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

April 5, 2006

Honorable Gerald L. Zahorchak, Secretary
Department of Education
333 Market Street, 10th Floor
Harrisburg, PA 17126

Re: Regulation #6-298 (IRRC #2520)
Department of Education
Vocational Education

Dear Secretary Zahorchak:

Enclosed are the Commission's comments for consideration when you prepare the final version of this regulation. These comments are not a formal approval or disapproval of the regulation. However, they specify the regulatory review criteria that have not been met.

The comments will be available on our website at www.irrc.state.pa.us. If you would like to discuss them, please contact me.

Sincerely,

Kim Kaufman
Executive Director
wbg
Enclosure

cc: Honorable James J. Rhoades, Chairman, Senate Education Committee
Honorable Raphael J. Musto, Minority Chairman, Senate Education Committee
Honorable Jess M. Stairs, Majority Chairman, House Education Committee
Honorable James R. Roebuck, Jr., Democratic Chairman, House Education Committee

Comments of the Independent Regulatory Review Commission

on

Department of Education Regulation #6-298 (IRRC #2520)

Vocational Education

April 5, 2006

We submit for your consideration the following comments on the proposed rulemaking published in the February 4, 2006 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the Department of Education (Department) to respond to all comments received from us or any other source.

1. Statutory Authority to promulgate regulations.

Senator Raphael Musto expressed the concern that the Department lacks the statutory authority to promulgate these regulations. The Department responded to Senator Musto, citing several statutory provisions authorizing the Department to establish standards for vocational education and the State Board of Vocational Education to approve these standards. However, the Department has also noted that, pursuant to the Public School Code of 1949, 24 P.S. §§ 26-2603-B(k) and 2606-B, “the State Board of Education makes all rules and regulations and approves policy, standards, rules and regulations developed, modified by the Department of Education under the control of the board.”

We agree with Senator Musto and share his concern. Promulgation of such standards as regulations must be undertaken by the State Board of Education. The authority to establish standards does not include the authority to promulgate regulations. Where the legislature intends to authorize the promulgation of regulations, it has done so explicitly, *Main Line Health, Inc. v. CAT Fund*, 738 A.2d 66 (Pa. Cmwlth. 1999) *affirmed* 777 A.2d 1048 (Pa. 2001).

2. Minimum time requirements and funding. - Economic or fiscal impact; Reasonableness.

The House Education Committee, Senator Noah Wenger, Chairman of the Senate Appropriations Committee, Representative Lynn Herman and several commentators representing vocational education programs and agriculture education in particular have submitted comments on § 339.22(a)(10)(i). This section pertains to minimum time requirements and state funding.

Some commentators have questioned the reasonableness of increasing the minimum hour requirements for vocational education programs. In order for a school entity to qualify for state subsidy under existing regulations, a student in a vocational education program must complete 240 hours per year in ninth grade and 360 hours per year in tenth, eleventh and twelfth grade. The proposed rulemaking would require all high school students to meet the 360 hour

requirement. In addition, language that allows students to count out-of-class time towards the hour requirement is being eliminated. Commentators argue that these changes, coupled with increased enforcement, would make it impossible for many programs, especially agriculture education programs, to meet the hour requirements. Thus, those schools would not receive reimbursement. The consequence of the loss of funding would be the elimination of vocational education programs from those schools.

We acknowledge the Department's difficult task of ensuring a quality vocational education system for all students in Pennsylvania and the necessity to do this. We understand that the minimum hour requirement is just one of several criteria used to ensure that vocational education programs meet a certain level of quality. However, we question the need to impose an hour requirement if a vocational education program is otherwise providing a quality program that is meeting the needs of the student and the local community.

We understand that the Department plans to reconsider the decision to delete provisions related to hours spent in supervised occupational and clinical experiences that currently count towards minimum hour requirements. The Department's intent to allow these experiences to count towards the minimum hour requirements should be included in the final-form regulation.

Finally, the existing time requirements found in the chart under Subsection (a)(4)(i) should be deleted.

VOCATIONAL EDUCATION STANDARDS

3. Section 339.1a. Definitions. - Clarity.

Concentrator

The last sentence of this definition states, "Only concentrator students are counted for vocational subsidies." This is a substantive provision that is not repeated in the body of the regulation. Substantive provisions in a definition are not enforceable. Therefore, the Department should delete this phrase from the definition and place it in the body of the regulation.

Diversified Occupations Program

The last sentence of this definition states, "A cooperative education certified teacher is required for such a program." This is a substantive provision that should be moved to the body of the regulation.

In addition, we recommend that the definition be redrafted with subparagraphs that list each of the characteristics of the diversified occupations program.

Participant

This term is defined but not used in the rest of Chapter 339. We recommend that it be deleted. If the Department chooses to retain this definition, we have two concerns. First, this definition identifies who is not a participant, but does not establish who is. The first sentence should be redrafted as follows: "A student enrolled in vocational education planned instruction for less than 360 hours per year."

Second, the last sentence of this definition states, “Participants do not qualify for vocational education subsidy.” This is a substantive provision that should be moved to the body of the regulation. If this provision is moved, the definition should be retained.

SBVE – Standards-Based Vocational Education

This phrase is not used in Chapter 339. However, the term “standards-based” is used throughout the regulation. The Department should either use the defined term of SBVE or amend the definition to “standards-based.”

In addition, the last two sentences of this definition state the following: “Occupational tasks reviewed by an occupational advisory committee provide the basis for instruction. The instructional system also incorporates and addresses attainment of academic standards (§ 4.12).” These sentences are substantive and should be moved to the body of the regulation.

School entity

This term is defined as follows: “Any local public education provider (such as public school, charter school, cyber charter school, AVTS, intermediate unit).” Would a technical institute be considered a school entity? If so, it should be added to the list of examples.

Technical institute

The last sentence of this definition states, “Technical institutes may not grant degrees, but are encouraged to develop articulation agreements with degree-granting institutions to facilitate transfer of student credit.” We have two concerns. First, this sentence is substantive and should be moved to a section in the regulation that pertains to technical institutes.

Second, the phrase “are encouraged to develop articulation agreements with degree-granting institutions to facilitate transfer of student credit” is non-regulatory language which indicates that this phrase is optional. It is inappropriate to include optional provisions in a regulation. If the Department wants technical institutes to develop articulation agreements, it should use the term “shall” instead of “encourage.”

4. Section 339.2. Operation. - Clarity.

This section uses the word “rigorous” to describe certain vocational programs. The Pennsylvania Code and Bulletin *Style Manual* discourages the use of indefinite terms (§ 6.16(b)(6)). “Rigorous” is such a term. Therefore, it should be defined or deleted and replaced with a term or phrase that is definitive and measurable. (“Rigorous also appears in § 339.4(d)(1)(i)(C)(I).)

In addition, this section uses the phrase “career and technical education vocation programs” and “technical education programs.” It is our understanding that these terms mean the same thing. We recommend that one term be used in this section and throughout the remainder of the regulation.

5. Section 339.4. Program approval. - Implementation procedures; Clarity.

Subsection (a) General rule

Subsection (a)(2) states that reapproval will take place between September 1, 2005, and June 30, 2010. This conflicts with Section 339.4(d)(2), which states that school entities shall submit for reapproval at least every five years. If reapproval on a five-year cycle is the goal of the Department, the date of June 30, 2010, should be deleted.

Subsection (b) Application for approval or reapproval

Subsection (b)(2) requires “Evidence that the program prepares students for high priority occupations or other occupations supported by local labor market information and is supported by local employers.” Other paragraphs of Subsection (b) also require “assurance” or “evidence,” but those paragraphs do not indicate how to meet those requirements. The final-form regulation should include specific requirements for all paragraphs under Subsection (b) that would allow the regulated entity to know if it is meeting its compliance requirements.

Subsection (b)(4) references the undefined terms of “industry-based standards” and the “Pennsylvania Skills Certificate.” We recommend that the Department either define these terms or provide a cross-reference to where the meaning of these terms can be found.

Subsection (b)(8) pertains to assurances that support or special services are available to students when disadvantaged, disabled or limited English-speaking students are enrolled as required by Chapters 14 and 15 of 22 Pa. Code. The Education Law Center submitted comments on their behalf and on the behalf of the Disabilities Law Project, The ARC of Pennsylvania, and Pennsylvania Protection Advocacy, Inc. The comments touch on several sections of the proposed rulemaking and include language that they believe would assure access to vocational education for students with disabilities and avoid future litigation. We encourage the Department to consider each of the concerns raised by these commentators to ensure that students with disabilities are served and to ensure the Department is meeting its statutory and regulatory duties.

Subsection (b)(13) requires evidence of joint planning with sending schools “around academic and other needs of attending students.” The phrase “other needs” imposes a vague requirement that would be difficult to meet. The “other needs” should be listed in the final-form regulation.

Subsection (c) Documentation

This subsection requires the maintenance of documents, but does not specify how long the documents should be kept. The final-form regulation should specify how long records should be kept after the compliance review is complete.

Subsection (d) Retain approval

Subsection (d)(1)(i) pertains to accountability standards. It requires school entities to implement the standards which will be subject to review by the Department. We have two concerns with Subsection (d)(1)(i)(A), which references “industry assessment,” “industry credentials,” “certification,” “State assessment” and “occupational competency evaluation.” Similar to our recommendation above, we recommend that the Department either define these terms or provide a cross-reference to where the meaning of these terms can be found.. Second, this Subsection states that a student’s level of occupational achievement will be measured by the Pennsylvania Skills Certificate or “other approved industry certification.” Who decides which method will be used to measure competency?

Subsection (d)(1)(i)(D) directs local entities to conduct studies. We have two questions. First, what is a local entity? Second, how often must the studies be conducted?

Subsection (d)(2) requires school entities to submit for reapproval “at least” every five years. The Department has indicated that reapproval is also required if the content of a program changes. Since the phrase “at least” is non-regulatory language that cannot be enforced, it should be deleted. The final-form regulation should include language that instructs school entities to submit for reapproval every five years and when changes to a program have occurred.

Subsection (d)(3) states the following:

In addition, the Department will notify, in writing, each school entity that does not meet or exceed expectations of the standards set by the Secretary, and will require the school to submit a compliance plan to the Bureau of Career and Technical Education. Each noncomplying school entity shall develop a compliance plan and document all corrective actions taken pursuant to it. Upon its approval of the plan, the Department will continue to review the program and provide technical assistance.

We have three concerns. First, the phrase “In addition” is not needed. Second, this section should include a time frame for completion of the duties imposed on the Department and the noncomplying school. Third, the phrase “does not meet or exceed” is problematic. A school might meet the standards but be in noncompliance because it did not exceed the standards. Therefore, the phrase “or exceed” should be deleted.

PLANNING

6. Section 339.15. Minutes. - Clarity.

This section requires minutes of the advisory, occupational advisory and administrative committee meetings to be kept for five years. Section 4.33, pertaining to advisory committees, addresses requirements of advisory committees. We recommend that record-keeping requirement be placed in § 4.33. We note that administrative committees are not referenced in

this part of Chapter 339. If the Department retains § 339.15, the reference to administrative committees should be deleted.

CURRICULUM

7. Section 339.22. Program content. - Possible conflict with existing regulations; Clarity.

Subsection (a)(2) references the academic standards of “mathematics, language arts and science.” Has the Department considered adding the standards for reading, writing, speaking and listening? Chapter 4, relating to academic standards, does not include language arts as a specific standard. What is meant by this term?

Similar to our concern under Section 339.4(d)(1)(i)(A), the terms or phrases found in Subsection (b)(6), which pertains to industry standards, are not defined. In order for the regulated community to meet the industry standards, they must have a clear understanding of what those standards are. Therefore, we recommend defining or providing appropriate cross-references for all of the terms used in this subsection.

Subsection (d) pertains to postsecondary education and training. It “encourages” articulation of secondary programs with postsecondary programs. The term “encourages” is non-regulatory language which indicates that compliance is optional. It is inappropriate to include optional provisions in a regulation. If the goal of the Department is to require a plan for articulation between secondary and post-secondary institutions, then this section should be rewritten to impose that mandate. In the alternative, this section should be deleted.

8. Section 339.29. Cooperative vocational education. – Implementation procedures.

This section requires compliance with guidelines published by the Department. Guidelines are not binding on either the Department or the regulated community. In order for the guidelines to be enforceable, they must be included in the regulation. In the alternative, this provision should be deleted.

FACILITIES

9. Section 339.51. Learning environment. - Clarity.

Paragraph (1) requires shop laboratories to meet standards of State licensing boards, accreditation providers and industry certification standards and also to take into consideration the recommendations of the occupational advisory committee. In order to assist the regulated community in complying with this requirement, the final-form regulation should list or cross-reference the boards, providers and certification standards that shop laboratories are expected to meet.

10. Section 339.53. Contemporary equipment. - Clarity.

This section requires equipment and facilities to be comparable to industry standards or reimbursement from the Department may be withheld if the standards are not met. As noted above, the final-form regulation should list the industry standards that will be applied. In addition, the term “comparable” is vague and unenforceable. Since funding may be denied if this requirement is not met, the first sentence of this section should be amended to state, “The equipment and facilities must meet industry standards.”

TECHNICAL INSTITUTES

11. Section 339.56. Technical Institutes. - Implementation procedures; Clarity.

All of the goals, requirements and standards of technical institutes are contained in this one section. In order to highlight the various requirements pertaining to technical institutes and make the regulation clearer to the regulated community, the Department should break certain subject areas into separate sections. Suggested section titles are: scope, authority, definitions, eligibility and reimbursement.

Subsection (e) pertains to funding. Subsection (e)(8) requires a technical institute to have a compliance plan as required by formal compliance review conducted by the Department. In order for technical institutes to meet the binding standards of this subsection and remain eligible for funding, they must know what those standards are. Therefore, the Department should explain what standards must be met during a formal compliance review and when that review will take place.

Subsection (e)(9) requires “contemporary equipment.” As noted above, the Pennsylvania Code and *Bulletin Style Manual* discourages the use of indefinite terms (§ 6.16(b)(6)). The final-form regulation should include a more definitive standard related to equipment that will allow a technical institute to know if it is in compliance.

Under Subsection (e)(10), a Technical Institute (TI) must be recognized by an accrediting agency to receive funding. It is our understanding that accreditation is only granted after an institution has been operating. How will the Department implement this provision?

Subsection (f) states the following: “Once a favorable vote takes place, a proposal to establish a TI shall be presented to the State Board for Vocation Education for its approval.” Subsection (c) requires a “majority vote.” This subsection references a “favorable vote.” Since “favorable” is an indefinite term, we recommend that it be replaced by “majority.” This would provide consistency between both subsections.

Subsection (j) pertains to cost and reimbursement. We have three concerns. First, what is an “out of school youth”? Would a student that dropped out or an expelled student be eligible for enrollment? At what age is a person no longer a youth? We recommend that this term be defined. Second, does the reference to an “approved budget” pertain to the budget of the Department or the technical institute? Third, do the phrases “current expense per student” and

“per student cost for current expense” mean the same thing? If so, one term should be used and defined. If not, both terms should be defined.

Subsection (k) states, “TIs are not degree-granting institutions, but can offer technical certificates.” The phrase “are not degree-granting institutions, but can” is non-regulatory language that should be deleted.

The term “TI board” is used in Subsection (k). This term is not defined. Clarity would be improved if this term was defined and used consistently throughout the regulation.

12. Miscellaneous clarity.

The definition of cluster vocational education in § 339.1a. references § 339.22(k). Subsection (k) does not exist. In addition, this definition is not used in the remaining text of Chapter 339. Therefore, it should be deleted.

The phrase “but not be limited to” in § 339.4(b) and § 339.32(2) is non-regulatory language that should be deleted.

The citation contained in § 339.4(b)(5) is incorrect. It should be § 339.22(a)(10)(i).

Section 339.22(c)(i)(A) is a repeat of §339.22(a)(2).

The reference to § 4.3 under § 339.29 is incorrect. Section 4.3 relates to definitions. The correct citation is §4.33, relating to advisory committees.

Section 339.23(6) refers to the “Industrial Board.” The correct reference is the Department of Labor and Industry.

Under Section 339.56, the phrase “as required” should be inserted between the word “Commonwealth” and “§ 40.2.”

IRRC #2520 #6-298
Department of Education
Vocational Education

Honorable Gerald L. Zahorchak, Secretary



Date: 4-5-06