

Disability Rights Network of Pennsylvania

A merger of PP&A and the
Disabilities Law Project

Advancing the rights of people with disabilities

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July 19, 2007

Ms. Michaele A. Totino
Regulatory Analyst
Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101
RE: ID#6-306 (2618)

Dear Ms. Totino:

The Disability Rights Network of Pennsylvania (DRN), formerly Pennsylvania Protection & Advocacy (PP&A), is the non-profit organization designated by the Commonwealth of Pennsylvania pursuant to federal law to eliminate abuse and protect the rights of adults and children with disabilities statewide. In furtherance of its obligation to promote full and meaningful participation in community life for children with disabilities, DRN is committed to expanding access to quality education, early intervention, and special education services in the most inclusive settings. It is in obedience to these two mandates, protection from abuse and promotion of community participation, that DRN submits the following comments to proposed 22 PA Code Chapter 14, Special Education Services and Programs.

As the organization charged with protecting children with disabilities from abuse and neglect, DRN must strenuously object to the most recent revisions made to 14.133, Behavior Supports. Defining a restraint as an intervention lasting longer than 30 seconds sets a new and dangerous precedent, precludes implementation of the very practices known to reduce restraint incidents, and starkly contrasts with progressive movement that seeks to ensure the safety of staff and children occurring in every other child-serving system in Pennsylvania. IEP meetings must be convened subsequent to restraint usage to implement proven reduction and prevention strategies such as debriefing and family and youth involvement. Further, prone restraints that inhibit breathing are known to be deadly and must be prohibited. Please know that DRN participated in the development of and fully supports the VALUE Coalition's comments on this most critical issue.

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REVIEW COMMISSION

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As the organization charged with promotion of community belonging, DRN acknowledges with gratitude the efforts of the State Board of Education in drafting 14.145 Least Restrictive Environment (LRE). Pennsylvania's imperative for prioritizing and affirming least restrictive environment requirements through Chapter 14 regulations is clear and substantiated. In spite of the settlement of *Gaskin* and efforts of PDE, the statewide placement rate for students in settings outside of regular schools increased significantly in the last year (from 4.3% in 04-05 to 4.4% in 05-06). School personnel are unfamiliar with the *Oberti* and *Girty* requirements, and the Bureau of Special Education has had limited success in enforcement, in part, because those decisions have not been codified in state regulation. Much of the language in 14.145 is an effective and necessary restatement and emphasis of the federal requirements:

14.145(a)(1) which reads: "To the maximum extent and as provided in the IEP, the student with a disability is educated with students who are not disabled," largely restates federal law (34 C.F.R. §300.114(a)(2)(i)).

14.145(a)(2) which reads: "Special classes, separate schooling or other removal of a student with a disability from the regular education class [occurs only] when the nature and the severity of the disability is such that education in the regular education class with the use of appropriate supplementary aids and services cannot be achieved satisfactorily," is a restatement of 34 C.F.R. § 300.114(a)(2)(ii) and the Court's decision in *Oberti*.

14.145(a)(3) which reads: "No student shall be determined to require separate education because the child cannot achieve at the same level as classmates who do not have disabilities if the child can, with supplementary aids and services, make progress in the goals included in the student's IEP," is the holding of the federal district court in *Girty v. School District of Valley Grove*, a decision that was affirmed as legally and factually correct by the Third Circuit Court of Appeals. As the *Girty* Court stated (163 F. Supp.2d 527):

In *Oberti*, the Third Circuit stressed that the IDEA does not require disabled children to receive the same educational experience as nondisabled children, and recognized that disabled children may benefit from regular education differently than nondisabled children. Stated differently, the relevant focus is whether Spike can progress on his IEP goals in a regular educational classroom with supplementary aids and services, not whether he can progress at a level near to that of his nondisabled peers.

Please know that my esteemed colleague, Janet Stotland, of the Education Law Center and the attorney who represented the plaintiff in the appeal of this case, would welcome any request for clarification or question on this issue.

14.145(a)(4) which reads: "A student shall not be removed from or determined to be ineligible for placement in a regular educational classroom solely because of the nature or severity of the student's disability, or solely because educating the student in the regular education classroom would necessitate additional cost or administrative inconvenience," not only complies with caselaw, but with decidedly clear comments to the IDEA 2004 regulations.¹

Contrary to arguments made at and since the State Board of Education meeting in May, the proposed LRE regulations in no way exceed minimum legal requirements. They simply clarify, emphasize and make pre-existing mandates accessible to educators, administrators, and, most importantly, families. Such clarity between decision-makers involved in the lives of children is both desirable and necessary.

Once again, DRN expresses its appreciation for the opportunity to have played a contributing role in the development of Chapter 14 and its confidence that you will most seriously consider these present concerns.

Sincerely,



Ilene W. Shane, Esq.
Chief Executive Officer

¹ See 34 CFR Parts 300 and 301, Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities; at <http://idea.ed.gov/download/finalregulations.html> P. 46587--"Public agencies, therefore, must not make placement decisions based on a public agencies' needs or available resources, including budgetary considerations and the ability of the public agency to hire and recruit qualified staff." ... "These options must be available to the extent necessary to implement the IEP of each child with a disability. The group determining the placement must select the placement option on the continuum in which it determines that the child's IEP can be implemented in the LRE." P. 46588--"Although the Act does not require that each school building in an LEA be able to provide all the special education and related services for all types and severities of disabilities, the LEA has an obligation to make available a full continuum of alternative placement options that maximize opportunities for its children with disabilities to be educated with nondisabled peers to the extent appropriate. In all cases, placement decisions must be individually determined on the basis of each child's abilities and needs and each child's IEP, and not solely on factors such as category of disability, severity of disability, availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience."