



**INDEPENDENT REGULATORY REVIEW COMMISSION
COMMONWEALTH OF PENNSYLVANIA
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June 18, 1997

Honorable Peter H. Garland, Ph. D., Executive Director
State Board of Education
333 Market Street, 1st Floor
Harrisburg, PA 17126

Re: IRRC Regulation #6-258 (#1827)
Certification of Professional Personnel

Dear Dr. Garland:

The Independent Regulatory Review Commission (Commission) has enclosed comments on your proposed regulation #6-258. These comments outline areas of concern raised by individual Commissioners and the Commission's staff. The comments also offer suggestions for your consideration when you prepare the final version of this regulation. These comments should not, however, be viewed as a formal approval or disapproval of the proposed version of this regulation.

If you or your staff have any questions on these comments or desire to meet to discuss them in greater detail, please contact John Jewett at 783-5475 or James M. Smith at 783-5439. They have been assigned to review this regulation.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert E. Nyce".

Robert E. Nyce
Executive Director

REN/lzd

cc: Eugene W. Hickok, Jr., Secretary
Office of General Counsel
Office of Attorney General
Pete Tartline

COMMENTS OF THE INDEPENDENT REGULATORY REVIEW COMMISSION

ON

STATE BOARD OF EDUCATION REGULATION NO. 6-258

CERTIFICATION OF PROFESSIONAL PERSONNEL

June 18, 1997

We have reviewed this proposed regulation from the State Board of Education (Board) and submit for your consideration the following objections and recommendations. Subsections 5(d) and 5(e) of the Regulatory Review Act (71 P.S. §§ 745.5(d) and (e)) specify the criteria the Commission must employ to determine whether a regulation is in the public interest. In applying these criteria, our Comments address issues that relate to statutory authority, legislative intent, fiscal impact, clarity and reasonableness of the proposed regulation, need for the rule, protection of public health and safety, and whether the regulation represents a policy decision of such a substantial nature that it requires legislative review. We recommend that these Comments be carefully considered as you prepare the final-form regulation.

1. Statutory authority for, consistency with legislative intent and clarity of waivers and equivalencies.

The proposed regulation amends Section 49.13(b) to delegate authority to the Department of Education (Department) to establish equivalencies for education and experience for each certificate area for candidates who did not complete an approved program, and to establish specific criteria for temporary waivers and a petition process for local school boards seeking a waiver. Legislators and other commentators have questioned the statutory basis for and clarity of these provisions. Although the proposed language states that the Department's decisions are subject to approval by the Board, exactly what role the Board will play is unclear.

A major concern is that the Board is the only entity with the statutory authority to "prescribe" standards for teaching certificates. Sections 1201 and 1202 of the Public School Code of 1949 (24 P.S. §§ 12-1201 and 12-1202) read as follows:

Section 1201. Certificates qualifying persons to teach

Only those persons holding one of the following certificates shall be qualified to teach in the public schools of this Commonwealth. -- (1) Permanent college certificate, ... or (9) such other kinds of certificates as are issued under the standards *prescribed* by the State Board of Education....

Section 1202. State certificates

State certificates shall be issued as herein provided. Each such certificate shall set forth the branches which its holder is entitled to teach. *No teacher shall teach,*

in any public school, any branch which he has not been properly certified to teach. [Emphasis added]

The House Education Committee (House Committee) and other commentators questioned whether the Board has the authority to delegate its responsibility to “prescribe” the standards for certification to the Department. In its comments on Subsection 49.13(b)(12) relating to equivalencies, the House Committee stated that it “strongly objects to the language of this subsection which, it believes, runs counter to the legislative intent of granting authority to the State Board for the standards of certification.” Senator James J. Rhoades, Chairman of the Senate Education Committee, submitted comments suggesting that Subsection 49.13(b)(12) be deleted from the proposed regulation. He added:

Reference to these equivalencies elsewhere in the draft ought to be deleted. This language is counter to the demonstrated need for certification and to the desire to raise the standard for teacher certification. Further, the current Chapter 49 requirements provide opportunities for uncertified persons to teach in public schools of the Commonwealth through the use of the “intern” certificate, the “emergency” certificate and experimental programs. The experimental programs were deleted in the revisions and this is a change that ought to be reconsidered.

Another statutory concern is that a waiver process is already established in Section 1214 of the Public School Code (24 P.S. § 12-1214). It prescribes the standards to be used in granting a “Department waiver of certification requirements.” Section 1214 reads as follows:

(a) The department may grant a waiver of certification requirements for a period not to exceed one year for a certificated professional employe currently employed by or on suspension from a school entity when the school entity submits a written waiver request containing the following:

- (i) the reason for the waiver;
- (ii) a program of study being followed by the employe to secure certification in the new position;
- (iii) the period of time necessary for the employe to secure certification in the new position;
- (iv) a statement showing the employe’s application for placement in the new position; and
- (v) a statement that the employe has completed twelve (12) semester credit hours in the area for which the waiver is requested.

(b) The employe for whom the waiver is granted shall pursue certification as outlined in the school entity’s waiver request. Failure to do so shall result in a revocation of the waiver.

Since the General Assembly has already set forth the procedures for waivers to certification, there is a question as to whether the Board has the authority to delegate authority to the Department to create a waiver process which would provide routes of alternative entry into the teaching profession in Pennsylvania.

Assuming, for the sake of argument, that the Board does have a legal basis for delegating its rulemaking authority to the Department, we would still object to Sections 49.13(b)(12) and (13) for several reasons. First, it would allow the Department to establish equivalencies which would substitute for certification requirements and criteria for the issuance of waivers outside of the regulatory review process. Accordingly, at its discretion, the Department could change the requirements for certification or establish criteria for the issuance of waivers without any prior notice to school boards, school administrators, teachers or the general public. Additionally, the regulation would not be subjected to public, Commission or legislative scrutiny.

Finally, with respect to Paragraph (12), the regulation is silent as to under what circumstances the Department would allow candidates for teaching positions to satisfy equivalent standards. With respect to Paragraph (13), the regulation is silent on what factors the Department would consider in establishing waiver criteria, how long the "temporary" waiver would last, or under what circumstances the Department would grant waivers. The House Committee also indicated that the language in Paragraph (13) was very unclear. Both the House Committee and Senator Rhodes stated that the Board should establish the specific criteria for waivers in the regulation.

To address our concerns, the regulation should be amended to delete Paragraphs (12) and (13) as proposed. The establishment of equivalencies or the granting of waivers are not merely administrative tasks which may be delegated to the Department. To the contrary, equivalent standards and waiver criteria are essentially binding norms of future effect, which should be promulgated as regulations. If the Board determines that it needs to modify its existing standards, it should set forth in the regulations detailed parameters which would guide the exercise of its discretion.

We recognize that the Pennsylvania Association of School Administrators (PASA) and Pennsylvania School Boards Association (PSBA) support equivalencies and waivers by saying there is a need for flexibility. The examples of the need for flexibility that they cite involve smaller districts seeking to utilize the talents of their educators to teach in related fields for which they have the experience or expertise but are not currently certified. For example, a chemistry teacher may be certified to teach chemistry but also have the experience and expertise to teach high school physics. The teacher's administrators or school board may want him to teach physics because they cannot afford to hire a "physics" teacher, but the teacher cannot teach physics unless he gets a certificate for that specific subject or a waiver. The regulatory review criteria support "flexibility" in regulations especially in cases affecting smaller entities such as small school districts with limited enrollments and resources that do not support the hiring of additional educators.

However, the proposed amendments go well beyond a response to this limited example. The amendments would allow the Department and Board to provide entry for candidates without a certificate in a related field or any type of teaching certificate or without any actual teaching experience or training. The problems cited by PASA and PSBA could be addressed by a less expansive approach. In some cases, they can be resolved by using existing provisions involving waivers or the intern process. As stated earlier, we recommend that these two subsections be deleted and replaced by other proposals that actually target the limited problem areas identified by the affected parties and are consistent with the statutory requirements of the Public School Code.

2. Statutory authority: Basis for "Grandfather Clauses."

Several commentators, including Senators Rhoades and Jeffrey E. Piccola, and other commentators such as the PSBA, expressed concern with the fact that the continuing professional development requirements of this regulation would not apply to educators that are currently certified. The statutory basis for this limitation is unclear. The pertinent requirements appear in two separate areas in the regulation. First, as amended, Section 49.11(a) would provide:

Certificates and letters of eligibility in force in this Commonwealth on ____
(*Editor's Note:* The blank refers to the effective date of adoption of this proposal)
shall continue in force and effect subject to all the terms and conditions under which they were issued, until they expire by virtue of their own limitations.

Second, Section 49.17(b) of the proposed regulation would read:

Professional personnel, obtaining an Instructional II, Educational Specialist II, Supervisory, or Administrative Certificate or Letter of Eligibility or Vocational Instructional II or Vocational Administrative Director Certificate after ____
(*Editor's Note:* The blank refers to the effective date of adoption of this proposal)
shall, thereafter, present to the Secretary evidence of satisfactory participation in continuing professional development every 5-calendar years....

These sections would exempt all teachers certified as of the date of the adoption of the regulations from the requirements of continuing professional development. The exemption would extend to those teachers presently subject to those requirements, pursuant to Section 1205.1 of the Public School Code of 1949 (24 P.S. § 12-1205.1) and Section 49.17(a) of the current regulations.

According to the Board's Counsel, the Board is statutorily obligated to establish this sweeping grandfather clause pursuant to Sections 1205, 1210 and 1213 of the Code (24 P.S. §§ 12-1205, 12-1210 and 12-1213). Those sections provide, in pertinent part, the following:

§ 1205. Issuing permanent college certificates

The Superintendent of Public Instruction shall issue a permanent college certificate to every graduate of an approved college or university.... Such work in education shall not exceed that required as of the time of graduation of such graduates from colleges or universities approved by the State Board of education. Such certificate shall entitle its holder to teach without further examination.

§ 12-1210. Existing Certificates

All teachers' certificates in force in this Commonwealth at the time this act goes into effect¹ shall continue in full force and effect, subject to all the terms and conditions under which they were issued, until they expire by virtue of their own limitations, unless they are sooner annulled for the reason and in the manner herein provided.

¹ March 10, 1949

§ 1213. Standard limited certificates

All standard limited certificates in force in this Commonwealth at the time this section takes effect shall become permanent and no additional requirements shall be added hereafter to keep them in full force and effect or otherwise to validate such certificates provided the holders of such certificates have satisfactorily taught at least ten (10) years in the public or nonpublic schools, or both, of the Commonwealth and have earned at least ninety (90) semester credit hours of undergraduate or graduate study.

We are not persuaded by the Board Counsel's legal argument. There is no valid reason for exempting all teachers certified prior to the effective date of the regulations from continuing professional development requirements. Reading the above cited grandfather provisions so narrowly would defeat the intent and effect of Section 1205.1(d) (24 P.S. § 1205.1(d)), amended March 30, 1988. That section provides, in pertinent part, as follows:

All professional employees of school districts, joint school districts, intermediate units or area vocational-technical schools receiving their initial Pennsylvania teaching or administrative certification, as provided for in this article, on or after June 1, 1987, shall be required at least once during every five-year period, commencing upon receipt of a permanent teaching certificate or an initial administrative certificate, to participate in professional development activity pursuant to the professional development plan of that professional employee's school district, joint school district, intermediate unit or area vocational technical school. [Emphasis added]

Pursuant to the Statutory Construction Act, every statute must be construed, if possible, to give effect to all of its provisions (1 Pa.C.S. § 1921). The grandfather clauses and the continuing development provision must be read together in *pari materia* (1 Pa.C.S. § 1932). Moreover, the provision enacted latest in time is deemed to be controlling (1 Pa.C.S. § 1934). Therefore, we conclude that the grandfather clause should only apply to those teachers certified prior to June 1, 1987, pursuant to Section 1205.1. This is the date that is now referenced in Section 49.17(c) for commissioned officers but is proposed to be deleted as other parts of existing provision are amended and moved to Section 49.17(b). In order to be consistent with the statute, we recommend that Section 49.11(a) be revised to use the date of June 1, 1987, and that this date also be used in Section 49.17(b).

3. Substantial policy decisions requiring legislative review: Continuing professional development, renewal of certification, and legislative initiatives.

The General Assembly is reviewing new requirements for continuing professional development in House Bill 159 and Senate Bill 706. In his testimony before the House and Senate Committees, the Department's Deputy Secretary stated that the Department thought it was very important that the final version of Chapter 49 more closely reflect these two pieces of legislation which address the same issues taken up in the proposed regulation's Section 49.17: the revalidation of teaching certificates. He said that the Department was "very grateful to the Legislature for the outstanding leadership that these bills represent."

Both this regulation and the pending legislation involve the permanence, renewal and validity of a teacher's certificate. House Bill 159 and Senate Bill 706 both require renewal of certification through professional development. In addition, Senate Bill 706 includes this clause: "All references to permanent certification in 22 Pa. Code Chapter 49 shall be null and void on the effective date of this section." The measures differ from the proposed regulation in that they would not limit the imposition of renewal requirements to new certificate holders.

The proposed regulation would require new certificate holders to renew their certificates by providing evidence that they complied with the professional development requirements. Teachers' organizations such as the Pennsylvania Federation of Teachers, AFL-CIO (PFT) and Pennsylvania State Education Association (PSEA) view certificates as "permanent" and object to the use of the word "renewal" of certificate in Section 49.17 of the proposed regulation. The House Committee also questions the use of the term "renewable" and the deletion of the term "permanent" in Sections 49.83 and 49.103. The House Committee wrote:

Sections 1201 and 1203 of the School Code specifically list several certifications as "permanent." If it is the Board's intent to replace permanent certificates with renewable certificates in the literal sense, then this Committee opposes that change as contrary to the intent and content of the Act.

At a later point in its comments, the House Committee "expresses some concern with a tendency by state educational agencies to anticipate legislative intent prior to the passage of legislation."

Given the major differences between the legislation and the proposed regulation, it is clear that this regulation raises a policy decision of such a substantial nature that it requires legislative review. The passage of legislation similar to House Bill 159 or Senate Bill 706 would resolve many of the questions raised by this regulation. We recommend that the Board closely monitor the actions of the General Assembly on these two pieces of legislation. If legislation similar to House Bill 159 and Senate Bill 706 is enacted into law, the Board needs to be prepared to conform this regulation with the legislation.

4. Need for elimination of Section 49.15.

Both the House Committee and, as noted earlier, Senator Rhoades questioned the deletion of Section 49.15 relating to the approval of experimental programs. The House Committee wrote the following:

As the Commonwealth proposes education reform, experimental programs at colleges and universities may provide both an alternative entry into the profession while providing evidence of the validity of various education reforms, such as college-based charter schools.

Given the obvious interest of the Board in creating opportunities for alternative entry into the teaching profession, we question the deletion of this section. The preamble of the proposed rulemaking contains no explanation for the deletion of this section. Unlike the proposed provisions for equivalencies and waivers, Section 49.15 establishes procedures and references applicable criteria for experimental programs. It could serve as a model for clarifying the new sections which are designed to provide for alternate paths of entry into the profession. Therefore, we recommend that the Board restore Section 49.15.

5. Public health and safety, and vocational education supervisors.

The Board's existing regulations have separate categories of supervisory certificates in Sections 49.161 and 49.162 relating to supervisors of vocational education. The Board is proposing a general consolidation of supervisory certificates under Section 49.111 *Supervisory Certificate* and in conjunction is proposing deletion of Sections 49.161 and 49.162.

Pennsylvania Association of Vocational Administrators (PAVA) commented that the supervision of vocational-technical education programs requires a specialized set of skills uniquely different from other educational programs. PAVA notes that the vocational teaching environment must be operated to safety standards established by the Occupational Safety and Health Administration. PAVA believes the skills required of a vocational supervisor are sufficiently different from a general education supervisor as to require a separate certification.

Portions of vocational education involve working with machinery or materials which can be dangerous. Obviously, students need to learn how to operate machinery or handle materials in a safe manner and supervisory input plays an important role in maintaining safety. The proposed consolidation of supervisory certificates would not make a clear distinction between supervision of vocational education and other subject areas. We question whether teachers with other backgrounds, such as an English or math teacher, are trained to supervise the safety aspects of working with machinery. For this reason, we recommend that the Board retain the vocational education supervisor certification category.

6. Clarity of and need for certification standards.

The proposed regulation makes several references to Department standards for certification. For example, Sections 49.81, 49.101, and 49.121 regarding certificate requirements all require candidates to meet "Department prescribed standards" for certification. Section 49.18(a)(1) related to the assessment program requires the Secretary to use the following principle in the development of an assessment program: "The assessment program will be based in the standards developed for each certificate."

However, the Board's regulations do not contain the certification standards referenced in the proposed regulation. Instead, the Department produces two documents which provide certification requirements. The first is titled "Pennsylvania Certification Manual." The second is titled "Standards, Policies and Procedures for State Approval of Certification Programs and for the Certification of Professional Educators for the Public Schools of Pennsylvania." These documents provide the actual standards for program approval and teacher certification.

We have several concerns with the current process for establishing certification standards. First, the proposed regulation lacks clarity because the standards for each certificate cannot be found in the Board's regulations. The standards are set forth in separate documents produced by the Department. The Department could change the certification standards at any time without notice. Therefore, the proposed regulation relies upon essentially a policy statement issued by the Department to the establish certification requirements. This creates the opportunity for a disjointed certification process. For example, the Board proposes to delete Sections 49.161 and 49.162 relating to supervisors of vocational education in a proposed consolidation of supervisory certificates. We cannot discern whether the Supervisor of Vocational Education certificate will still exist. The documents produced by the Department list the Supervisor of Vocational

Education certificate, along with several other categories of supervisory certificates, which are not in the Board's regulations. We recommend that the Board clarify the standards for each certification.

Second, the Board's certification standards should also be in regulations because the standards represent substantial and binding policy decisions with the full force and effect of law and they require regulatory review. The standards for certification have broad impact because they encompass the quality and cost of education and affect virtually all the parties involved in public education including school boards, school administrators, teachers, students and taxpayers. We are concerned that the certification requirements are established without any formal process that allows for public comment and legislative review. Changes to certification requirements are substantial policy decisions which require regulatory review.

Finally, in addition to authority under 24 P.S. §§ 1201 and 1202, the Board has the statutory authority to establish certification requirements under 24 P.S. § 2070.2 *Certification requirements* which provides the following:

No person shall teach in a public school in the Commonwealth unless he has met the *certification requirements as established by the State Board of Education* which are applicable to the institution where he is employed. [Emphasis added]

These statutory provisions require the Board to establish certification requirements. However, the Board is not establishing these certification requirements; the certification requirements are being established by the Department through 22 Pa. Code § 49.13.

We recommend that the Board establish certification requirements in its regulation. This would provide for the clarity needed in the proposed regulation as well as allow for public comment and legislative review. The rulemaking process would provide the Board with the opportunity to review and scrutinize each certification program area and each standard while also addressing a recognized need for greater flexibility in the application of certification requirements.

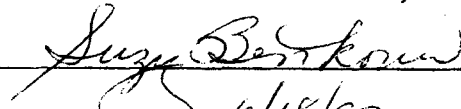
7. Clarity and reasonableness.

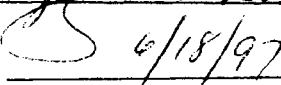
- a) Proposed Section 49.17(c) has a errant reference to "requirements under subsection (c)." As a result, this subsection would inadvertently reference itself. In addition, provisions such as Section 49.83 also reference Section 49.17(c). We believe that the correct reference is Section 49.17(b) and recommend that the Board review and correct these references for clarity.
- b) The House Committee, Senator Rhoades and the Pennsylvania Associations of Elementary and Secondary School Principals (PAESSP) all expressed concern with the phrase "the areas of assignment and certification" in Section 49.17(b)(1) and (2). The legislators suggested that this language may be too limiting and needs clarification or definition. PAESSP suggested the addition of specific language to allow study programs leading to administrator or supervisory certification. They believe this is necessary because Pennsylvania will be losing a large share of its school administrative force due to retirements during the next five years. With fewer teachers enrolling in administrative preparation courses, there is a need to encourage educators with leadership skills to become administrators. We suggest that review and address these concerns.

- c) Existing Section 49.103(a) requires an applicant to "have completed 3 years of satisfactory *service* on a Level I Educational Specialist Certificate." The proposed parallel Section 49.103(2) would alter this requirement by requiring an applicant to "have completed 3 years of satisfactory *teaching* on an Educational Specialist I Certificate." Educational Specialist Certificates cover areas that may not require actual teaching experience such as school psychologists, dental hygienists and school nurses. We recommend that the Board delete the requirement for *teaching* and continue the existing requirement for *service* in this provision. If it is the intention of the Board to require teaching experience, we recommend that the Board justify the need for teaching experience for each of the affected certificates.

IRRC Regulation #6-258 (#1827)
State Board of Education
Certification of Professional Personnel

Honorable Peter H. Garland, Ph.D., Executive Director



Date:  _____