



Quality & Fairness in
Pennsylvania's Public Schools

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Mr. Jim Buckheit
Executive Director
State Board of Education
333 Market Street
Harrisburg, PA 17126-0333

RE: PROPOSED 22 PA CODE CHAPTER 14

Dear Mr. Buckheit:

The Education Law Center is a public interest law firm dedicated to improving education opportunities and outcomes for Pennsylvania's most vulnerable public school students. Over the more than three decades that ELC has been operating, we (and I personally) have talked with tens of thousands of families and advocates about their positive and not so positive experiences with the special education and early intervention systems.

As a member of the VALUE Coalition, ELC strongly endorses VALUE's comments which focus on the significant retreat in current 22 PA Code §14.133 (Behavior Support) reflected in the proposed regulations. ELC concurs with VALUE's judgment that this is the most significant problem with the proposed regulations, and that, in its current form, the regulation is a threat to the safety and well-being of the most vulnerable children with disabilities.

ELC acknowledges the State Board's open process and its considerable openness to the comments of the disability community as is reflected in this draft. However, there are still some significant omissions that I hope can be corrected before these regulations become law. Pennsylvania has always been a leader in protecting and educating students with significant disabilities, and these critical regulations will govern the early intervention preschool and special education systems for decades to come.

In these comments, I would like to focus primarily on certain VALUE recommendations that didn't make it to the proposed draft, and on extended school year programs (ESY) for preschoolers with disabilities.

Extended School Year and ESY for Preschoolers

First, our thanks to the Department for its excellent reworking of 22 PA Code §14.132 to include necessary timelines and other clarifications. Pennsylvania was the first state to recognize and implement ESY for children with disabilities, and it's great that we continue to improve our procedures and practice.

As to preschoolers with disabilities, as a result of a complaint filed by the Education Law Center with the Division of Compliance, the Department is obligated to revise its regulations to ensure that preschoolers eligible for ESY are served. In 22 PA Code §14.155(c), the Department has established a legally problematic standard that applies exclusively to preschoolers, rather than simply amending the generic ESY regulation, §14.132, to include preschoolers. The result is that preschoolers are eligible only if they "lose skills over breaks" and that loss must be "evidenced through child performance data." Compare the preschooler ESY standard to §14.132, which clearly states that regression/recoupment is one (but not the only factor) for determining eligibility, and which makes explicit that predictive data ("observations and opinions by educators, parents, and others") can be the basis for an ESY determination. See, §14.132(b)(5). This problem is easily corrected by amending 14.132(a) as follows:

[S]chool entities must use the following standards for determining whether a student with disabilities and an eligible young child requires ESY as part of the student's program.

Resolving Disputes Without Hearings

IDEA 2004 encourages parents and LEAs to resolve disputes in the quickest, least adversarial, and least costly way. Here are four proposals that would promote that goal to the benefit of families and LEAs.

1. Permit enforcement of mediation and dispute resolution agreements through DOC:

Pennsylvania has the authority to permit DOC to enforce mediation and resolution session agreements – the regulations should make clear that DOC has this authority. Otherwise these agreements can be enforced only in state or federal court, which is not feasible for most families, and in any case is financially and emotionally costly for all parties. *See* 34 C.F.R. § 300.537; 71 Fed. Register 46604.

2. Restore the optional pre-hearing conference: Since the mid-1970's, either an LEA or a family has been able to request a pre-hearing conference (PHC). A PHC has a 10 day timeline, so a family can get a prompt meeting that may resolve a dispute that otherwise would be the subject of a hearing. But the PHC regulation, 22 PA Code §14.161, is proposed for deletion. Why is there a need for a PHC given the new option of a resolution session? To get to a resolution session, the parent must file a hearing complaint that can survive a sufficiency challenge. The PHC just requires a request for a meeting. Since PHCs are waivable by either party, there is simply no reason to eliminate this option and force families into the hearing process.

3. Align the statutes of limitation for filing a complaint with DOC and for filing a hearing complaint: Pennsylvania can set a two year statute of limitation for filing a complaint with DOC (to parallel the hearing system), but otherwise the statute of limitations is only one year. The Pennsylvania regulations should align these statutes at two years. *See* 71 Fed. Register 46606. Parents can file a request for a hearing for a violation that took place more than two years ago if the school district withheld information or deliberately misrepresented that it had resolved the problem. These exceptions should also apply to the DOC process. *Id.* Eliminating these inconsistencies would encourage more families to use DOC, and force fewer into the hearing system.

Ensuring Access to Information and Informed Choices

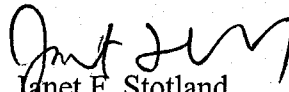
The free exchange of information reduces mistrust and enhances respect and cooperation between families and LEAs. The next group of recommendations would ensure that families are adequately informed about their rights, and that they have access to classrooms and to school records so that they can participate effectively in the development of their children's programs.

4. Provide families timely and free copies of their child's education records: Federal law guarantees families "access" to school records, but not free copies. Chapter 14 should ensure families free copies before such crucial events as the IEP meeting, the mediation or resolution session, or a hearing.
5. Provide families and their experts access to current and proposed classrooms: We greatly appreciate the Department's decision to include in this draft new §14.108, entitled "Access to Classrooms." It's an important first step, but more is needed. It gives parents access to the child's current classroom, but not to the new classroom the school is offering. Also, the families' experts are not included. The federal FERPA Office has made clear that FERPA is not a bar to such observations because it prohibits only the disclosure of information from students' education records. We propose the following amendment to proposed §14.108:

Access to Classroom. Parents, and experts invited by and with the written authorization of parents, will have reasonable access to their child's current or proposed classroom(s) [within the parameters of LEA policy]. LEAs may have reasonable classroom access policies to ensure school and the classroom safety and functioning.

6. Parental waiver of rights requires informed consent: The Pennsylvania regulations should state that any parental waiver of a right (e.g., to excuse a mandated IEP team member) must meet the standard for informed consent – that is, the parent should have written notice explaining the proposal, and the waiver should be in writing. At minimum, Chapter 14 should require informed consent for waiver of a student's three year reevaluation [see 34 C.F.R. 300.303(b)(2), which permits the LEA and the parent to "agree that a reevaluation is unnecessary"].

Thank you for this opportunity to partner in this important work.


Janet F. Stotland
Co-Director

cc: Arthur Coccodrilli, Chair, Independent Regulatory Review Commission
The Honorable James J. Rhoades, Senate Education Committee
The Honorable Jeffrey E. Piccola, Senate Education Committee
The Honorable James R. Roebuck, Jr., House Education Committee
The Honorable Jess M. Stairs, House Education Committee
The Honorable Dennis O'Brien, Speaker, House of Representatives
The Honorable Barbara McIlvaine Smith, Chair, Subcommittee on Special Education