualified staff. As such, districts cannot be held responsible for the implementation of an effective plan ***unless*** they are given complete authority to implement these plans unilaterally after **consulting** with the union.

2. C. 2. This indicator examines the district's support of “the development of professional learning communities for teaching staff members that provide collegial support, job embedded learning, and coaching to enhance professional practice.” These communities include coaching or classroom visitations. As such, this indicator can have a strong impact both for the teacher giving the lesson and the teacher who is doing the coaching. For example, creating time within the currently designated teacher work day for these activities may require: a reorganization of staff assignments, including changes from a duty-free prep period to assign classroom visitations, team meetings, or other activities that indicate the presence of professional learning communities. ***These changes in work schedules are mandatorily negotiable*** and hold the potential for union claims for extra pay for increased workload. In addition, ***these negotiations can, and do, occur during the life of an existing contract.*** Thus, this indicator not only implicates negotiations and the potential for higher costs of employment

not only for the reassigned individuals but for their substitutes as well, and also invites the disruption involved in midcontract negotiations.

Further, the development and support of professional learning communities that occur during the normal work day will disrupt the amount and continuity of instructional time. Therefore, many districts may need to increase the length of the teachers' work day and work year to meet this indicator. ***The length of the teachers' work time is a well-established mandatory topic of negotiations.*** As such, districts seeking to minimize interruptions of their educational programs will need to seek unions' negotiated agreements to change their current work hours. Union responses to these proposals could veto any desired increase in work time or place a high, and possibly unaffordable, price tag on the needed change.

Achieving effective learning communities would, thus depend on unions' agreements to acceptable and affordable changes in current practices. Yet, districts that are hampered in their attempts to develop these desired communities because of their unions' unwillingness to change existing contractual terms could be penalized by their inability to meet this indicator. ***To assure that learning communities are implemented throughout the State, the DOE could require that teachers' participation become an expected part of New Jersey teachers' responsibilities that are scheduled by the board, after consultation with the union, either during or after the current school day, without additional compensation.***

And C. 5.a. This indicator requires novice and mentor teachers to hold bi-weekly meetings. This requirement also affects the current schedule of those involved in the mentoring program. While meetings involving observations of teaching practice must occur during the students' day, meetings involving collegial support could also occur after school. Here, as above, the DOE could require an extension of the school day for this purpose.

It is clear to us that boards of education, no matter how committed they are to successfully implementing plans to recruit valued teachers and other staff, along with their desires to create innovative and exciting learning communities to enhance the educational environment for both students and staff, may not be successful on their own efforts. Boards of education need the ability to develop plans for recruitment and other educational strategies for success and fiscal efficacy without the constraints of negotiations. Quite simply, the DPR's require strategies that possibly can never be put into place because of the need for the union's agreement. Without such agreement, a district board of education cannot successfully score in the affirmative for the indicator.

DOE's Jurisdiction The Department's comments, in a variety of situations, have indicated the belief that it lacks the statutory authority to issue regulations that intrude with negotiations. We would suggest however, that the Department does have authority to directly state, by speaking in the imperative, the directives required to put forth any standards that become State policy, as NJQSAC does.

It is well established that departments, in their role as regulators, have the authority to issue imperative rules, directives and guidelines affecting terms and conditions of employment that preempt negotiations. (See for example, *Bethlehem Tp. Bd. of Ed.*, 91 N.J. 38, 1982 which held that the Department's rules and regulations that specifically address and establish terms and conditions of employment preempt negotiations over those issues.) That ruling came as a result of a challenge to the Code's regulations governing teachers' evaluations.

Thus, we believe that the Department of Education has the authority to set the standards for implementation of its DPRs. This would assist boards of education in meeting the obligations of the indicators without triggering the complex and complicated obligation to bargain in good faith over necessary changes in districts' terms and conditions of employment. We reiterate our great concern that the ability to conform with the requirements of NJQSAC cannot occur without the Department's consideration of the many other implications inferred in the DPR's.

May we suggest that, in its QSAC regulations, the Department include provisions that parallel the approach of *N.J.A.C 6A-32.44 (c.)* to permit union involvement and input all while preserving the district's responsibility to comply with the state's educational policy. The addition of the following language to the definition of "Performance Indicators" at *N.J.A.C 6A-30-1.2* would achieve this goal:

“When these indicators involve the development and implementation of plans that may result in a district need to modify terms and conditions of employment, the district shall have the authority to make such changes, after consultation with the majority representative of its teaching staff members.”

We reiterate our great concern that the ability to conform and comply with the requirements of NJQSAC cannot occur without the Department's consideration of the many other implications inferred in the DPR's.

We are grateful to have had this opportunity to illustrate our deep concerns about boards of education being able to meet their mandates under NJQSAC. If boards have the tools to advance the policies of the State in establishing indicators for success of students and staff, we believe that educational policy will be greatly advanced. Your considerations of not only these, but other concerns we have brought before the Department in the past, are deeply appreciated.

If there is any additional information that NJSBA can provide to you, please do not hesitate to contact us. We look forward to a continued dialogue, and again thank you for your willingness to discuss the DPR's at length. Esther Strassman and I are ready to assist you in any other ways that may be helpful.

Sincerely,

Michael A. Vrancik
Director of Governmental Relations

MAV/bmh