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EMERGENCY PREPAREDNESS

September 25, 2003

James Buckheit, Executive Director
State Board of Education
333 Market Street, 1st Floor
Harrisburg, PA 17126-0333

Dear Mr. Buckheit:

As a Special Educator for 26 years and as a member of the House Education Committee, I would like to take this opportunity to comment on proposed 22 Pa. Code, Chapter 14, §14.162 (c) regarding impartial due process hearing and expedited due process hearing. I oppose this amendment and are asking IRRC and the House and Senate Education Committees to disapprove the proposed change. The comments that follow in this letter were prepared in conjunction with PSBA Deputy Chief Counsel Emily J. Leader, who has represented school districts in special education matters for over 15 years.

The issue at hand was first raised in a policy letter sent to Mr. H. Douglas Cox of Virginia's Department of Education by the United States Department of Education Office of Special Education Programs (OSEP), *Letter to Cox*, September 12, 2001. In this letter, OSEP analyzed the right of school districts to initiate due process hearings where a school district is of the opinion that a student with disabilities requires special education and related services but the parent withholds consent for the initial provision of these services. OSEP based its analysis entirely on 34 C.F.R. §300.505, which relates to parental consent, ignoring other provisions of the Individuals with Disabilities Education Act (IDEA) and its implementing regulations. OSEP opined that school districts could not initiate due process hearings for the initial provision of special education and related services to students with disabilities.

This raises several legal concerns for school districts and educational concerns for children in Pennsylvania who have disabilities and need special education. Specifically, it undermines school district's obligations under the IDEA to locate children with disabilities, and, where needed, to provide these children with a free and appropriate public education (FAPE) pursuant to an individualized education program (IEP). Failure to comply with these mandates will jeopardize funding and can open school districts to lawsuits, including those for monetary damages.

A state is eligible for assistance under 20 U.S.C. §1412 of the IDEA only if it meets certain conditions, which include that FAPE is available to all children with disabilities residing in the state who are between age 3 and age 21. To this end, the state must demonstrate it has established a goal of providing full educational opportunities to all children with disabilities.

The state has a "Child Find" responsibility to ensure students with disabilities who are in need of special education and related services are identified, evaluated, and their needs are met. It must also ensure that, "Children with disabilities and their parents are afforded the procedural safeguards required by Section 615." 20 U.S.C. 1412 (2)(C).

The failure to identify and provide services to a child with disabilities has formed the basis for monetary damages against a school district. *W.B. v. Matula, et al.*, 67 F. 3d 484, 104 Ed. Law Rep. 28, 13 A.D.D. 338 (3d Cir. 1995).

> Congress enacted the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C.A. § 1400 *et seq.*, to assist states in educating disabled children. In order to receive funding under IDEA, a state must provide all disabled students with a "free appropriate public education." 20 U.S.C.A. § 1412(1) (Supp.1998). [FN5] This education must be tailored to the unique needs of the disabled student through an individualized educational program ("IEP"). *See Board of Educ. v. Rowley*, 458 U.S. 176, 181-82, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982).

Ridgewood Bd. of Educ. v. N.E. ex rel. M.E., 172 F. 3d 228 (3d Cir 1999) (footnote omitted).

> The "child find" requirement directs states and local school districts to "identify, locate and evaluate" all children with disabilities and to provide them with special education services . . .. In order to ensure that districts do not avoid the "child find" requirement, the IDEA imposes certain requirements with respect to children who show signs of disabilities but who have not actually been evaluated. ...

T.B. v. School District of Philadelphia, 1997 WL 786448 (E.D. Pa.) Although the *T.B.* opinion related to a class action certification of a class consisting of students facing expulsion who might be children with disabilities, it also highlights a particular issue in the present matter. School districts are supposed to provide certain safeguards to students facing expulsion when the school has "deemed knowledge" that this is a student in need of special education services. Here, the proposed regulation change lets a school district complete the evaluation process but then requires it to put the child in regular education classrooms, without specially designed instruction or related services, and with no behavior intervention plan. They must do this, under this view of the law, even when the school district has well documented knowledge of the student's disability and need for special education and related services. The result, should the school district's attempt to discipline the child, will be legal

action against the school district, which has been hampered by this misinterpretation of the law.

The IDEA requires, " that all school districts have an individualized program in effect for each child with a disability in its jurisdiction", 20 U.S.C. §1414 (d)(2). A school district cannot comply with this requirement if it has no binding means to resolve the dichotomy between a parent's withheld consent to initial provision of services and the district's obligation to provide the student with FAPE. This leads to the potential for absurd results in implementing the proposed change to the regulation. Under this scenario, if parents withhold consent to initial services and school district efforts at persuasion and mediation do not work, a student with an IQ of 45, in need of the most basic education in toileting, eating, dressing, etc., could end up in a regular education classroom with no specially designed instruction and no related services.

The IDEA does not stand for this result, nor does the need to ensure that parents' rights are observed require that the school district be rendered helpless in the face of such a circumstance. The IDEA provides parents with procedural safeguards, which includes the right to have such differences aired at a due process hearing with specific protections in place.

At 20 U.S.C. §1415 the IDEA sets out the requirements for establishing due process procedures:

(a) ESTABLISHMENT OF PROCEDURES – Any State educational agency, State agency, or local educational agency that receives assistance under this part shall establish and maintain procedures in accordance with this section to ensure that **children with disabilities** and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies.

(b) TYPES OF PROCEDURES- The procedures required by this section shall include –

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(6) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child (emphasis supplied).

This right to present complaints via a due process hearing is further addressed in the regulations which interpret and implement the IDEA. 34 C.F.R. §300.507 permits a parent or a public agency to initiate a hearing on any of the matters described in 34 C.F.R. §300.503 (a) (1) and (2). These matters specifically include those times when a school district proposes to **initiate** the "identification, evaluation, or educational placement of the child or the provision of FAPE to the

child" (emphasis supplied). Thus, the regulations specifically provide that a school district may initiate a hearing when it proposes to initiate the provision of special education and related services to the child.

Perry Zirkel, Ph.D., J.D., LL.M., a professor at Lehigh University, a member of Pennsylvania's Special Education Appeals Panel, and a well known authority in the field of special education, recently published an article in The Education Law Reporter entitled, "Do OSEP Policy Letters Have Legal Weight?" 171 Ed. Law Rep. 391, January 16, 2003. In his conclusion, he makes a crucial point which we highlight here, "... if the child is ultimately the frame of reference, then arguably such state laws [which permit school district initiated hearings for initial services] add to rather than conflict with the requirements of the IDEA." Zirkel at 396. If there is a dispute as to the child's need for special education and related services, the child is afforded greater protection when the school district can request a due process special education hearing to ensure the child receives FAPE. The parents are afforded due process through the regulations governing due process hearings.

The Secretary of the United States Department of Education may only withhold funding under the IDEA after affording a state a reasonable notice and an opportunity for a hearing. 20 U.S.C. §1416. I urge the State Board of Education to move forward to a hearing on this matter, if necessary, and to establish that OSEP's position regarding school districts' right to initiate hearings on the initial provision of program and placement of children with disabilities is erroneous and contravenes the IDEA.

Finally, I would emphasize that continuing to permit school entities to initiate a due process hearing simply allows the discussion to continue with the intent of making a decision that is best for the child. It does not imply that a school will force a child to accept a particular placement or program. Rather, it provides schools with an opportunity to present its recommendations and reasons before an impartial hearing officer.

I appreciate the opportunity to review and comment on the proposed amendment to Chapter 14. Please contact me if you wish to discuss any of the issues addressed in this letter.

Respectfully,

BERNARD T. O'NEILL
State Representative
29th Legislative District