

JOHN R. MCGINLEY, JR., ESQ., CHAIRMAN
ALVIN C. BUSH, VICE CHAIRMAN
ARTHUR COCCODRILLI
ROBERT J. HARBISON, III
JOHN F. MIZNER, ESQ.
ROBERT E. NYCE, EXECUTIVE DIRECTOR
MARY S. WYATTE, CHIEF COUNSEL



PHONE: (717) 783-5417
FAX: (717) 783-2664
irrc@irrc.state.pa.us
<http://www.irrc.state.pa.us>

INDEPENDENT REGULATORY REVIEW COMMISSION
333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

September 7, 2000

Honorable Eugene W. Hickok, Jr., Secretary
Department of Education
333 Market Street, 10th Floor
Harrisburg, PA 17126

Re: Regulation #6-269 (IRRC #2129)
Department of Education
Charter School Services and Programs for Children with Disabilities

Dear Secretary Hickok:

Enclosed are our Comments. They will soon be available on our website at www.irrc.state.pa.us.

Our Comments list objections and suggestions for consideration when you prepare the final version of this regulation. We have also specified the regulatory criteria which have not been met. These Comments are not a formal approval or disapproval of the proposed version of this regulation.

If you would like to discuss these Comments, please contact my office at 783-5417.

Sincerely,

Robert E. Nyce
Executive Director

wbg

Enclosure

cc: Honorable Jess M. Stairs, Majority Chairman, House Education Committee
Honorable Nicholas A. Colafella, Democratic Chairman, House Education Committee
Honorable James J. Rhoades, Chairman, Senate Education Committee
Honorable Allyson Y. Schwartz, Minority Chairperson, Senate Education Committee
Nanette Kimmel

Comments of the Independent Regulatory Review Commission
on
Department of Education Regulation No. 6-269
Charter School Services and Programs for Children With Disabilities
September 7, 2000

We submit for your consideration the following objections and recommendations regarding this regulation. Each objection or recommendation includes a reference to the criteria in the Regulatory Review Act (71 P.S. § 745.5a(h) and (i)) which has not been met. The Department of Education (Department) must respond to these Comments when it submits the final-form regulation. If the final-form regulation is not delivered by August 7, 2002, the regulation will be deemed withdrawn.

1. General. - Clarity.

This regulation contains the defined term "children with disabilities." However, the text of Sections 711.6, 711.7, 711.8, 711.9, 711.21, 711.22, 711.42, 711.43, 711.44 and 711.62 uses other terms such as "students," "person," "handicapped child," "child," "children" and "student or young child." For clarity, the Department should review these sections and use the defined term consistently.

2. Section 711.1. Definitions. - Consistency with the statute and Clarity.

Charter school

The definition of this term differs from the definition included in the Charter School Law of 1997 (Act) (24 P.S. 17-1703-A). For clarity, the Department should consider including only the statutory citation of terms that are also defined in the Act.

Additionally, the definition in the regulation contains a reference to the term "regional charter schools." In the Act, the term "regional charter schools" is a separately defined term. For consistency with the statute, the Department should include a definition of the term "regional charter schools" in the final-form regulation or cite the Act.

At-risk student

This term is defined but it is not used in the text of the regulation. Therefore, the Department should delete the term in the final-form regulation.

3. Section 711.2. Purpose and intent. - Clarity.

This section should clarify that, pursuant to Section 1732-A of the Act, charter schools are exempt from the requirements of Chapter 14 (relating to special education).

4. Section 711.3. Incorporation of Federal laws. - Reasonableness and Clarity.

We have a number of concerns with this section. First, Subsection (a) includes the phrase “Charter schools assume the duty to ensure that a FAPE is available to a child with a disability in compliance with...its implementing regulations in Title 34 CFR Part 300...*or* Section 504....” (Emphasis added.) Why did the Department use “or” instead of “and” in this instance?

Second, in Subsection (b), the Department is incorporating by reference 21 different citations of Title 34 CFR Part 300. The title and the listing are confusing. It would improve the clarity of this regulation if the Department moved each incorporation by reference to the corresponding sections of the regulation under the applicable subject areas.

Third, commentators have suggested that the following citations to Title 34 CFR should be included in the final-form regulation. These include: 300.138, relating to participation in assessments; 300.139, relating to reports relating to assessments; and 300.574, relating to children’s rights. The Department should incorporate these provisions by reference, or explain why they should not be incorporated.

Fourth, Subsection (c) begins with the phrase “Except as expressly provided in this chapter....” This phrase is confusing. We were unable to find any sections in the proposed rulemaking where the citations to the sections of Title 34 CFR were not incorporated by reference. For clarity, the Department should delete this phrase.

Finally, the title of this section, “Incorporation of Federal laws” is misleading. All of the incorporations by reference are to Federal regulations. The Department should consider revising the title of this section to reflect this distinction.

5. Section 711.4. Supervision. - Clarity.

SEA and Department

Subsection (a) states “the Commonwealth, through the Department as the SEA” will provide general supervision. This language is redundant in that both the terms “SEA” and “Department” are defined in this regulation. For clarity, the Department should review this subsection and other sections in the regulation and use one defined term consistently.

Monitoring

Subsection (b) provides “the Department will establish and implement methods of administration, including effective and proper methods of monitoring....” It is not clear from this language what constitutes “effective and proper methods of monitoring.” Further it is not clear how the Department will “ensure compliance.” We suggest that the Department describe in

this section the actions for monitoring and ensuring compliance that will be taken by the Offices of Special Education and Education Initiatives.

6. Section 711.5. Personnel. - Clarity.

This section requires persons who provide services in charter schools to have “appropriate certification, *notwithstanding* Section 1724-A of the act.” (Emphasis added.) The word “notwithstanding” should be replaced by the words “in accordance with” to more clearly convey the Department’s intent.

7. Section 711.6. Annual report. - Reasonableness and Clarity.

Subsection (a) specifically lists the information that the annual report must contain. One of the commentators remarked that the annual report should include additional information similar to that provided by school districts. For example, reporting requirements should include: the age and type of exceptionality for each enrolled student; the level of intervention provided to each student; certification of staff providing services to each student; and programs and services available to students with disabilities.

School districts already provide such detailed information in their plans. The Department should decide whether incorporating these suggested reporting requirements in the requirements for charter schools’ annual reports is necessary.

8. Section 711.7. Enrollment. - Clarity.

Subsection (b) states that the charter schools “may establish reasonable criteria” to evaluate prospective students. The phrase “reasonable criteria” is vague. The Department should clarify this phrase in the final-form regulation.

9. Section 711.8. Education records. - Clarity.

Subsection (a) requires that the educational records should be forwarded when a child with a disability transfers schools. This section should emphasize that *all* of the student’s educational records should be transferred.

Additionally, there is nothing that indicates the educational records are confidential. The Department should consider adding language requiring the confidentiality of educational records if it isn’t already protected by another statute or regulation. If this is the case, the appropriate statute or regulation should be cross-referenced.

10. Section 711.9. Payments. - Clarity.

Subsection (a)(1) uses the term “school entity.” The Department should include or reference the statutory definition of this term in the final-form regulation.

11. Section 711.21. Child find. - Consistency with statute and Clarity.

Subsection (a) requires all charter schools to “establish written policies and procedures to ensure that all children with disabilities that are enrolled in the charter school...are identified and evaluated.” Federal regulations, specifically Title 34 CFR Part 300.125(a)(i), add the requirement that children with disabilities that are enrolled in a charter school are also “located.” For consistency with federal regulations, the Department should amend Subsection (a) to reflect that children with disabilities enrolled in a charter school are “identified, located and evaluated.”

12. Section 711.22. Evaluation and reevaluation. - Clarity.

This section contains the phrase “unless a shorter period is required by existing law.” From our discussions with the Department, the only requirement for reevaluating “students with disabilities” more often than every three years is found in the consent decree in *PARC v. The Commonwealth*, 334 F. Supp. 1257(1971). The requirements found in the consent decree should be included in the final-form regulation.

Parents and teachers of a child with a disability have the right, under Title 34 CFR Part 300 to request an evaluation or reevaluation of a child with a disability at any time. This fact should be clearly stated in a separate provision.

13. Section 711.41. IEP. - Reasonableness and Clarity.

Adopting and developing an IEP

This section makes charter schools responsible to ensure that transferring students with disabilities receive “special education and related services in conformity with an IEP, either by adopting the existing IEP or by developing a new IEP for the child.” We have two concerns with this section.

First, in this section, the Department should clarify who is responsible for developing a new IEP, or reference the IEP regulations that contain the specifics for IEP development.

Second, Section 711.41 should require the persons responsible for IEP development in a charter school to use IDEA procedures to develop a new IEP.

14. Section 711.42. Transportation. - Clarity.

Subsection (a) states, “The child’s school district of residence is responsible for ensuring that transportation to and from the charter school, *when recommended* as a related service in an IEP...” (Emphasis added.) This subsection is unclear. Does this mean that the child’s school district of residence is not responsible for transportation unless the child’s IEP recommends such service? The Department should clarify this subsection in the final-form regulation.

15. Section 711.43. Educational placement. - Statutory authority and Clarity.

Subsection (a) states “When the IEP team at a charter school places a child in another public agency, private school, approved private school or private agency, and the parents choose to

keep their child enrolled in the charter school, the charter school is obligated to pay for that placement.” We have two concerns regarding this subsection.

First, Subsection (a) parallels Section 13-1376(a) of the Public School Code (24 P.S. § 13-1376(a)), which requires public school districts to pay for a child with a disability’s education if the child’s IEP requires placement in another institution better able to handle that child’s needs. However, this provision is not applicable to charter schools pursuant to Sections 1715-A(1) and (7) and 1732-A of the Act. Therefore, we object to the Department’s intention to shift this obligation to charter schools.

Section 1715-A of the Act states, “A charter school shall only be subject to the laws and regulations as provided for in Section 1732-A¹ or ² as otherwise provided for in this article.” Section 1732-A(a) of the Act references specific statutory and regulatory provisions that apply to charter schools. Additionally, Section 1732-A(c)(2) authorizes the Secretary of Education to ensure that charter schools comply with “...Federal laws and regulations governing children with disabilities.” Neither of these provisions authorizes the Department to impose the requirement in Subsection (a).

Therefore, we ask the Department to provide a citation to the specific statutory provision or federal regulation which requires charter schools to pay for a child with a disability’s education if the child’s IEP requires placement in another institution. If the requirement is not supported by specific statutory authority as required by Section 1715-A, this subsection should be deleted.

Additionally, the term “IEP team” in Subsection (a) is unclear. The Department should define this term in either this section, or Section 711.1, relating to definitions.

16. Section 711.44. ESY. - Clarity.

“Recoupment” and “regression”

Paragraphs (4)(i) - (iii) outline factors in addition to “recoupment” and “regression.” It is unclear why these factors were included. It is also unclear as to how these factors will be measured in children with disabilities. The Department should explain how these factors were derived, and how they will be measured, in the final-form regulation.

Additionally, there are a number of terms and phrases that are unclear in Section 711.44. These include: “at least” in Paragraph (6); “pay particular attention” in Paragraph (7); “relevant” in Paragraph (8); “others having direct contact with the student” in Subsection (9)(2); “appropriate” in Paragraph (11)(iii); and “motivation and trust” and “irreversible withdrawal” in Subsection (4)(iii). The Department should provide specific criteria for determining these standards or delete them in the final-form regulation.

17. Section 711.61. Suspension and expulsion. - Reasonableness and Clarity.

Suspension and expulsion

This section deals with the suspension and expulsion of a child with a disability from a charter school. Subsections (a), (b) and (d) cross-reference Chapter 12 (22 Pa. Code § 12) as the proper

procedure for suspending or expelling a child with a disability. However, Chapter 12 does not mention any specific requirements that must be met to suspend or expel a child with a disability. We understand that schools cannot apply normal discipline guidelines to special education students unless procedural requirements mandated under federal law have been met.

Title 34 CFR Parts 300.520 – 300.529 expressly state the requirements for the suspension and expulsion of a child with a disability. These requirements are more detailed about the process for suspension and expulsion than the process outlined in Section 711.61 of the proposed rulemaking. Therefore, in addition to referencing Chapter 12, the Department should incorporate by reference 34 CFR Parts 300.520 – 300.529 in this section of the final-form regulation.

18. Section 711.62. Procedural safeguards. - Clarity.

Hearings

This section provides the hearing process for charter schools. Are hearings the only available avenue for grievances against charter schools? Would mediation be available? If so, the Department should list the available options in the final-form regulation.

Also, the phrase “without delay” in Paragraph (2) is unclear. The Department should include a minimum time frame in the final-form regulation.

IRRC #2129 (#6-269)
Department of Education
Charter School Services and Programs for
Children with Disabilities

Honorable Eugene W. Hickok, Secretary

T. Brown
Date: 9/7/06