

**LEGISLATIVE HISTORY CHECKLIST**  
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(Bilingual education--waivers)

**NJSA:** 18A:35-18

**LAWS OF:** 1995 **CHAPTER:** 59

**BILL NO:** S1474

**SPONSOR(S):** Scott and others

**DATE INTRODUCED:** September 26, 1994

**COMMITTEE:** **ASSEMBLY:** Health & Human Services  
**SENATE:** Education

**AMENDED DURING PASSAGE:** No

**DATE OF PASSAGE:** **ASSEMBLY:** February 27, 1995  
**SENATE:** February 9, 1995

**DATE OF APPROVAL:** March 31, 1995

**FOLLOWING STATEMENTS ARE ATTACHED IF AVAILABLE:**

**SPONSOR STATEMENT:** Yes

**COMMITTEE STATEMENT:** **ASSEMBLY:** Yes  
**SENATE:** Yes

**FISCAL NOTE:** No

**VETO MESSAGE:** No

**MESSAGE ON SIGNING:** Yes

**FOLLOWING WERE PRINTED:**

**REPORTS:** No

**HEARINGS:** No

See newspaper clippings--attached:

"Whitman signs waiver of bilingual education," 4-1-95, Star Ledger."State grants flexibility in bilingual classes," 4-1-95, Bergen Record.

Also attached:

Attorney General ruling mentioned in Senate statement.

KBG:pp

SENATE, No. 1474  
STATE OF NEW JERSEY

INTRODUCED SEPTEMBER 26, 1994

By Senators SCOTT, DiFRANCESCO, Ewing and Palaia

1 AN ACT concerning programs in bilingual education and  
2 amending P.L.1974, c.197.

3

4 BE IT ENACTED *by the Senate and General Assembly of the*  
5 *State of New Jersey:*

6 1. Section 4 of P.L.1974, c.197 (C.18A:35-18) is amended to  
7 read as follows:

8 4. a. When, at the beginning of any school year, there are  
9 within the schools of the district 20 or more pupils of limited  
10 English-speaking ability in any one language classification, the  
11 board of education shall establish, for each such classification, a  
12 program in bilingual education for all the pupils therein; provided,  
13 however, that a board of education may establish a program in  
14 bilingual education for any language classification with less than  
15 20 children therein.

16 b. The Commissioner of Education may waive the requirement  
17 that a board of education establish a full time bilingual education  
18 program when the board is able to demonstrate that due to the  
19 age range, grade span or geographic location of the eligible pupils  
20 it would be impractical to provide a full time bilingual education  
21 program. The waiver shall permit the district to implement a  
22 special alternative instructional program for as long as the  
23 conditions exist that justified the waiver.

24 (cf: P.L.1974, c. 197, s.4)

25 2. This act shall take effect immediately.

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STATEMENT

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30 This bill would allow the Commissioner of Education to waive  
31 the requirement that a board of education establish a full time  
32 bilingual education program if the board can demonstrate that  
33 due to the age range, grade span or geographic location of the  
34 eligible pupils it would be impractical to provide such a program.

35 Current law requires that a school district establish a full time  
36 bilingual education program if there are 20 or more children in a  
37 district in any one linguistic group. This has not been possible if  
38 the children are scattered among the various grades and in  
39 different school buildings. Also, the large number of languages  
40 involved have made it difficult if not impossible to provide  
41 teaching staff. Therefore, the State Department of Education  
42 has been granting waivers to school districts. Recently, the

EXPLANATION--Matter enclosed in bold-faced brackets [thus] in the  
above bill is not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

1 Attorney General ruled that these waivers are not consistent with  
2 the statute and the practice must be ended by next year. This  
3 bill amends the statute to authorize the department to continue  
4 granting waivers in these exceptional circumstances.

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7  
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9 \_\_\_\_\_  
10 Authorizes the commissioner to grant waivers for bilingual  
education programs in certain cases.

ASSEMBLY HEALTH AND HUMAN SERVICES COMMITTEE

STATEMENT TO

SENATE, No. 1308

STATE OF NEW JERSEY

DATED: MARCH 9, 1995

The Assembly Health and Human Services Committee favorably reports Senate Bill No. 1308.

This bill requires every child support order to specifically include a provision indicating how medical support coverage (health insurance) is to be maintained for the child. The bill also amends the "New Jersey Support Enforcement Act," P.L.1981, c.417 (C.2A:17-56.7 et seq.) to establish a mechanism for notifying employers of their employees' medical support obligations and for enforcing those obligations.

SENATE EDUCATION COMMITTEE

STATEMENT TO

SENATE, No. 1474

STATE OF NEW JERSEY

DATED: NOVEMBER 1, 1994

The Senate Education Committee favorably reports Senate Bill No. 1474.

This bill allows the Commissioner of Education to waive the requirement that a board of education establish a full time bilingual education program if the board can demonstrate that due to the age range, grade span or geographic location of the eligible pupils it would be impractical to provide such a program.

Current law requires that a school district establish a full time bilingual education program if there are 20 or more children in a district in any one linguistic group. The State Department of Education has been granting waivers of this requirement to school districts. Recently, the Attorney General ruled that these waivers are not consistent with the statute, and the practice must be ended by next year. This bill amends the statute to authorize the department to continue granting waivers in exceptional circumstances.

1.17.701  
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## OFFICE OF THE GOVERNOR NEWS RELEASE

**CN-001**

**Contact:** CARL GOLDEN  
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**TRENTON, N.J. 08625**

**Release:** IMMEDIATE  
MARCH 31, 1995

Gov. Christie Whitman today signed legislation authorizing the Commissioner of Education to grant waivers for bilingual education programs in certain instances.

In signing the bill, the Governor also pledged her continued effort to "reinforce the Administration's commitment to bilingual education reform."

The Governor said that the Commissioner of Education will scrutinize the current body of rules and regulations governing bilingual education with an eye toward reforms.

The signature on the legislation today was necessary to enable local school districts to include funding in budgets for the coming year.

A FULLER STATEMENT BY THE GOVERNOR IS ATTACHED

**GOVERNOR WHITMAN'S STATEMENT**  
**BILINGUAL EDUCATION WAIVER BILL**

The signing of this bill enables school districts to know with certainty, as they finalize their budgets next month, that they may continue their current bilingual programs in the 1995-96 school year. In effect, the bill reactivates regulations of the State Board of Education that last year were declared illegal by the Attorney General.

Those regulations were adopted in recognition of the fact that the existing bilingual education law requires full-time programs in some instances where they simply are not possible. The State Board's rules have long permitted -- and now will continue to permit -- school districts to obtain waivers to offer alternative programs where full-time programs are not feasible.

I have asked Commissioner Leo Klagholz, in granting waivers under this new law, to adhere strictly to the State Board's regulations. This will assure that waivers will be granted only where the age range, grade span and/or geographic location of eligible students is such that a full-time program would be educationally undesirable. An adherence to established rules will also require that each alternative program be approved by the Department of Education.

Commissioner Klagholz has assured me that the waiver process will be rigorous and comprehensive. The process requires districts to certify that the existing State Board regulations and the spirit and intent of the bilingual statutes are adhered to. Also, the Commissioner will carefully examine the regulations and propose any changes that will reinforce our commitment to bilingual education reform.

The signing of the waiver bill provides a solution to an immediate and very serious problem. But, I consider it to be only an interim measure. I believe that we must now achieve more comprehensive reform of the bilingual education law.

We must fix that portion of the law concerning full-time programs that makes a waiver process necessary.

We must tighten our definitions of alternative programs to be sure they adequately meet the needs of students who lack English language proficiency.

We must strengthen the involvement of parents while protecting the right of each student to a thorough and efficient education.



We must assure that all bilingual programs transition students to the regular education program within a reasonable time period.

And, we must build in flexibility so that innovative approaches can be explored in a responsible manner.

All of these provisions are contained in a bill I support strongly, Assembly Bill 66. This bill was developed with bipartisan sponsorship in consultation with the Department of Education. A-66 passed the Assembly earlier this month, and I am hopeful that the bill will soon be considered in the Senate. In fact, it is my understanding, based on discussions between Senator Ewing and members of my staff, that the Senator has agreed to post the Senate version of A-66 in committee and to vote for its release after appropriate discussion.

I am grateful to Senator DiFrancesco for his sponsorship of this critically important waiver bill. I also commend Assemblymen Rocco and Garcia for their sponsorship of A-66. And, I appreciate Senator Ewing's willingness to work with us in achieving a comprehensive reform of bilingual education statutes. I look forward to signing a comprehensive reform bill in the near future.



*State of New Jersey*  
DEPARTMENT OF LAW AND PUBLIC SAFETY  
DIVISION OF LAW  
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~~XXXXXXXXXX~~  
ASSISTANT ATTORNEY GENERAL  
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(609) 292-1760

August 10, 1994

Dr. Richard A. DiPatri  
Deputy Commissioner  
New Jersey State Department of Education  
225 East State Street  
CN 500  
Trenton, New Jersey 08625-0500

Re: 94-80165: Whether the Bilingual Education Act  
Authorizes Adoption of Regulations Providing for a  
Waiver for Implementation of a Special Alternative  
Instructional Program and for Parental Consent Prior  
to Enrollment of LEP Students in Bilingual/ESL  
Programs?

Dear Deputy Commissioner DiPatri:

You have asked for our advice as to whether the Bilingual Education Act, N.J.S.A. 18A:35-15 et seq. (L. 1974, c. 197) [the Act], authorizes adoption of two changes to the current Bilingual Education code, N.J.A.C. 6:31-1 et seq. More specifically, you have asked whether adoption of provisions permitting a waiver for special alternative instructional programs and requiring parental consent before a student may be enrolled in bilingual/English as a Second Language or English language services programs is permitted by the Act. For the reasons hereinafter set forth, you are advised that it is our conclusion that a code provision permitting a waiver for special alternative instructional programs in lieu of a full-time bilingual program is barred by the terms of the Act where such waiver is based on the impracticality of offering a full time bilingual program. However, a waiver may be appropriate where it is shown to be impossible to provide a full time bilingual program. In addition, requiring parental consent in advance before a limited English proficient student can be enrolled in programs mandated by the Legislature would be contrary to the provisions and intent of the Act.

The Act provides, in pertinent part, that when "...there are within schools of the district 20 or more pupils of limited



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English speaking ability [LEP pupils] in any one language classification, the board of education shall establish a program in bilingual education...". N.J.S.A. 18A:35-18. The Legislature explicitly defined the parameters and content of a "program" in bilingual education as follows:

"Programs in bilingual education" means a full-time program of instruction (1) in all those courses or subjects which a child is required by law, rule or regulation to receive given in the native language of the children of limited English-speaking ability enrolled in the program and also in English (2) in the aural comprehension, speaking, reading, and writing of English, and (3) in the history and culture of the country, territory or geographic area which is the native land of the parents of children of limited English-speaking ability enrolled in the program and in this history and culture of the United States. [N.J.S.A. 18A:35-16]

The Federal Bilingual Education Act ("the federal Act"), 20 U.S.C.A. §3281 et seq., and the regulations adopted pursuant thereto, 34 C.F.R. §500 et seq., are designed to encourage states to develop, implement or improve programs for the provision of services to LEP students. To this end the federal government provides funding for grants, to be awarded on application through a competitive process, in nine different areas. Funding provided under the federal Act must supplement rather than supplant existing state or local funding. 20 U.S.C.A. §3291(f)(5). It should be noted that the federal Act does not require a State to provide a program of bilingual education and/or services to LEP students. The regulations with respect to grant recipients for basic programs provide, in pertinent part:

(a) Before enrolling a child in the project (including each LEP child and each child whose language is English) and with sufficient advance notice to give the parents or legal guardians of the child adequate opportunity to decline enrollment, a grantee shall inform the parents or legal guardians of-

....

(2) The alternative education programs that are available;

....

(5) The option of and opportunity to decline enrollment of the child in the project... [34 C.F.R. §501.40].

Recipients of grants for pilot projects for special alternative instructional programs must also meet the requirements set forth at 34 C.F.R. §501.40. 34 C.F.R. §526.40.\*

In interpreting a statutory provision, the starting point must be the language of the statute itself. Sheeran v. Nationwide Mutual Ins. Co., Inc., 80 N.J. 548, 556 (1979). Where a statute is clear and unambiguous on its face, it is not open to administrative construction or interpretation. Vreeland v. Byrne, 72 N.J. 292, 302 (1977). In such circumstances, there is no need, nor may there be any resort, to look behind the plain words of the statute to discern the legislative intent. Demsey v. Mastropasqua, 242 N.J. Super. 234 (App. Div. 1990); Russel v. Saddle Brook Restaurant Corp., 199 N.J. Super. 186 (App. Div. 1985). In reviewing any legislative enactment, the primary focus must be to give proper effect to the specific language which the Legislature has chosen to employ in enacting such legislation. State v. Butler, 89 N.J. 220 (1982). In the absence of an explicit indication that statutory language is intended to have a special meaning, such language must be construed and given effect in accordance with its plain meaning. Levin v. Parsippany-Troy Hills, 82 N.J. 174, 182 (1980). Additionally, statutory language must be read in light of the overall statutory context in which it appears, State v. Brown, 22 N.J. 405 (1956); Petition of Sheffield Forms Co., 22 N.J. 548 (1956), and in a manner which will further the overall purpose of the legislation of which it is part, Central Const. Co. v. Horn, 179 N.J. Super. 95 (App. Div. 1981). Where the Legislature has specifically defined a statutory term, that definition governs. In re Stenmark Associates/Request to Vacate Exemption Letter Denial, 247 N.J. Super. 13 (App. Div. 1991). Finally, in general the word "shall" as used in a statute is construed to be mandatory. No Illegal Points, Citizens for Drivers Rights, Inc. v. Florio, 264 N.J. Super. 318 (App. Div. 1993).

The proposed N.J.A.C. 6:31-1.6 Special Alternative Instruction Program (SAIP) provides:

(a) A district may request a waiver in writing from the Department of Education, to establish a special alternative instruction program (SAIP) when there are 20 or more pupils eligible for the bilingual education program in grades kindergarten through 12 and the district is able to demonstrate that due to the age range, grade span and/or geographic location of eligible pupils it would be impractical to provide a full-time bilingual program. This waiver, if approved, shall permit the district to implement a special

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\* As set forth hereafter, the federal regulations do not apply to existing State or LEA programs.

alternative instructional program for as long as the conditions exist that justified the waiver.

(b) A special alternative instructional program (SAIP) is designed to meet the special linguistic, educational, and cultural needs of LEP pupils. A SAIP provides daily English language instructional services geared to the grade, age, and language ability of the pupil by a certified bilingual teacher and/or a certified ESL teacher. A SAIP can also include bilingual instruction, but is not a full program of bilingual education. All SAIPs also provide daily ESL instruction. Special alternative instructional programs may include:

part-time bilingual education program, bilingual resource program, bilingual tutorial program, High Intensity ESL, and Sheltered English program services, which at a minimum provide 2 periods of instruction to meet the basic skill needs of LEP pupils.

(c) Districts requesting a waiver from the Department of Education shall:

1. Submit the waiver request as part of the District's Bilingual/ESL Program Plan as detailed in N.J.A.C. 6:31-1.14.

2. The plan shall include data on student enrollment, program description, staffing requirements, and student achievement.

In adopting administrative regulations the court imposes the requirement that the agency demonstrate at a minimum that its actions can be understood to be consistent with the underlying legislative mandate. In re Township of Warren, 132 N.J. 1 (1993). Administrative regulations cannot alter the terms of legislative enactments or frustrate the policy embodied in the statute. Matter of Fresh Water Wetlands Protection Act Rules, N.J.A.C. 7:7A-1.1 et seq., 238 N.J. Super. 516 (App. Div. 1989). Administrative regulations which are inconsistent with legislation pursuant to which they are adopted are invalid. Dixon Venture v. Joseph Dixon Crucible Co., 235 N.J. Super. 105 (App. Div. 1989), certif. granted, 118 N.J. 204 (1989), aff'd as modified, 122 N.J. 228 (1990). See also Matter of Repeal of N.J.A.C. 6:28, 204 N.J. Super. 158, 162 (App. Div. 1985) (the terms of a regulation may not narrow the statutory language).

An application of these principles to the present case clearly demonstrates that the Department lacks the authority to waive the statutory requirements. Indeed, the "waiver" contemplated by the proposed code provision conflicts with and impermissibly narrows the Act and the definition of "bilingual

education programs" set forth therein. Matter of Fresh Water Wetlands, supra; Matter of Repeal of N.J.A.C. 6:28, supra. The proposal contemplates that SAIPs are to be offered instead of a full-time bilingual program. SAIPs do not meet the statutory definition of a bilingual program because: (1) a SAIP is less than full-time; (2) there is no requirement that the LEP student receive instruction in required courses in his/her native language; (3) there is no requirement that the SAIP provide instruction in the oral comprehension, speaking, reading, and writing of the LEP student's native language; (4) there is no requirement that the SAIP include instruction in the history and culture of the country of the LEP student's parents origin.

In seeking such a waiver, the sole stated requirement is that the applicant district demonstrate that it is "impractical." The articulated criteria for determining that provision of the mandated program is impractical is that the district demonstrate that due to the "age range, grade span and/or geographic location" of the LEP students provision of a bilingual education program is impractical. In requiring such a program whenever there are 20 more students "within schools of the district," as opposed to in a school or grade level or of a certain age, the Legislature has implicitly addressed the difficulties contemplated by the proposed regulation and determined that, notwithstanding these problems, a program of bilingual education must be provided.

Resort to the federal regulations with respect to special alternative instructional programs, or to required parental consent, under the federal Act does not provide support for the proposed regulation(s). The federal Act, and the grants and funding thereunder, is addressed to pilot projects and intended to supplement existing efforts. A state may choose to extend greater rights to LEP pupils than those conferred by the federal statute. See Geiss v. Parsippany-Troy Hills Bd. of Ed., 774 F.2d 575 (3d Cir. 1985). The existing effort required in New Jersey is the full-time program of bilingual education which the Legislature has mandated whenever the threshold conditions have been met. The Department cannot, therefor, propose SAIPs in lieu of that which is required by State law.

In using the word "impractical" the proposed regulation, and thus this opinion, does not address those circumstances where the provision of a full time program of bilingual education by the district might be objectively demonstrated to be impossible. One such circumstance, which you have advised does occur, would be presented if the district, despite its best efforts, could not obtain appropriately certified teaching staff members.

As a general proposition the courts have held that imputing to the Legislature an intent which will result in an imposition of what amounts to an impossible burden on an administrative agency is not consistent with reason. American Cyanamid Co. v. State Department of Environmental Protection, 231

N.J. 292 (App. Div. 1989), certif. denied 117 N.J. 89 (1990). Where the Legislature did not contemplate a specific situation, the court must interpret the statute consonant with the probable intent if the circumstances had been foreseen. County of Essex v. Waldmen, 244 N.J. Super. 647 (App. Div. 1990), certif. denied 126 N.J. 332 (1991). The legislative intent and reason of a statute should prevail over literal sense. Lesniak v. Budzash, 133 N.J. 1 (1993). The court is required to assume that the Legislature intended a reasonable approach and the statute should be construed to effect a reasonable approach. Middlesex Co. Health Dept. v. Browning Ferris Industries of Elizabeth, N.J., Inc., 252 N.J. Super. 134 (App. Div. 1991). Statutes and the regulations promulgated thereunder should be read to effect the legislative intent. Coletti v. Union Co. Bd. of Chosen Freeholders, 217 N.J. Super. 31 (App. Div. 1987).

Accordingly, the Department could propose regulations which provide that where literal and full compliance with the Act is not possible, the local district is required to comply as fully as is possible and to make efforts to come into full compliance with the Act.

The proposed code section which would require parental consent for the enrollment of an LEP student in a bilingual education program provides, in pertinent part, as follows:

(a) Written notice shall be provided to parents of LEP pupils informing them of the following: that the ~~pupil~~ has been identified as limited English proficient and in need of bilingual/ESL services; that the parents have a right to deny enrollment into any program designed to meet the pupil's language needs; and that the district will conduct a follow-up assessment of each child, not enrolled at the parent's, request within 6 months to a year to determine student progress.

...  
(e) Parent consent must be obtained in writing by the district prior to enrolling limited English proficient students in an instructional program model designed to meet their needs.

The statutory framework provides that parents must be notified "of the fact that their child has been enrolled in a program of bilingual education." N.J.S.A. 18A:35-22. The Legislature recently amended the Act to provide parents a right of appeal (subsequent to the enrollment mandated by N.J.S.A. 18A:35-22):

If any parent or teaching staff member disagrees either with the decision that a

pupil exit from or remain in the district's bilingual education program, the parent or teaching staff member may appeal this decision. After exhausting a local appeal process, any parent or guardian who is not satisfied with the district's explanation for its decision shall have the right to a hearing as a contested case before the Commissioner of Education or his designee. The final decision with respect to placement shall be based on the best interests of the child in accordance with assessment criteria set forth in section 1 of this amendatory and supplementary act. An appeal under this provision shall be heard and decided by the commissioner or his designee on an expedited basis.

N.J.S.A. 18A:35-19.2 (L. 1991, c. 12, §2, eff. Jan. 24, 1991). The Assembly Education Committee Statement with respect to the above cited statute recited, in pertinent part:

It is also the intention of the Assembly Education Committee that the appeal to the Department of Education shall be handled as a contested case with the final decision to be made by the commissioner or a designated assistant commissioner. The commissioner, or his designee, can retain the matter to hear and decide or refer the matter to the Office of Administrative Law for a hearing and a recommended initial decision by an administrative law judge.

The two statutory provisions cited above, read in conjunction, evidence that it was the Legislature's intent that the decision to place a LEP student in a bilingual education program be made by the school district with the parents or guardians of the LEP pupil having a right to appeal the same. Determination of placement, on appeal, is to be made on the basis of the best interests of the child.

The proposed parental consent regulation, requiring notification and consent prior to enrollment of an LEP student in a bilingual education program, reverses the statutorily prescribed sequence of enrollment, notification, appeal. In enacting N.J.S.A. 18A:35-22 and, most recently, N.J.S.A. 18A:35-19.2, the Legislature looked at this issue and recognized the primary responsibility of educators with respect to enrollment while protecting the parents' rights by providing for an appeal process. Requiring parental consent as a condition to enrolling a child effectively renders meaningless the above statutory amendment, L. 1991, c. 12. Moreover, the proposed code, while requiring subsequent evaluation of the pupil's progress should the parent refuse consent, provides

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no mechanism for provision of the mandated bilingual education program to a LEP student who is demonstrably unable to succeed without it. Finally, such a circumstance is also antithetical to the statutory requirement that, where there is a dispute to appropriate placement for the student it is to be resolved by the Commissioner or his designee based "on the best interests of the child." However, it would not be inconsistent with the statutory provisions cited for the Department to propose regulations which would give the parents or legal guardians of an LEP student who have filed an appeal of their child's enrollment the option of having the child remain in a regular classroom setting pending resolution of the appeal.

For the reasons set forth herein, you are advised that the Department lacks the authority to propose a regulation which would waive the requirements of the Act to permit local districts to provide special alternative instructional programs in lieu of the mandated full time bilingual education program on the basis that provision of a full time bilingual education program is impractical. The Department does, however, have the authority to propose regulations consistent with the Act to address those circumstances where it is impossible for a school district, for objectively demonstrable reasons, to comply with the Act. Finally, you are further advised that it is our opinion that the Department may not propose a regulation which would require parental consent before a student requiring a bilingual/ESL program or services is permitted to receive them.

Very truly yours,

DEBORAH T. PORITZ  
ATTORNEY GENERAL OF NEW JERSEY

By: 

David Earle Powers  
Deputy Attorney General