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

March 8, 2001

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

Re: Regulation #6-270 (IRRC #2144)
State Board of Education
Special Education Services and Programs

Dear Dr. Garland:

The Independent Regulatory Review Commission disapproved your regulation on March 8, 2001. Our Order is enclosed and is available on our website at www.irrc.state.pa.us.

Section 7(a) of the Regulatory Review Act requires, within seven days from receipt of this letter, that you notify the Governor, Standing Committees and the Commission of your selection of one of the following options: (1) proceed with promulgation under Section 7(b); (2) proceed with promulgation under Section 7(c); or (3) withdraw the regulation.

Sincerely,

John R. McGinley, Jr.
Chairman
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
Honorable Eugene W. Hickok, Jr., Secretary, Department of Education
Nanette Kimmel, Administrative Officer, State Board of Education

**INDEPENDENT REGULATORY REVIEW COMMISSION
DISAPPROVAL ORDER**

Commissioners Voting:

Public Meeting Held March 8, 2001

John R. McGinley, Jr., Chairman
Alvin C. Bush, Vice Chairman – by Phone
Arthur Coccodrilli
Robert J. Harbison, III
John F. Mizner, dissenting

Regulation No. 6-270
State Board of Education
Special Education Services and Programs

On August 23, 2000, the Independent Regulatory Review Commission (Commission) received this proposed regulation from the State Board of Education (Board). This rulemaking amends Chapter 14 and deletes Chapter 342 of 22 Pa. Code. The proposed regulation was published in the September 2, 2000 *Pennsylvania Bulletin* with a 30-day public comment period. The final-form regulation was submitted to the Commission on February 5, 2001.

The regulation establishes procedures to identify students in need of special education services and describes requirements and procedures for delivery of such services. The regulation also incorporates federal regulations at 34 CFR Part 300 by reference. Promulgation of this rulemaking is necessary for the Commonwealth to continue receiving funds under the Federal Individuals with Disabilities Education Act.

The Board failed to respond to a number of the Commission's Comments and provided an inadequate response to others. The comment response requirement in the Regulatory Review Act (71 P.S. § 745.2) was designed to enable the Commission to meet its mandate to determine whether a regulation is in the public interest. To determine what economic impact a regulation will have, whether there will be a negative effect on the public, and whether the requirements imposed by a regulation are clear, feasible and reasonable, this Commission needs to be able to gauge the reaction to the Board's response to the issues raised. Although the Board did provide a more detailed response and rationale subsequent to this Commission's inquiries, responses outside the regulatory review process do not provide the necessary public exposure to generate reaction, nor is it within the timelines outlined in that process.

An agency's final-form regulation should be accompanied by a response to comments of the Commission, and those of other commentators, that fully explains changes to the final-form regulation as well as its rationale for not making recommended changes. Further, questions asked in the Commission's Comments should be answered, to help us further understand your proposal.

Several issues, which we raised in our Comments, remain concerns. With respect to these issues, the Commission could have benefited from the public's reaction to the Board's subsequent responses. First, the statutory and regulatory definitions of "early intervention services" and "mutually agreed upon written arrangement" should be consistent. The definitions

of these terms in Section 14.101 are not identical to the corresponding statutory definitions. Clarity would be improved by either referencing or exactly repeating the statutory definitions.

Second, the final-form regulation should address the role of foster parents in obtaining special education or early intervention services. The federal regulations at 34 CFR Section 300.20 define the term "parent" in two subsections. Subsection (a) generally defines "parent" and Subsection (b) defines the term relating to "foster parent." The federal definition provides "unless State law prohibits a foster parent from acting as a parent, a State may allow a foster parent to act as a parent." Therefore, the responsibility remains with the Board to clarify the role of foster parents.

Finally, the definitions of "itinerant," "part-time" and "resource" should be clarified. These definitions are confusing. In our Comments on the proposed rulemaking, we asked the Board to clarify these definitions. The Board responded that these terms are well understood by practitioners in the field. However, these regulations will be used by a wider range of individuals than practitioners in the field.

Additionally, we have several remaining concerns relating to the reasonableness of the caseload requirements and the deletion of class size requirements (71 P.S. § 745.5a(i)(3)(iv)); clarity of the incorporation by reference of federal regulations (71 P.S. § 745.5a(i)(3)(ii)); and the reasonableness of the two-year reevaluation period for children in early intervention programs (71 P.S. § 745.5a(i)(3)(iv)).

First, we question the reasonableness of eliminating the class size restrictions. Section 14.142(a) of the final-form regulation contains a chart of the maximum caseload allowed on a single teacher's roll for each school district. In our Comments on the proposed rulemaking, we noted that the existing caseload chart (22 Pa. Code § 342.42) established "the maximum number of exceptional students in the room with the teacher at any one time." The revised caseload chart does not contain such a limit.

In the Preamble, the Board explains that it chose to eliminate class size restrictions because: (1) there is no federal requirement for establishing class sizes; (2) staffing of classes for students with disabilities cannot be determined effectively as a uniform statewide standard; (3) caseload requirements provide general protections; and (4) procedural safeguards prevent class size from impeding students from achieving their goals established in their Individualized Education Programs (IEPs).

We are not persuaded by the Board's rationale. Although federal requirements do not mandate class size restrictions, they do not preclude the Board from establishing such limits. As previously noted, the existing caseload chart imposed limits on the maximum number of exceptional students in a classroom. The Preamble does not indicate that the limits in the existing caseload chart were unreasonable. Restoring these limits would ensure that exceptional students receive the staff attention necessary to achieve the goals of their IEPs. Furthermore, the basis for the maximum caseloads contained in the chart is unexplained. The Board should specify how the caseload range was determined.

Second, we question the reasonableness of requiring parents and other interested parties to piece together the appropriate federal regulations from an extensive list along with the pertinent Chapter 14 requirements. We continue to believe that inserting the references to the federal regulations in the corresponding sections would improve the clarity of the final-form regulation.

The final-form regulation includes an extensive list of federal regulations which are incorporated by reference. This approach is confusing. In our Comments, we noted that clarity would be improved if each reference to federal regulations were inserted in the corresponding section of the Board's regulation.

The Board declined to make this change, stating that the Department of Education has and will continue to develop publications to help parents, teachers and administrators understand their rights under both state and federal statutes and regulations.

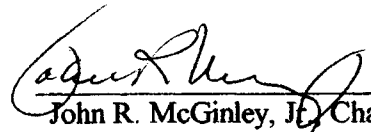
Third, we question the reasonableness of requiring reevaluations only every two years. Section 14.153(4)(iii) of the final-form regulation requires reevaluations to occur at least every two years for children in early intervention programs. The existing regulations require reevaluations every year. The Board has not adequately explained why it expanded the time frame for reevaluations to every two years.

We have determined this regulation is consistent with the statutory authority of the State Board of Education (24 P.S. §§ 1-101 - 26-2606-B) and the intention of the General Assembly. However, after considering the other criteria of the Regulatory Review Act discussed above, we find promulgation of this regulation is not in the public interest.

BY ORDER OF THE COMMISSION:

This regulation is disapproved.




John R. McGinley, Jr., Chairman