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July 12, 2007

Mr. Jim Buckheit, Executive Director
State Board of Education
333 Market Street
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PA. STATE BOARD
OF EDUCATION

**Re: Comments on Proposed Amendments to Chapter 14 of Title 22 of
the Pennsylvania Code as Published in the Pennsylvania Bulletin**

Dear Mr. Buckheit:

I write to offer comments on one aspect of the proposed revisions to Chapter 14 of Title 22 of the Pennsylvania Code.

I am the parent of a 13-year-old son who has autism. I am also a lawyer, a point I mention only because it has specific relevance to the issue I would like to address.¹

I write specifically to address the "Procedural Safeguards" provisions of the proposed regulations. As I understand those provisions, the Board proposes to make modest changes but otherwise to retain the two-tiered administrative-hearing system that has been in place for some time in Pennsylvania.

When it approached amending Chapter 14, the Board had, I believe, three choices with respect to procedural safeguards: (1) it could leave the system largely as it has been; (2) it could leave in place the two-tiered system but add qualifications for hearing officers and standards for adjudication; or (3) it could do away with the second tier.

A significant number of advocates favor the third choice: abandoning altogether the special education appellate panels. While I respect their views and the reasons they offer, I do not agree. There are also a significant number of advocates for the second choice: a meaningfully reformed second tier. I am among them. I know of few persons who favor the first choice, perhaps because it perpetuates a system that many have concluded is not working well for any of its participants.

The draft regulations call for hearing officers and appellate panels to abide by the General Rules of Administrative Practice and Procedure in Title 1 of the Pennsylvania Code.

¹ I am also a member of Pennsylvania's Special Education Advisory Panel (the "SEAP"). Importantly, however, the views expressed in this letter are mine alone, and I do not purport to state the views of the SEAP. The SEAP has offered its suggestions directly to the Board.

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While I believe that to be helpful, it does not address the principal areas of concern, and the draft regulations appear to follow the first – and least desirable – option described above.

I would be grateful if the Board would consider the following recommendations:

1. The regulations should establish certain qualifications both for hearing officers and appellate officers.

2. The regulations should require that hearing officers and appellate officers undergo training before commencing their work, and that they have annual continuing education (e.g., seminars on current issues in special-education law, due process and decision writing).

3. The regulations should require that appellate panels treat as precedential the decisions of previous panels, the Pennsylvania Commonwealth Court, the Pennsylvania Supreme Court, the United States Court of Appeals for the Third Circuit and the Supreme Court of the United States. Although panels are implicitly obligated to follow the decisions of the various courts, there is no current requirement that they follow one another. The result is, all too commonly, inconsistency and arbitrariness in that litigants' results can often depend more on which panel hears the case than on the facts or the law.

4. The regulations should require that the composition of appellate panels rotate from case to case. My understanding is that, under the current practice, the same appellate officers sit together on the same panel on each case. Again, such a practice promotes inconsistency from panel to panel (I should note that every appellate court of which I am aware rotates the compositions of their three-judge panels).

If Pennsylvania is to retain the second tier of its due-process system (and I believe it should), it must significantly reform that second tier or it will simply perpetuate a system that few believe is working well now for anyone in the process.

I appreciate the Board's consideration of these comments.

Very truly yours,


David R. Fine