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REPORT ON LEGISLATION BY THE COMMITTEE ON EDUCATION LAW

A.8398 **M. of A. Nolan**
S.5636 **Senator Oppenheimer**

AN ACT relating to special education programs and services and implementation of the federal Individuals with Disabilities Education Improvement Act.

THIS BILL IS OPPOSED

As a non-partisan organization devoted to the rule of law, the New York City Bar Association has a keen interest in insuring that New York State and New York City provide the federally mandated "free appropriate public education" (FAPE) to all New York City school children with disabilities. Members of the Education Law Committee are parents, advocates, and citizens, each concerned about the future of this City.

On behalf of the Association, we write in opposition to A.8398/S.5636, a Bill proposed by the NYS Education Department (SED) and sponsored by the Chairs of the Assembly and Senate Education Committees. In particular, we object to SED's proposals to: (1) reduce the statute of limitations from two years to 180 days for due process claims under the Individuals with Disabilities Education Act (IDEA) for unilateral parental placement in a private school; (2) require mandatory mediation prior to commencement of a due process hearing under Education Law 3602-c; and (3) impose limitations on access to special education for students receiving transportation to nonpublic schools outside their district of residence. Rather than enact A.8398/S.5636 into law, we urge the Legislature and the Governor to simply extend the current education law beyond June 30, 2009.

The Committee further notes that, although the Bill purports to implement the provisions of the federal 2004 IDEA amendments, it also includes a number of "mandate relief proposals" – meant to cut costs by eliminating or reducing special education mandates– that are in no way required by the IDEA amendments. These mandate relief proposals were presented to the NYS Regents in January, 2009, and SED was instructed to obtain input from stakeholders and to estimate potential cost savings before moving its proposals further. These proposals were the subject of recently concluded public hearings. The Regents have not been given an opportunity to consider the proposals in light of the public comments and SED has not provided the cost savings analysis the Regents requested. Since the "mandate relief proposals" were not fully vetted or approved by the Regents, we believe it is premature and inadvisable for the Legislature to adopt any of the proposed amendments in the Bill other than those necessary to make permanent earlier revisions relating to New York's compliance with IDEA.

Shortening the Statute of Limitations for Tuition Reimbursement Claims (§8 of the Bill)

The SED proposal to reduce the two year due process statute of limitations was already addressed and rejected in 2007 by the Regents and the Legislature, after Congress allowed States the option of adopting a limitations period different than the two-year period otherwise federally mandated. 20 U.S.C. §1415(b)(6)(B). Only four other states in the country have opted for an IDEA due process statute of limitations shorter than two years and only one state imposes a shorter statute of limitations just for private special education school funding (i.e., tuition reimbursement) cases – as SED proposes here. There is no compelling reason to revisit this issue and impose such an unusual, abbreviated limitations period on parents who believe their children's special education needs can not be met in the public school settings offered by school districts.

Any money saved by time barring claims filed after 180 days would be at the expense of vulnerable families likely to miss the filing deadline because they have difficulty affording or finding counsel to represent them. This risk will be heightened by the lack of clarity as to when the statute would begin to run. The proposed language specifies that the triggering event is "placement" of the child in a private school. It is unclear whether this means the date the parent accepts an offer of placement, signs an enrollment contract, makes a tuition deposit or payment – or the date the child first attends the private school. With a timeline as short as 180 days, there is likely to be extensive litigation over this question – which means more time, expense and delay for both parents and school districts.

The SED's failure to clarify this language in its proposal is especially problematic in New York City. Parents regularly wait until mid to late August for public school placement offers, while private schools typically require that parents sign contracts and make deposits in the Spring to reserve a place for their child in the fall. Thus, the proposal could, in theory, force a parent to file a claim for tuition reimbursement before they had even received a placement offer, much less had an opportunity to determine whether it was appropriate for their child. To avoid this unfair and unworkable result –requiring that parents file claims before they are even ripe – any shortened timeline under consideration should specify that the limitations period starts on the first date of attendance at the private school program.

Moreover, shortening the statute of limitations for tuition reimbursement cases will likely impact the ability of all *other* claims to be heard in a timely manner because New York City will not be able to accommodate the flood of claims brought within 180 days of the start of the school year. It is already commonplace for parents to experience delays in scheduling and completion of hearings in New York City due to the high volume of claims brought each year – despite time lines mandated by law. The impact of further delays will not be limited to parents seeking private school funding; it will delay resolution of many other types of claims brought by parents seeking appropriate services and placements in the public school system. To avoid such a result, the City would have to devote even more resources to expand the capacity of the impartial hearing process system – a measure that would only serve to increase rather than decrease costs.

Mandatory Mediation (§4 of the Bill)

This proposal is unlikely to serve the intended effect of avoiding litigation and will only increase the costs for all sides of due process hearings, which already include procedures to resolve such disputes through a resolution process. 20 USCS § 1415 (e). It will, however, be likely to delay provision of special education services for families who cannot afford to pay for services up front, and who must wait for the due process procedure to be accomplished. Not all parents who pay for private school or seek to home school are wealthy; many parents place their children in parochial schools and use the hearing process to obtain IEP mandated special education services. In addition, many middle-income parents with children in private schools will incur needless additional legal costs if required to proceed to mediation without any assurance that the school district will even consider tuition funding via that process. Nothing is served by forcing parties into mediation with its attendant costs under such circumstances.

Special Education Transportation (§7 of the Bill)

Current law provides that a school board is to provide transportation up to a distance of 50 miles to and from a nonpublic school for children with identified disabilities for the purpose of receiving services or programs similar to the ones the school district has recommended. The proposed amendments to ED Law 4402 are problematic for a number of reasons.

- A student identified with a disability would only be entitled to receive transportation to a nonpublic school that provided all of the mandated special education programs or services. For example, if the nonpublic school did not offer some of the IEP mandated related services (e.g., speech therapy, occupational therapy, or counseling), and they were arranged by the parents to be provided off-campus at a provider's office, the cost of such transportation would have to be borne by the parents.

- Students with identified disabilities receiving transportation to nonpublic schools outside their district of residence – even if within the 50 mile radius – would not be entitled to funding for special education programs or services. Parents would have to elect either transportation or special education services; they would not be entitled to funding for both.

The proposed changes would create enormous barriers for families of moderate or limited economic means. These services are mandated to be publicly funded and it is unfair – and possibly contrary to the federal IDEA law – to deny such funding to students just because they attend nonpublic schools outside their district of residence via transportation paid for by that district. Moreover, the rationale for exempting the school district of location from providing special education services for nonpublic school students is left unclear by the Bill. Under current law, the boards of education of districts providing services to non-resident pupils are reimbursed by the school district of residence for these costs. Education Law 3602-c (7).

Finally, the SED memo in support states that these provisions were proposed in response to concerns by school districts that "some parents of nonpublic school students may seek to use Education Law 4402 (4)(d) inappropriately to, receive transportation for a longer distance than would otherwise be allowable under the transportation mileage limitations approved by the voters of the school district when in fact their child is receiving comparable special education

services from another school district ….” However, as noted above, the Bill’s language goes far beyond limiting the distance in mileage paid by the school district; it would deprive the student of IEP mandated services, simply because the services were not provided by the nonpublic school. Also, it is unlikely a parent would send his/her child to a nonpublic school far from home, unless s/he truly believed this to be absolutely necessary. The school district’s responsibility for the cost of needed related services should not depend upon whether or not the district is also paying for transportation.

Conclusion

The Education Law Committee respectfully requests that the Legislature reject those portions of the proposed amendments identified above and defer consideration of all other provisions of the Bill until such time as the Regents has had an opportunity to consider the issues raised during the recently concluded public hearings. To that end, we urge the Legislature and the Governor to simply extend the current education law beyond June 30, 2009.

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