

## **Legal Memorandum on Trauma, Schools and Poverty**

### *Understanding Institutional Obligations to Children Experiencing Trauma II: New Jersey State Law on School-Based Responsibilities*

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*Introduction*— This memo is the second in a series of documents prepared as part of the Center on Law, Inequality & Metropolitan Equity's (CLiME) Trauma, Schools, and Poverty project. The classroom, as the centerpiece of a child's daily life, is one place where the needs of childhood trauma victims can be both collectively and individually addressed. CLiME does not assume that existing special education or antidiscrimination law in schools is the optimal means for protecting or supporting victims of childhood trauma; however, we commence this research by investigating whether schools have a duty to act in support of these students under the current regime and, if so, what actions are required. Initial research at the pre-drafting stage of this project informed CLiME's decision to first consider special education and antidiscrimination law, and its applicability to our work. More specifically, the antidiscrimination framework will be analyzed through the lens of disability to determine whether children suffering from trauma belong to that protected class and are therefore entitled to certain legal rights. The scope of this memo is limited to New Jersey State law and addresses the following questions:

#### ***Do schools in New Jersey have a duty to act to prevent, intervene, or accommodate the proliferation of trauma among its student population?***

- For what purpose were the current special education and antidiscrimination laws in New Jersey drafted?
- Who qualifies as a “disabled” or “handicapped” child protected by the State's special education and antidiscrimination law and to what services/accommodations are these individuals expressly entitled by command of the law? Are victims of childhood trauma likely to qualify as “disabled” or “handicapped” under State law?
- What are the main charges of the State's special education law? Specifically, does the school have an affirmative duty to “find” children with disabilities among the student population and what action is required once a student is identified?
- Within the context of disability protection, what is the promise of New Jersey's antidiscrimination law and whom does it protect?
- Is there additional law that requires schools to address learning, health, or behavior of students who are not necessarily classifiable under special education law or due accommodations under the antidiscrimination statutes?

*Summary of Content*— More students qualify for special education under New Jersey State Law than are covered under IDEA, the federal special education legislation. All qualifying students under IDEA (as well as socially maladjusted students) are covered by the State code and are entitled to a free appropriate public education (FAPE), identical to the FAPE requirement in IDEA. Just as the State’s special education legislation parallels and expands upon federal law (IDEA, specifically), the State’s antidiscrimination legislation has also been invoked to parallel and expand upon the scope of the Americans with Disabilities Act (ADA) within schools. The State’s Law Against Discrimination (NJLAD) is similar to to the ADA overall; however, the threshold for proving injury is considered to be lower. New Jersey’s early Intervention and Referral Services program under Title 6A (I&RS) mandates that schools be proactive in creating a coordinated plan for intervening if students are experiencing difficulties with learning or behavior.

## **SPECIAL EDUCATION**

### **WHAT IS THE PURPOSE OF NEW JERSEY SPECIAL EDUCATION LAW?**

#### *Legislative Findings and Determination*

“The Legislature hereby finds and determines that the security and welfare of the State require that all school-age children be assured the fullest possible opportunity to develop their intellectual capacities. In order to achieve this objective it is the intent of this Legislature to require that the State and local communities identify and provide remedial services for handicapped children in both public and nonpublic schools.” N.J. STAT. ANN. § 18A:46-19.1 (West, Westlaw through L.2015, c. 120 and J.R. No. 7).

### **WHO QUALIFIES AS DISABLED OR HANDICAPPED UNDER NEW JERSEY SPECIAL EDUCATION LAW?**

#### **Definitions:**

“[H]andicapped child [under New Jersey special education law] shall mean and include any child who has an intellectual disability or who is visually handicapped, auditorily handicapped, communication handicapped, neurologically or perceptually impaired, orthopedically handicapped, chronically ill, **emotionally disturbed, socially maladjusted**, multiply handicapped, autistic, or pre-school handicapped. N.J. STAT ANN. § 18A:46-1. It is noteworthy that Title 6A of the administrative code further defines the categories. N.J. ADMIN. CODE § 6A:14- 3.5(c). “[T]he disability [must also] adversely affect[] the student’s educational performance<sup>1</sup> and the student [must be] in need of special education and related services.” *See id.*

The meaning of the phrase “adversely affects . . . educational performance” varies throughout the county. It is state, rather than federal law, which provides the context for this

phrase in absence of federal guidance. *See* J.D. ex rel. J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 66 (2d Cir.2000); *see also* 20 U.S.C. § 1401(8) (incorporating the state agency’s standards by reference); *see also* *Town of Burlington*, 736 F.2d at 789; *Mr. I v. Maine Sch. Admin. Dist. 55*, 416 F. Supp. 2d 147, 157 (D. Me. 2006) *aff’d sub nom. Mr. I. ex rel. L.I. v. Maine Sch. Admin. Dist. No. 55*, 480 F.3d 1 (1st Cir. 2007) (interpreting “adversely affects educational performance” language under Maine law). Of available resources on Westlaw, no New Jersey case interprets the phrase according to the state law.

*What is Emotional Disturbance and Social Maladjustment? Do these classifications apply to victims of trauma?*

“‘Emotionally disturbed’ means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a student's educational performance due to . . . [a]n inability to learn that cannot be explained by intellectual, sensory or health factors; . . . [a]n inability to build or maintain satisfactory interpersonal relationships with peers and teachers; . . . [i]nappropriate types of behaviors or feelings under normal circumstances; . . . [a] general pervasive mood of unhappiness or depression; or . . . [a] tendency to develop physical symptoms or fears associated with personal or school problems[.]” N.J. ADMIN. CODE § 6A:14-3.5(c)(5). Emotional disturbance is defined nearly identically to the definition appearing in regulations corresponding to IDEA. *Compare* N.J. ADMIN. CODE § 6A:14-3.5(c)(5)<sup>4</sup>, *with* 34 C.F.R. § 300.8(c)(4).

Under New Jersey law, “[s]ocial maladjustment’ means a consistent inability to conform to the standards for behavior established by the school. Such behavior is seriously disruptive to the education of the student or other students and is not due to emotional disturbance.” *See* N.J. ADMIN. CODE § 6A:14-3.5(c)(11). There is no federal definition for “social maladjustment,” despite the appearance of the term in IDEA as a group expressly excluded from coverage. Inclusion of the term itself under state law indicates an effort on behalf of New Jersey legislators to create a would-be definition of “social maladjustment” under federal law, while also extending special education services to that cohort of students.

The question of whether traumatized students may be classified under these categories is reserved for future memoranda. Preliminary research suggests that the effects of childhood trauma *could* present as classifiable behavior under either emotional disturbance or social maladjustment, depending upon the individual case.

## **WHAT ARE THE MAIN COMPONENTS OF NEW JERSEY SPECIAL EDUCATION?<sup>2</sup>**

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<sup>2</sup> The components included in this list are not exhaustive and are listed in an order intended to provide chronological clarity, rather than listed by order of importance. The provision of FAPE, discussed *infra*, is the hallmark of the special education law and should be considered the main thrust of its charge.

## **1. Identification:**

“Each board of education, according to uniform rules prescribed by the commissioner [of education] with the approval of the State board, shall provide for the identification of any children between the ages of five and 21 residing in the district and enrolled in the public schools of the State or in a nonpublic school located in the district, who cannot be properly accommodated through the school facilities usually provided, because of handicaps. “ N.J. STAT. ANN. § 18A:46-6 (West, Westlaw through L.2015, c. 120 and J.R. No. 7). The procedures for identification are described in New Jersey Administrative Code, Title 6A. Each district shall first attempt to use strategies for assisting learning, behavior, or health difficulties through general education. *See* N.J. ADMIN. CODE § 6A:14-3:3(a)(3). Referral, if deemed necessary, is then made “by instructional, administrative and other professional staff of the local school district, parents and state agencies, including the New Jersey Department of Education and agencies concerned with the welfare of students.” *See id.* Evaluation and/or “other educational action” is then made, if appropriate. *See id.*

### **Key Take-Away:**

This is a “child-find” obligation. The question of whether a school’s duty to identify handicapped students is based on actual or constructive notice is not addressed.

## **2. Notification:**

Notification is required by means of the consent requirement in N.J. ADMIN. CODE § 6A:14-2.3. The consent requirement begins with initial evaluation of a child and consent is repeatedly required in numerous circumstances throughout provision of services. *See id.* When parents with operative parental rights are unavailable, a court of competent jurisdiction may appoint an individual to stand in for a parent. *See* N.J. ADMIN. CODE § 6A:14-2.3(b). When parents refuse an initial (Individual Educational Plan (IEP), a school cannot compel consent through a due process hearing; however, the school will not be penalized for failing to provide FAPE to a child whose parents have refused his or her individual education plan (IEP). *See* N.J. ADMIN. CODE § 6A:14-2.5(c). A school may, but is not required to request a due process hearing to obtain consent when a parent has refused an IEP, under limited circumstances, and the district and parent cannot agree as to alternative action. *See id.* Requests for a hearing are permissible if consent is withheld prior to an initial evaluation, reevaluation, or the release of records under 6A:32. *See* N.J. Stat. Ann. § 6A:14-2.3(a)(1),(3),(4).

## **3. Evaluation:**

“Each board of education shall separately or jointly with one or more boards of education employ a psychological examiner, who acting jointly with special education personnel approved by the commissioner, shall administer the procedures for diagnosis and classification required in this chapter, or, in lieu of employing a psychological examiner, it or they may contract to use, with or without financial reimbursement, the psychological or other services of any clinic or agency approved by the commissioner.” N.J. STAT. ANN. § 18A:46-11 (West, Westlaw through L.2015 c. 120 and J.R. No. 7). Procedural safeguards

under Title 6A, including a requirement that a variety of assessment tools be utilized in the evaluation process are similar to the federal legislation under IDEA. *See* N.J. ADMIN. CODE § 6A:14-2.5.

#### **4. Classification:**

A student is classifiable, or “eligible for special education and related services” when the student has “one or more of the disabilities” [described above on page 2,] “the disability adversely affects the student's educational performance and the student is in need of special education and related services. Classification shall be based on all assessments conducted including assessment by child study team members and assessment by other specialists [as indicated].” *See* N.J. ADMIN. CODE § 6A:14-3.5(c).

#### **5. Provision of FAPE:**

FAPE is a legal term of art meaning a “Free Appropriate Public Education.” A robust discussion of the nuance involved with FAPE is beyond the scope of this memo; however, the FAPE definition under New Jersey law is identical to its definition under the federal special education act, the Individuals with Disabilities Act (IDEA). *See* N.J. ADMIN. CODE § 6A:14-1.1(b)(1). IDEA defines FAPE as “special education services . . . provided at public expense, under public supervision and direction, and without charge [,which] meet[s] the standards of the State educational agency [and] include[s] an appropriate preschool, elementary school, or secondary school education in the State involved.” *See* 20 U.S.C.A. § 1415(9). IDEA also requires these services to be “provided in conformity with the individualized education program [IEP]”<sup>3</sup>. *See id.*

Similar to the federal law, only substantive violations of FAPE shall be automatically determined in violation of the FAPE requirement. N.J. ADMIN. CODE § 6A:14-2.7. Procedural violations may indicate a violation where it can be proven the violations “[i]mpeded the child's right to a FAPE; . . . [s]ignificantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE to the child; or . . . [c]aused a deprivation of educational benefits.” *See id.* The FAPE requirement is not necessarily met merely because a student is “advancing from grade to grade[.]” N.J. ADMIN. CODE § 6A:14- 1.1(b)(3).

If a parent enrolls a child in a private school after determining the public school failed to provide a child previously enrolled in special education with FAPE, an administrative law judge may require tuition reimbursement. *See* N.J. ADMIN. CODE § 6A:14-2.10(b); however, parents are not entitled to placement and tuition reimbursement for time spent at a unilaterally chosen nonpublic school, unapproved by the State Department of Education, when FAPE would be available in a less restrictive environment. *M.H. v. Union Tp. Bd. of Educ.*, 92 N.J.A.R.2d (EDS) 132 (1992). Parents may be entitled to reimbursement at a school not approved for special education by New Jersey State Department of Education if the district had failed its duty to provide FAPE. *J.S. v. Livingston Bd. of Educ.*, 92 N.J.A.R.2d (EDS) 94 (1992).

#### **Key Take-Away:**

Under New Jersey law, a student will not be classifiable unless their disability “adversely affects the student’s educational performance.” Although there is no

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<sup>3</sup> More information regarding IEPs can be found in memo one of this series and as-yet unposted memoranda/working papers at <http://www.clime.newark.rutgers.edu/>.

definitive clarity on what this requirement means, as according to the FAPE requirement, we may safely assume that a child passing grade levels may still be experiencing the adverse affects to which this clause refers. Since the FAPE requirement under state law mirrors IDEA, it is reasonable to assume the requirement maintains much of the same nuance.

## **6. Dispute Resolution/Mediation:**

N.J. ADMIN. CODE § 6A:14-2.6 (optional voluntary process available for disagreements between parents and districts regarding identification, evaluation, classification, placement, or FAPE).

## **7. Due Process Hearing:**

N.J. ADMIN. CODE § 6A:14-2.7 (outlining appropriate timelines and circumstances for initiating a hearing).

## **WHAT DETAILS ABOUT SERVICES DOES NEW JERSEY SPECIAL EDUCATION LAW PROVIDE AND WHO OVERSEES THESE SERVICES?**

The Administrative Code declares that “counseling, occupational therapy, physical therapy, school nurse services, recreation, social work services, medical services and speech-language services” are required wherever necessary for the student to “benefit from the educational program.”<sup>4</sup> *See* N.J. ADMIN. CODE § 6A:14-3.9. The services providers must be deemed appropriate and the legislation clearly outlines where services must be delivered by certain individuals, namely licensed/certified professionals. *See id.* In some instances, as with counseling services, a variety of providers (i.e. social workers, school psychologists or guidance counselors) would all be considered qualified. *See* N.J. ADMIN. CODE § 6A:14- 3.9(1). School staff may inform parents of other types of services not included within the obligations of this section; however, this advice does not then further obligate the school to pay for or provide those additional services. *See* N.J. ADMIN. CODE § 6A:14-3.9(12).

Child study teams are comprised of the key players in the provision and oversight of special education services in New Jersey. *See* N.J. ADMIN. CODE § 6A:14-3.2. Child study teams must include “a school psychologist, a learning disabilities teacher-consultant and a school social worker.” N.J. ADMIN. CODE § 6A:14-3.1(b). The child study team must participate in the evaluation and eligibility determination for students potentially in need of special education services. N.J. ADMIN. CODE § 6A:14-3.2(d). The team may be involved in numerous other activities, such as providing direct services for disabled students or providing preventative/support services to students in regular

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<sup>4</sup> It appears that all students eligible for special education receive an individualized education plan (IEP). *See* N.J. ADMIN. CODE § 6A:14-3.7. This would include socially maladjusted students, whom are not entitled to an IEP or any of the special education services available under the Federal Individuals with Disabilities Education Act (IDEA).

education. *See id.* From the child study team, a case manager will be designated for each child for whom an initial evaluation is conducted. *See* N.J. ADMIN. CODE § 6A:14-3.2.

### **NOTE ON “IDEA” COMPLIANCE**

New Jersey Special Education Law is designed to remain in compliance with IDEA and maintain eligibility for funding. The New Jersey law reiterates the requirements to be funding-eligible under the federal law and outlines the types of reporting procedures districts must follow in order to have funding renewed. *See* N.J. ADMIN. CODE § 6A:14- 1.2(e) (defining elements of required annual reporting, including demographic information about classified students and information about staff providing services, with notation of expected shortages and vacancies). Reports must specifically inform the Department of Education, in compliance with IDEA, about the numbers of disabled students exiting education, subjected to suspensions, removed to alternative educational settings, and those involved in statewide assessments. The statute also requires data about postsecondary transition outcomes and preschool outcomes. *See id.* Districts are required under this subchapter to establish a “parent advisory group” for providing input on district-wide decisions regarding disabled students. *See* N.J. ADMIN. CODE § 6A:14-1.2(h).

## **ANTIDISCRIMINATION**

### **What is the purpose of the New Jersey Law Against Discrimination (NJLAD)?**

“All persons shall have the opportunity to . . . obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation . . . without discrimination because of . . . disability . . . subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right.” N.J. STAT. ANN.. § 10:5-4 (West, Westlaw through L.2015 c. 120 and J.R. No. 7).

### **HOW DOES THE NJLAD DEFINE UNLAWFUL DISCRIMINATION BY A SCHOOL AGAINST A DISABLED PERSON?**

It is unlawful for any “superintendent, agent, or employee of any place of public accommodation directly or indirectly to refuse, withhold from or deny to any person any of the accommodations, advantages, facilities or privileges thereof, or to discriminate against any person in the furnishing thereof[.]” “A place of public accommodation” includes “any kindergarten, primary and secondary school, trade or business school, high school, academy, college and university, or any educational institution under the supervision of the State Board of Education, or the Commissioner of Education of the State of New Jersey.” N.J. STAT. ANN. § 10:5-5(1) (West, Westlaw through L.2015 c. 120 and J.R. No. 7). This definition expressly excludes distinctly private accommodations, as well as religious and sectarian schools. *See id.*

For purposes of NJLAD, the definition of “[d]isability” includes “any mental, psychological or developmental disability, including autism spectrum disorders, resulting from anatomical, psychological, physiological or neurological conditions which prevents the normal exercise of any bodily or mental functions or is demonstrable, medically or psychologically, by



accepted clinical or laboratory diagnostic techniques.” N.J. STAT. ANN. § 10:5-5(q). A NJLAD disability is defined against a lower threshold than the federal discrimination statute (Americans with Disabilities Act/ADA), because NJLAD disabilities need not be severe or immutable, and there is no requirement that such disability substantially limit “a major life activity.” *See Viscik v. Fowler Equip. Co.* 800 A.2d 826, 834-35 (N.J. 2002).

### *Illuminating Case Law*

*J.T. v. Dumont Pub. Sch.*, 103 A.3d 269 (N.J. Super. Ct. App. Div. 2014) (Holding that a school is not barred by the NJLAD from funneling special needs students into a single school, rather than permitting students to be accommodated in their neighborhood schools where the plaintiff suffered no actual harm.) This case further supports the proposition that in order to plead a violation, the plaintiff must prove a deprivation of a benefit, not merely a deprivation of a benefit in one’s neighborhood school. The court concluded that centralization of special education within the district was not in conflict with federal law, which stipulates a preference but not an obligation to place students in their general neighborhood classrooms.

A federal district court noted that under the NJLAD, plaintiffs will ultimately need to establish that the district impeded plaintiffs’ participation in educational services “because of his disability”. *D.G. v. Somerset Hills Sch. Dist.*, 559 F. Supp. 2d 484, 501- 03 (D.N.J. 2008). This limitation, reminiscent of the framework of the ADA has proven fatal for some NJLAD claims. *See, e.g., id.*

\* The “because of” language makes for a potential complication: if a student is subjected to disciplinary procedures because of poor attendance, and it is only later considered whether poor attendance was connected to social maladjustment, will the disciplinary procedures be deemed discriminatory?

## **REGULAR EDUCATION: LEARNING, BEHAVIORAL, AND HEALTH DIFFICULTIES**

### **WHAT IS REQUIRED OF NEW JERSEY SCHOOLS TO ADDRESS LEARNING, BEHAVIOR, AND HEALTH DIFFICULTIES FOR REGULAR EDUCATION STUDENTS?**

The Intervention and Referral Services (I&RS) program was designed to comport with non-special education requirements within Title 6A of the administrative code. The administrative code requires a school-wide system for delivering supportive services to students regardless of whether they otherwise meet the threshold for special education services. The chapter also permits direct, student specific services. The code's subchapter eight reads as follows:

“District boards of education **shall establish** and implement in each school building in which general education students are served a coordinated system for planning and delivering intervention and referral services designed to assist students who are experiencing learning, behavior, or health difficulties, and to assist staff who have difficulties in addressing students' learning, behavior, or health needs. District boards of education shall choose the appropriate multidisciplinary team approach for planning and delivering the services required under this subchapter.” N.J. ADMIN. CODE § 6A:16-8.

*Express functions of I&RS services*

“Functions of intervention and referral services

(a) The functions of the system of intervention and referral services in each school building shall be to:

1. **Identify learning, behavior and health difficulties of students;**
2. **Collect information** on the identified learning, behavior, and health difficulties;
3. **Develop and implement action plans that provide for appropriate school or community interventions or referrals to school and community resources,** based on the collected data and desired outcomes for the identified learning, behavior, and health difficulties;
4. **Provide support, guidance and professional development to school staff who identify learning, behavior and health difficulties;**
5. **Provide support, guidance and professional development to school staff who participate in each building's system for planning** and providing intervention and referral services;
6. **Actively involve parents or guardians** in the development and implementation of intervention and referral services action plans;
7. **Coordinate the access to and delivery of school resources** and services for achieving outcomes identified in intervention and referral services action plans;
8. **Coordinate the services of community-based social and health provider agencies and other community resources** for achieving outcomes identified in intervention and referral services action plans;
9. **Maintain records of all requests for assistance and all intervention and referral services action plans** and all related student information, according to the requirements of [federal and state law]
10. **Review and assess the effectiveness of each intervention and referral services action plan in achieving the identified outcomes,** and modify each

action plan to achieve the outcomes, as appropriate; and

11. At a minimum, annually review intervention and referral services action plans and the actions taken as a result of the building's system of intervention and referral services, and make recommendations to the principal for improving school programs and services, as appropriate." N.J. ADMIN. CODE § 6A:16-8.2.

**Key Take-Away:**

New Jersey schools have a duty to address learning, behavioral and health challenges of traumatized students, even if those students do not meet the threshold required for special education. Moreover, the I&RS program is one that is proactive; it requires schools to establish coordinated plans for addressing these issues on a universal basis, within regular education. As such, through this charge, New Jersey may require schools to act in such a way that despite experiencing traumatic events or prolonged exposure to trauma, these students should receive services to address their needs PRIOR TO a deterioration in their capacity and educational performance that would qualify them for special education.

Nevertheless, the skeletal instruction provided by the code suggests that the details of implementation of these programs are subject to the discretion at the district level. To fully understand I&RS programming, research must necessarily be conducted outside the letter of the law and within the districts, themselves.

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