JESS M. STAIRS, MEMBER
PA HOUSE OF REPRESENTATIVES
HOUSE BOX 202020
HARRISBURG, PA 17120-2020
PHONE: (717) 783-9311
WEB SITE: WWW.JESSSTAIRS.COM
E-Mail: jstairs@pahousegop.com

R.D. #1
ACME, PA 15610
PHONE: (724) 423-5141

House of Representatives
COMMONWEALTH OF PENNSYLVANIA
HARRISBURG

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THE RURAL CAUCUS
PA HISTORICAL PRESERVATION CAUCUS
TIMBER CAUCUS

September 28, 2005

Original: 2367

John R. McGinley, Chairman
Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17126-0333

Dear Mr. McGinley:

Pursuant to Section 5.1 of Act 181 of 1982, known as the Regulatory Review Act, the House Education Committee met on Wednesday, September 28, 2005, to take action on final-form regulation #6-280 (22 Pa. Code, Chapters 7 and 12).

In the Committee's review of the final-form regulations, various issues of contention arose, including the prohibition and definition of corporal punishment. The following information highlights the main issues on which the Committee voted (14-10) to disapprove the final-form regulation #6-280:

- **Ban of Corporal Punishment**.—Sections 510 and 1317 of the Public School Code expressly allow: (1) school boards to adopt and enforce such reasonable rules and regulations as they deem necessary, and (2) teachers, vice principals and principals to exercise the same authority as to conduct and behavior over the pupils attending school as the parents, guardians or persons in parental relation exercise at home. Accordingly, a prohibition of corporal punishment by the State Board would conflict with current statutory provisions of the Public School Code which empower school boards to utilize corporal punishment as they deem necessary, and thus be a regulatory overreach by the State Board of Education.

- **Definition of Corporal Punishment**.—Section 12.5 defines corporal punishment as physically punishing a student for an infraction of the discipline policy, while section 12.6 defines the term as a form of physical discipline that is intended to cause pain

and fear and in which a student is spanked, paddled or hit on any part of the body with a hand or instrument. In considering the latter definition, certain Committee members asked: (1) Must discipline or punishment cause both pain and fear to be considered corporal punishment, or would discipline or punishment be considered corporal punishment without causing pain in addition to fear? What is of concern here is that it appears the definition is establishing two conditions for the practice, which may be erroneous since physically punishing a student for an infraction of the discipline policy may not necessarily cause fear in a student.

Additional information addressing corporal punishment and other provisions of the final-form regulation is attached for your consideration. It was submitted to the House Education Committee by the Pennsylvania School Boards Association, which requested that the Committee send it along with its letter to the Commission. If you have any questions regarding it, I encourage you to contact Tim Allwein, Assistant Executive Director for Governmental and Member Relations, at 506-2450 (ext. 3325).

In closing, on behalf of the House Education Committee, I would like to extend my sincere gratitude to Mr. Jim Buckheit, Executive Director of the State Board of Education, for his willingness to meet with the Committee and its staff on this final-form regulation. If there are any questions regarding our comments, please contact my office at 783-3911.

Sincerely,

Representative Jess M. Stairs
Chairman, House Education Committee

JMS/er
Enclosure

cc: Ms. Kim Kauffman, Executive Director, IRRC
Mr. Karl Girton, Chairman, State Board of Education
Mr. Jim Buckheit, Executive Director, State Board of Education
Members of the House Education Committee (Harrisburg Offices)

TO: Members of the House Education Committee

FROM: Timothy Allwein, Assistant Executive Director for Governmental and Member Services

DATE: September 28, 2005

SUBJECT: Chapter 12

The Pennsylvania School Boards Association would like to take this opportunity to comment on the final form draft of proposed changes to 22 Pa. Code, Chapter 12, regarding students and student services, as submitted by the State Board of Education (Proposed regulation #6-280).

PSBA has been actively involved with the State Board as it has worked to revise this chapter. We commend the board for its hard work to revise Chapter 12, particularly since it has not been modified in several years. Understandably, there was an extensive amount of work necessary to update these regulations to reflect years of legislative changes, court decisions and current practice.

We have generally supported most of the proposed changes, with some exceptions, and our previous comments reflect those concerns. The latest draft presents some new wrinkles, which are addressed in this letter along with some remaining issues from prior drafts. It is important that the concerns outlined below be addressed in order to avoid endangering students, impeding learning, hampering due process, and creating unnecessary unfunded mandates.

Three common themes always should be kept in mind. First, PSBA began advocating recognition of student rights and responsibilities long before Chapter 12 was first promulgated in the 1970s. However, finding a proper balance in this regard has to reflect that school officials' absolute top priorities must be to cultivate an effective educational process and foster an environment that is safe and conducive to learning. Both courts and common sense agree that these priorities require that rights of students take a modified, more limited form in the school setting than similar rights of adults in general society.

Second, while it is true states may choose to adopt laws that stake out more extensive expressive and other rights for students than those delineated in court decisions under the federal Constitution, this is a choice almost always made at the expense of school officials' ability to maintain good order and discipline in the schools and protect the educational environment and learning process from damage and disruption.

This never should happen inadvertently, as a result of oversimplification or superficial analysis. If ever the legislative intent is to tie the hands of school authorities to a greater extent than is already the case under federal laws and court decisions, that intent should be clearly stated at the outset and such provisions must be drafted with utmost specificity. PSBA suggests that this kind of deliberate choice should never be made via administrative regulatory process, and without explicit legislative direction.

Third, even when the intent is merely to outline existing standards drawn from statutes or court cases, using a regulation to restate the law often has unintended adverse effects, and can be an especially bad idea in many rapidly evolving legal contexts. Although simplified summaries of settled legal standards can be a useful tool for school leaders, simplification often sends drafters down a narrow legal tightrope.

Attempting to set an assured safe course through shifting tides in vaguely charted waters almost always results in a tendency to steer wide and err on the safe side, by imposing greater restraints on the orderly administration of schools than the courts or statutes require, at the expense of student safety and the educational process. Non-regulatory information papers, circulars and guidelines are a better means than regulations if the main object is to inform officials about legal standards.

School Rules (Section 12.3) – The draft adds language prohibiting rules that are "discriminatory." Unqualified use of the term "discriminatory" in this context is ill-considered and dangerous. It should be deleted, replaced or qualified somehow. While some specific forms of discrimination are illegal or morally wrong, discrimination in general is not a negative thing. Lawful and desirable discrimination is what underlies all intelligent decision-making and is the key to an ordered society. We should hope that all citizens, including students and their teachers and especially leaders, will discriminate in everything they do---to discriminate between good ideas and bad ideas, between healthy choices and unhealthy choices, between reliable sources of information and rumor, between acceptable behavior and unacceptable behavior, between conscientious effort and laziness, between good performance and poor performance, and so on. Rules and decisions that are not discriminatory in some way are by definition arbitrary and capricious.

Corporal Punishment (Section 12.5) – The proposed changes would prohibit corporal punishment entirely while preserving the right of a teacher to use reasonable force in certain limited circumstances. We must emphasize that PSBA does not advocate the use of corporal punishment, and we recognize that the use of corporal punishment in public schools often sparks a lively public debate. However, we also note that the U.S. Supreme Court sees it as permissible when authorized under state statutes, and that the Pennsylvania courts construe Section 1317 of the Public School Code to authorize corporal punishment as a means to which school officials may resort in enforcing student conduct standards (unless parents have exercised opt-out provisions of the existing regulation).

PSBA is concerned about the ongoing uncertainty likely to result from an administrative regulation that purports to prohibit what the General Assembly has authorized in the School Code. PSBA questions when if ever the State Board can, by regulation, erase authority the General Assembly has given to local school officials. Although the Pennsylvania Supreme Court recognizes the Board's authority to issue regulations governing local officials' handling of student discipline matters, the Court stressed that such regulatory power is not unlimited and that specific provisions might be held invalid for various reasons.

Consequently, we believe that if Chapter 12 is approved as proposed, it still would be important for the General Assembly to take action clarifying the Commonwealth's policy on corporal punishment.

Expulsion Hearings (Section 12.6 and Section 12.8) – PSBA has several concerns about the proposed language for Sections 12.6 and 12.8, primarily relating to the time limit within which formal expulsion hearings must be held after initial exclusion from school (out of school suspension), and the requisite notices. New language in the current draft also creates a new unfunded mandate without undefined limits.

Initially, we note that the proposed 15-day time limit language in Section 12.8 creates an inconsistency with similar language in Section 12.6. As stated in Section 12.6, the period is measured beginning with the initial exclusion from school, but in the new language proposed for Section 12.8 the period would begin with the issuance of a notice of charges, which in practice often occurs several days after the initial suspension. This conflict should be corrected.

The more important concern is that by replacing the previous more flexible language with a definite deadline, the proposed language does not sufficiently account for delays in hearings that are requested or caused by the student, parent or student's counsel. Fifteen days may not at first appear too stringent a deadline, and although in practice most districts usually can meet the preferred ten-day target, there are frequent circumstances when a 15-day limit cannot be met for reasons that are not the fault of the school district.

A common example occurs when a student's family retains counsel shortly before an expulsion hearing and the family simply notifies the school that their lawyer either cannot make it at the scheduled time or needs additional time to prepare. Although the school district may be ready to proceed in a timely way, and any delay is requested by or attributable to the student, districts may be unable to persuade the student's family or attorney to "mutually agree" on a rescheduled date, or even to accept responsibility for the postponement in writing.

PSBA believes it would be a mistake to adopt proposed deadline language that could become the unintended basis of litigation against a school district that chooses to err on the safe side by postponing a hearing based on a phone message from the student's parent or attorney, rather than proceed against an empty chair or against an unrepresented family protesting the absence of counsel retained at the last minute.

Neither problem would exist if the regulations retained the original language in Section 12.6 that a formal hearing should not be "unreasonably delayed" and in Section 12.8 calling for the hearing to be held "with all reasonable speed." This language provides districts with the necessary flexibility to accommodate continuance requests from students' parents or attorneys without undermining the need for speedy due process.

Alternatively, both problems could be addressed as follows:

> At the end of the last sentence of the proposed new language for paragraph (d) of Section 12.6, add the words: "<u>or unless a delay in the hearing has been caused or requested by the student or student's representative.</u>"

and

> Change the proposed new language for paragraph (b)(ix) of Section 12.8 to read: "<u>within 15 school days of the initial exclusion from school, unless further delay was requested or</u>

caused by the student or student's parent, guardian or counsel, or otherwise is mutually agreed to by the parties.

A similar issue arises with the addition, in paragraph (b)(ii) of § 12.8, of language replacing the prior requirement that notice of the time and place of hearing be "sufficient" with an absolute three-day notice requirement. While three days notice may be a reasonable default period, the reality is that hearing dates often are adjusted or set based on numerous factors, based on communications with families or attorneys, within three days or less of when the hearing actually takes place. To reflect that reality the phrase "unless mutually agreed upon by the parties" should be added to the initial sentence of that paragraph. The absence of such safety valve language could result in unnecessary delay of hearings.

In addition, the current draft imposes a new unfunded mandate of uncertain dimension, by requiring that a copy of the recording or transcript of a formal hearing "shall be provided at no cost to a student who is indigent." For one thing, this requirement should apply only "upon request." In practice, when the hearing is recorded via stenographer, transcripts are not always prepared as a matter of course from steno notes, and often are ordered only when an appeal is filed or appears likely, or when requested by a family offering to pay. Ordering transcripts every time in order to furnish a copy to an "indigent" student who has not requested it is expensive and wasteful.

Also, the term "indigent" has no definite recognized meaning and its unqualified use could become grist for litigation. A better approach would be to define "inability to pay" by reference to an existing established standard. An appropriate recognized standard would be the household income levels in federal poverty guidelines, as published by the U.S. Department of Health and Human Services in the Federal Register and on the HHS website.

Freedom of Expression (Section 12.9) – PSBA supported the changes previously proposed for this section by the board, adding further references to more recent Supreme Court cases addressing student expression. We continue to support the somewhat different approach taken in the current draft, and offer the thoughts below in response to previous opposition by certain student and newspaper groups, in the event such groups continue their attempts to portray these changes as an attempt to expand authority of school officials to censor student publications. We think such fears are misplaced and are generated by a shortsighted focus only upon those student publications. The approach argued by those groups would unduly limit the options of school administrators when responding to threats of harm to the school community.

First, everyone needs to understand that student publications do not present the main problems Chapter 12 must be fine-tuned to address, nor are they the reason it is so important to ensure school officials have the authority to do the things necessary for protecting the school environment from threats, disruption and violence. Second, we must keep in mind that the student expression provisions of Chapter 12 affect much more than what may or may not be published in a school newspaper. The kinds of so-called "expression" school officials must be empowered to deal with include ethnic harassment, bullying, hazing, overt or implied threats of violence, wearing of jewelry, tattoos, tee-shirts or other items adorned with alleged racist or gang symbols or overtly sexual messages, and use of the internet or even school-owned network systems to spread vicious and career-threatening falsehoods about teachers, administrators and

other students.

The student newspaper representatives attacked PSBA and the Board over the previously proposed amendment of §12.9 to include references to two U.S. Supreme Court decisions elaborating upon its landmark teachings in *Tinker v. Des Moines Community School District* --- the 1986 decision in *Bethel School District v. Fraser,* and the 1988 decision in *Hazelwood School District v. Kuhlmeier.* Although all case references have been removed from the current draft, adding references to *Fraser* and *Hazelwood* would have been an appropriate means of alerting both school officials and students to more recent teachings of the U.S. Supreme Court that better illuminate the contours of student expressive rights in school settings and provide more helpful and specific guidance for all concerned.

However, while the current draft may not specifically refer to those cases, it is important nonetheless that the remaining language of Chapter 12 be consistent with the principles established in all three of those cases. In *Tinker*, the Court sought to balance the free expression rights of students with what it described as the "need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." The benchmark chosen by the Court was that students have the right to express themselves so long as such expression does not materially and substantially disrupt the work and discipline of the school. The Court stressed that "conduct by the student, in class or out of it, which for any reason--whether it stems from time, place, or type of behavior--materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech."

The *Fraser* case involved a student's speech to an assembly containing pervasive sexual innuendo that was plainly offensive to both teachers and students. In holding that it did not violate student free speech rights to prohibit such conduct, the Court said that "the process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order." The Court also said "A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students."

The *Hazelwood* case involved editorial control over a school-sponsored newspaper published as a curricular program. The Court held that in such circumstances, "educators are entitled to exercise greater control over [school sponsored] student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school." In other words, the Court summarized, "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."

Both of the later cases set eminently reasonable standards entirely consistent with *Tinker*. PSBA is at a loss to understand why the newspaper representatives seem so worried that the Board in the previous draft of Chapter 12 chose to mention the Fraser and Hazelwood decisions. In the

event the newspaper representatives continue to voice similar objections, it would be appropriate to ask if they are arguing either that Chapter 12 should instruct school officials that they must tolerate sexually explicit speech by students in school, or that school officials should have no editorial say in what appears in school-funded publications for academic credit. At the same time, they should be reminded how editorial control works in the real world of journalism.

The newspaper groups also attacked PSBA and Board over the change proposed in the previous draft for Section 12.9 (b), adding two words as follows: "Students have the right to express themselves unless such expression materially and substantially interferes with the educational process, threatens immediate **or serious** harm to the welfare of the school or community, encourages unlawful activity or interferes with another individual's rights."

The newspaper groups appeared to be arguing that Chapter 12 should require school officials to stand idle when student speech threatens any kind of harm to the school or community, so long as the threat is not "immediate." Perhaps this may have seemed adequate when Chapter 12 was first written, and the focus was on armbands protesting the Vietnam War. In the wake of 9/11, and school shootings in Columbine, CO, and numerous other places in our nation, including Edinboro, Williamsport, Red Lion and other Pennsylvania locations, it is NOT adequate. School officials need to take every threat seriously, and have every reason to worry about careless words packing the potential to send already jumpy students into panic. The last thing Pennsylvania needs is for Chapter 12 to suggest the contrary.

PSBA believes the approach of the current draft is better yet, inserting the word "serious" in place of "immediate" rather than simply adding it.

Section 12.14 Searches – The proposal requires school districts to adopt reasonable policies and procedures regarding student searches. However, existing language sets a standard, perhaps not intended, that could tie the hands of school officials in protecting the educational environment to a greater degree than any Constitutional court case might impose.

The problem is the requirement, entirely created in Chapter 12, that students be notified prior to a locker search and given an opportunity to be present. This would seem to suggest, regardless of the justification, that a search must be postponed if the student is absent or otherwise cannot be notified, perhaps providing the opportunity for any contraband therein to be cleaned out by other students provided with the combination or key.

We know from both Pennsylvania and federal court decisions that students have a lesser expectation of privacy within the school setting, and may have little or no expectation of privacy with regard to school lockers, especially when school officials make clear that lockers can be searched at any time, and that their use is conditioned upon students' compliance with school rules and regulations.

What the section ought to say, if anything on this point, is that reasonable efforts should be made both to notify the student and to permit the student to be present during the search.

We appreciate the opportunity to comment on the final form proposal. Please contact me if you wish to discuss any specific issue addressed in this letter.

Original: 2367

JAMES R. ROEBUCK, MEMBER
208 IRVIS OFFICE BUILDING
HOUSE BOX 202020
HARRISBURG, PENNSYLVANIA 17120-2020
PHONE: (717) 783-1000
FAX: (717) 783-1665

4800 BALTIMORE AVENUE
PHILADELPHIA, PENNSYLVANIA 19143
PHONE: (215) 724-2227
FAX: (215) 724-2230

House of Representatives

COMMONWEALTH OF PENNSYLVANIA
HARRISBURG

Democratic Chairman Education Committee

Caucuses
PA Higher Education Assistance Agency, Member Board of Directors
PA Historical And Museum Commission
Black History Advisory Committee, Member
PA Legislative Black Caucus, Member

October 5, 2005

John R. McGinley, Chairman
Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

Re: State Board of Education
Final-form regulation, #6-280 (IRRC #2367)
Pupil Personnel Services and Students

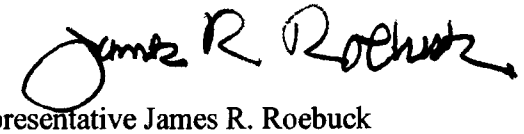
Dear Mr. McGinley:

As Democratic Chairman of the House Education Committee and a member of the State Board of Education, I am writing to express my support for the recommendation of the State Board of Education to abolish corporal punishment in public schools in its revision of Chapter 12 of the School Code with one amendment regarding the definition of corporal punishment in Section 12.16.

As defined in Section 12.16, corporal punishment is "a form of physical discipline that is intended to cause pain and fear and in which a student is spanked, paddled or hit on any part of the body with a hand or instrument." I have deep concerns about the language "intending to cause pain and fear" in the definition in that it appears that in order for an action by a school employees to be considered to be corporal punishment that the intent of the action must be to both "cause pain **and** fear". I can very easily see situations whether either the intent of the school employee is either pain or fear but not necessarily both. If this were to be the case then technically their action would not be considered corporal punishment. I would suggest to safeguard against this ever happening that the language "cause pain **and** fear" be changed to "cause pain **or** fear". I believe this small but important amendment to Section 12.16 strengthens the State Board's intent to abolish corporal punishment.

I join with a wide range of respected professional organizations, including the National Education Association, the Parent-Teachers Association, the American Medical Association, the American Academy of Pediatrics and the American Psychological Association in calling for the abolishment of corporal punishment through approval of revisions to Chapter 12.

Sincerely,



Representative James R. Roebuck
Democratic Chairman, House Education Committee

cc: Ms. Kim Kauffman, Executive Director, IRRC
Mr. Karl Girton, Chairman, State Board of Education
Mr. Jim Buckheit, Executive Director, State Board of Education
Representative Jess M. Stairs, Chairman, House Education Committee