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February 21, 2001

The Honorable Michael D. Fisher
PA Office of the Attorney General
16th Floor, Strawberry Square
Harrisburg, PA 17120

**RE: *Proposed Final Form Regulations: Charter Schools Services
and Programs for Children with Disabilities***

Dear Attorney General Fisher:

On February 6, 2001, the Pennsylvania Department of Education sent proposed final form regulations for Charter School Services and Programs for Children with Disabilities to the House and Senate sub-committees on education. The House Committee unanimously approved these regulations on February 14, 2001. Upon review of these proposed regulations, I believe they are an improvement over earlier drafts, but still contain specific provisions that violate the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400 *et seq.* and applicable case law.

Since you have the ultimate responsibility for insuring that state regulations conform to applicable law, I would like to draw your attention to several specific provisions in the hope that you will direct the Department of Education to make the necessary changes. Specifically, I am concerned about the following four provisions:

1. § 711.61 - *Procedural Safeguards - Discipline*: This provision affords expelled students less than the "free appropriate public education" guaranteed by the IDEA.
2. § 711.44 - *Extended School Year (ESY)*: The proposed regulation fails to meet the minimum federal standard set forth in the IDEA and applicable case law.
3. § 711.42 - *Transportation*: Nowhere in this provision does it state that either the charter school or the district of residence is responsible for ensuring the provision of appropriate transportation for a child with a disability when needed as a related service.
4. § 711.3 - *Incorporation of Federal Regulations*: Two key federal regulations that should have been incorporated by reference have been omitted.

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Procedural Safeguards - Discipline

Public commentators, House and Senate Education Committees, and IRRC all suggested that § 711.61, titled *Suspensions and Expulsions*, was incomplete in identifying the requirements under 34 C.F.R. §§ 300.520-529. As a result, this section was modified and citations to the Federal regulations were expressly incorporated by reference in § 711.3. Even with this modification, § 711.61(d) is in direct conflict with the IDEA and its regulations and affords expelled students less than the "free appropriate public education" guaranteed by the IDEA. 20 U.S.C. § 1412(a)(1)(A) states:

A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, *including children with disabilities who have been suspended or expelled from school* (emphasis added).

See also 34 C.F.R. § 300.121(a).

Sub-section (d) of the proposed charter school regulations states:

When a child with a disability has been expelled from a charter school, *the charter school shall provide the child with a disability with the education required under §12.6(e) until the charter school is notified in writing that the child is enrolled in another public agency, private school, or private agency* (emphasis added).

Referencing Chapter 12 is simply not enough to meet the standard set forth in the IDEA.

Chapter 12 permits "an education" that provides far less than the free appropriate public education required by the IDEA. 22 Pa. Code § 12.6(e)(1) does not mandate a "free appropriate public education." Rather, it states that "students who are less than 17 years of age are still subject to the compulsory school attendance law even though expelled, and *they must be provided an education.*" 22 Pa. Code § 12.6(e) (1) (emphasis added). § 12.6(e)(2) further provides that a district must only make "some provision" for an expelled student's education. See also *Abremski v. Southeastern School District*, 421 A.2d 485 (Pa. Commw. Ct. 1980)(combination of home study and weekly in-school counseling constituted adequate alternative education during an expulsion). For expelled students over the age of 17, there is no entitlement to any education.

To be consistent with the IDEA, the charter school regulations must incorporate the language of 20 U.S.C. § 1412(a)(1)(A) explicitly, or by reference, to ensure that charter schools are indeed required to provide a free appropriate public education to children with disabilities who are expelled, subject only to the limitations set forth in § 1412(1)(b).

Extended School Year (ESY)

The proposed regulation fails to meet the minimum federal standard set forth in the IDEA and applicable case law for ESY eligibility. In the *previous* draft of these regulations, § 711.44 titled, *ESY*, sub-section (2) stated:

A child with disabilities is entitled to ESY services if regression caused by interruption in educational programming and limited recoupment capacity, or other factors makes it unlikely that the student will attain or maintain skills and behavior relevant to established IEP goals and objectives (emphasis added).

In the final form regulations proposed by the Department the words "attain or" have been deleted. This is also true in sub-section (8).¹ Deleting the language "attain or" limits the provision of ESY programs beyond what is permissible under the IDEA and its regulations. This is because the effect is to restrict ESY eligibility to children who have a problem "maintaining" skills they have already acquired (*i.e.*, a "regression/recoupment" problem). The IDEA, by contrast, requires ESY whenever such services are "necessary for the provision of a free appropriate public education." 34 C.F.R. § 300.309(a)(2). This broader standard encompasses not only situations involving the maintenance of existing skills, but also circumstances where the child needs services in order to *attain* skills that s/he has not yet mastered. *See Johnson v. Independent School District #4*, 921 F.2d 1022 (10th Cir. 1990) *cert. denied*, 111 S. Ct. 1685 (1991)(court held that regression/recoupment standard is not the only measure used to determine the necessity of a structured summer program); *see also Yaris v. Special School District*, 728 F.2d 1055 (8th Cir. 1984).

Please note that, in the ESY section of the latest version of the Chapter 14 regulations, the decision has been made to eliminate entirely the provision containing the "attain/maintain" language. Instead, these regulations now provide list of "other factors" to be considered noting that, "No single factor shall be considered determinative." See proposed § 14.132(2)(Jan. 01). While I oppose this approach, I do see it as preferable to adopting §§ 711.44(2) and (8) as proposed.

Therefore, the "attain" language should be reinstated.

Transportation

§ 711.42 - *Transportation*. Nowhere in this provision does it make clear that either the charter school or the district of residence is responsible for ensuring that appropriate transportation be provided to a child with a disability who needs transportation as a related service. As written, the regulation is inconsistent with the IDEA's provisions that guarantee a child with a disability appropriate transportation as a related service. *See* 20 U.S.C. § 1401 (22) (defining related services to include transportation and other services that may be required to assist a child with a disability to benefit from special education.)

These regulations should expressly state that children with disabilities are entitled to free and appropriate transportation when needed as a related service. This is true even when, as in some districts, transportation is not provided to any student. There has been some confusion in the field whether transportation as a related service is the obligation of the resident district or the charter

school. These regulations should make it clear which entity, the charter school or the resident school district, is responsible for the provision of this service and who pays for it.

Incorporation of Federal Regulations

In § 711.3, two key federal regulations that should have been incorporated by reference have been

¹ Sub-section (8) of the final form regulations reads: "ESY services shall be designed to maintain skills and behaviors established in IEP goals and objectives." This provision also deletes the words "attain or."

The Honorable Michael D. Fisher
Office of the Attorney General
February 21, 2001

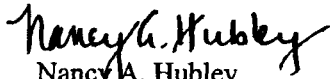
omitted. Missing from this list are the following:

1. **34 C.F.R. § 300.2** (Applicability of this Part to State, Local and Private Agencies) sets forth the applicability of the IDEA regulations to among others, state and local educational agencies. Charter schools in Pennsylvania are local educational agencies subject to the provisions of 300.2. The charter school regulations should make this clear by incorporating by reference 34 C.F.R. § 300.2 in § 711.3 of the proposed regulations.

2. **34 C.F.R. § 300.341** (Responsibility of SEA and Other Public Agencies for IEPs), states that the SEA shall insure that each public agency develops and implements an IEP for each child with a disability. § 300.341 (a)(1). It further states that this section also applies to "other public agencies, including LEAs, that provide special education and related services directly, by contract or through other arrangements." Charter schools are an "other public agency" that are also LEAs in Pennsylvania, subject to the mandate of paragraph (a) of this section. The charter school regulations should make clear that charter schools must also ensure that they develop and implement IEPs for each child with a disability consistent with 34 C.F.R. § 300.341(a). Thus, 34 C.F.R. § 300.341 should be included on the list of federal regulations incorporated by reference in § 711.3 of the proposed regulations.

Please feel free to call me if you have questions or would like to discuss any of these issues in more detail. Thank you for your consideration of my concerns.

Respectfully yours,


Nancy A. Hubley
Pittsburgh-Director

cc: Linda Barrett, Esq.
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