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SCHOOL BOARDS  
ASSOCIATION, INC.

774 LIMEKILN ROAD, NEW JERSEY, PA 17070-2398 / (717) 774-2331 / FAX (717) 774-0718

2003 SEP 29 AM 9:57  
INDIVIDUALS WITH DISABILITIES  
REVIEW COMMISSION

September 25, 2003

Ms. Patricia White, Executive Director  
State Board of Education  
333 Market Street, 1<sup>st</sup> Floor  
Harrisburg, PA 17126-0333

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SEP 26 2003

PA. STATE BOARD  
OF EDUCATION

Dear Ms. White:

*Patti*

The Pennsylvania School Boards Association 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. We 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 by 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

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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).

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*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.

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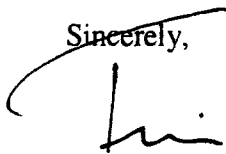
If there is a dispute as to the child's need for special education and related services, the child is afforded greater protection when the school district can request a due process special education hearing to ensure the child receives FAPE. The parents are afforded due process through the regulations governing due process hearings.

In researching this issue, PSBA legal staff contacted via national e-mail the membership of The National School Boards' Association Council of School Law Attorneys for input and comments. Nine members replied and indicated that they, too, disagree with the interpretation of the regulations as promoted in "Letter to Cox." One of these individuals is an attorney in Virginia and she indicated that school districts in Virginia are still permitted to initiate hearings for initial program and placements. PSBA also contacted five attorneys in Pennsylvania who represent school districts and one of these attorneys contacted seven Pennsylvania attorneys who represent parents of students with disabilities. None of the individuals contacted presented arguments in favor of this proposed rule change and all of them were of the opinion that it is in contravention of the mandates of the IDEA. While this is anecdotal evidence, we believe that this should be taken into account in deciding whether to approve the proposed rule change.

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. We have urged 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.

We 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.

Sincerely,

A handwritten signature in black ink, appearing to read "Tim", with a large, sweeping flourish extending to the left.

Timothy M. Allwein  
Assistant Executive Director  
Governmental and Member Relations



Original: 2350

203 Graham Street  
Sewickley, Pennsylvania 15143  
Phone: (412) 749-3600  
Fax: (412) 749-3601  
*An Equal Opportunity Employer*

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2003 NOV -3 AM 9:24

REVIEW COMMISSION

October 27, 2003

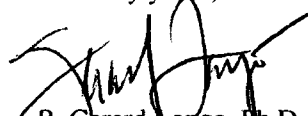
Independent Regulatory Review Commission  
John R. McGinley, Jr., Esq.  
14<sup>th</sup> Floor  
333 Market Street  
Harrisburg, PA 17101

Dear Mr. McGinley and Members of the Commission:

Please be advised that the Quaker Valley School District is in support of the Pennsylvania School Boards Association's opposition to the amendment of Title 22, Chapter 14 which removes the ability of school districts to initiate due process hearings when the district believes that a student with disabilities requires special education and related services. We suggest that although the predominance of the parents are responsible and will make decisions in the best interest of their child, this is not always the case. The primary focus of school personnel ought to be on the best interest of the child. When there is disagreement we must have an adversarial process to examine the arguments made by the school district and the parents.

We believe that the Office of Special Education Programs has misinterpreted federal law and that this misinterpretation will cause harm to children. We request that this amendment be returned to the state board of education for further review.

Sincerely yours,



R. Gerard Longo, Ph.D.  
Superintendent

RGL/cmk

Mr. Jim Buckheit, Executive Director, Pennsylvania State Board of Education  
The Honorable John Pippy  
The Honorable Susan Laughlin  
The Honorable Mark Mustio  
Dr. Sally Kush, Director of Pupil Services  
Dr. Joseph Clapper, Assistant Superintendent  
Quaker Valley Board of School Directors



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PENNSYLVANIA  
SCHOOL BOARDS  
ASSOCIATION, INC.

Original: 2380

September 25, 2003

Robert Nyce, Executive Director  
Independent Regulatory Review Commission  
333 Market Street, 14<sup>th</sup> Floor  
Harrisburg, PA 17101

RECEIVED  
2003 SEP 29 AM 9:50  
INDEPENDENT REGULATORY  
REVIEW COMMISSION

Dear Mr. Nyce:

Enclosed are the comments of the Pennsylvania School Boards Association to the State Board of Education concerning proposed 22 Pa. Code, Chapter 14, §14.162(c). This change revises current provisions regarding impartial due process and expedited due process hearing. We oppose this amendment and are asking IRRC as well as the House and Senate Education Committees to disapprove the proposed change.

The amendment would remove the current ability of school districts to initiate due process hearings for the initial placement of a child in a special education program. It was adopted because the State Board had been advised by the Pennsylvania Department of Education that the federal Office of Special Education Programs interpreted the state's regulations as being inconsistent with federal rules specific to parental consent and that the state was subject to lose over \$300 million in federal funding if it did not make the change. According to OSEP, a hearing officer does not have the authority to grant school district relief to override a parent's withholding of consent.

PSBA has argued against the change, maintaining that it undermines a school district's obligation under the federal law to locate children with disabilities, and where, needed, to provide these children with a free and appropriate public education. Further, PSBA noted, OSEP's interpretation is inconsistent with the child find provisions of federal law and court cases declaring that it is a child's right, not the right of the child's parents, to special education services.

It has been suggested that federal funding will be withheld from Pennsylvania if this proposed change is not approved. The Secretary of the United States Department of Education may only withhold funding under the IDEA affording a state a reasonable notice and an opportunity for a hearing. We have urged the State Board 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 contradicts the IDEA.

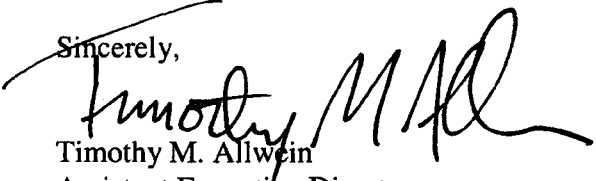
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Mr. Robert Nyce  
September 25, 2003  
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When the State Board approved the amendment to Chapter 14 in March, it did so because the members did not want to lose federal funding, although they agreed that the matter was worthy of continued discussion at the federal and state levels. At this time, PSBA continues to believe that this issue should be pursued at the federal level, and that until the matter can be clarified, the proposed amendment to Chapter 14 be disapproved.

We appreciate the opportunity to present our comments to you. Please contact me if you wish to discuss any of these issues.

Sincerely,



Timothy M. Allwein  
Assistant Executive Director  
Governmental and Member Relations



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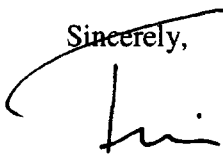
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Assistant Executive Director  
Governmental and Member Relations