

July 24, 2007

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Ms. Michelle Totino  
Regulatory Analyst  
Independent Regulatory Review Commission  
333 Market Street, 14<sup>th</sup> Floor  
Harrisburg, PA 17101

Subject: Input regarding the Board of Education's recommendations for revision of chapter 14 special education regulations\*

Dear Ms. Totino:

In December 2006, the Autism Society of Pennsylvania was most appreciative at being given the opportunity to present recommendations, within the rubric of the mandated process for the State Education Regulation revisions, on behalf of school-age Pennsylvanians on the autism spectrum. We were heartened that several of our suggestions were included in the Board of Education's published recommendations for changes to Chapter 14, such as retention of the Massachusetts autism language on items to consider for IEPs, and increased ESY protections and early eligibility. To us it was an indication of increased recognition by the Board that characteristics unique to autism require autism-specific additions and adjustments to the regulations and to state educational practices.

For the first time we began to feel that our efforts to provide input that would help assure appropriate education for our autistic children was valued by those entrusted with the responsibility to provide it.

You can imagine then our admixture of surprise and consternation regarding alterations that were made without warning to the Chapter 14 working drafts only minutes before the Board voted on passing its final draft. There was no opportunity for public discussion, hearings, or further Roundtable input regarding these unannounced changes.

The most disconcerting of the last-minute changes regard the use of restraints and aversives on children in schools. If chapter 14 is approved in the Board's proposed form, it will contain a new clause allowing physical restraint of children for under 30 seconds at a time, as well as endorsing the use of prone restraint holds in Pennsylvania's schools under certain circumstances. These changes severely weaken Pennsylvania's wise and longstanding tradition of protecting school age children from harmful and even deadly restraints, and undermine our state's commitment to proven,

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research-based, positive behavioral practices.


Many among our ASA-PA constituency have experienced the fear of sending a child to school, knowing that a behavior incident or a misapplication of the child's behavior plan could trigger a physical altercation and subsequent restraint on the child.

Our members are aware that children with autism have been killed by well-meaning educators and law enforcement officials who do not recognize the dangers associated with restraining a terrified, struggling, and often language impaired autistic child, who might also be physically impaired and/or medically fragile.

Imagine not being able to speak, not understanding social interactions, being afraid and suddenly having someone try to hold you down. Our children cannot and will not know how to respond to such restraint, other than by struggling to the point of exhaustion or unconsciousness. Such brutal restraint procedures are forbidden in residential care and treatment facilities for special needs Pennsylvanians of all ages. Why then should they be permitted to be vested upon school children?

The current regulations demand that schools hold a meeting within 10 days after an incident of restraint occurs. The new regulations, without explanation, remove this 10 day mandatory meeting, thereby denying parents the opportunity to participate in preventative planning for a child who has been restrained. We believe that the removal of this mandatory meeting will result in situations where parents will not be fully notified of incidents of restraint of their children. We suggest, reasonably, for those who removed this necessary meeting requirement to imagine, just for a moment, that the child involved is theirs.

The changes to the regulations are unacceptable – they will almost certainly lead to injuries and even deaths of children in the autism community. We have therefore added a new section to our comments that includes language defining best practice in the use of restraints and aversive techniques in schools.

  
Felicia Hurewitz, Ph.D.  
for Autism Society of America-Pennsylvania (ASA-PA)  
Special Education Work Group - Stacey Groder, Felicia Hurewitz, Marie McClay, Mary Mauer, Luciana Randall, Sabra Townsend, Dan Torisky

Cc: PA Board of Education  
***(\*)as presented, with attachments, at the IRRC and Board of Education hearing in Harrisburg, Wednesday, July 18, 2007***

Autism Society of America  
– Pennsylvania Chapter –

Request for Re-examination of  
Changes Made from the Working Draft to the  
Final Draft of the PA Special Education Regulations (\*)

July 18, 2007

*Request for Re-examination of Changes  
Made from the Working Draft to the Final Draft  
of the PA Special Education Regulations(\*)*

**The recommendations below address key areas that we urge you to reexamine:**

The burgeoning incidence of autism, 1 in 150 births, has increased the challenge of the mandated burden upon our state education system to provide education appropriate to the needs of students with autism. These additional recommendations, like those you've accepted, are offered to reduce this burden. They are logical, reasonable, and consistent with the Board of Education's function of putting in place standards and practices most likely to ensure appropriate education for all children in our state.

**Use of physical restraints in schools**

Restraint and aversive techniques pose a particular risk to individuals with autism. ASA-PA endorses the recommendations of the VALUE Coalition regarding the need to revise the language concerning restraints and positive behavior interventions in 22 Pa Chapter 14. The VALUE Coalition's well-reasoned, research-based position statement sets forth this recommendation with great clarity.

**The Special Education Appeals Panel and oversight of the Office of Dispute Resolution (ODR).**

At the roundtables for chapter 14, multiple comments were given regarding difficulties with the neutrality and with oversight of the Special Education Appeals Panels. The PA school board association and disability and parent advocate groups, uniformly called for the removal of the appeals panel and for a return to a single tier, streamlined efficient system for holding special education due process hearings and appeals. The March 14<sup>th</sup> draft of Chapter 14 regulations eliminated the special education appeals panel as requested. Inexplicably, the appeals panel was re-added to the regulations in the final draft.

We continue to recommend that the Special Education Appeals Panel should be eliminated. If it is not eliminated, we request increased oversight for the panel, as follows

- Currently ODR is guided by an advisory Panel that meets once a year. The minutes of the advisory panel meetings are not open for public review, nor are the meetings open for public comment. We request that the workings of the ODR advisory panel become open for public comment and review.

- Currently there is one member of the 15 person special education appeals panel who in a 2 year period authored 24% of Appeals Panel decisions. It is clear that individual, Perry Zirkel, is not neutral in his application of the law. This is well-known in the special education community. Consider the decisions of Perry Zirkel, analyzed over a 2 year period(\*\*)
  - he reduced compensatory education for parents in 10 cases and increased it minimally in 2 cases, for a net balance of a reduction in compensatory education by 5,211 hours.
  - he granted parental exceptions in only 12% of cases, while District exceptions were granted in 71% of cases.
  - he cites his own journal articles or reviews for legal authority to motivate his decisions in 48% of cases! (25 separate citations in 2 years.)

**(\*\*) see page 5 substantiation of above summary of Zirkel decisions**

**Assignment of compensatory hours**

Sum of changed compensatory by Zirkel decisions	-5211
Zirkel decreases compensatory	10 times
Zirkel increase compensatory	2 times (minimal hours)

**Out of 40 decisions, how often does Zirkel use his own publications as authority to render decisions?**

Total number of times Zirkel cites self for authority in making decisions	25
# of cases cites self	19
proportion cases cites self	47.5%

Decision outcome totals	excepted?	prevailed?
# of times Parents excepted HO decision	34	4
Proportion of times parents excepted HO decision and prevailed	11.8%	
# of times School excepted HO decision	21	15
Proportion of time Schools excepted HO decision and prevailed	71.4%	
# of appeals panel members	15	
Proportion of decisions determined by Zirkel over a 20 month period	23.8%	

ODR must be revamped so that it may be perceived as a neutral and fair body in determining special education case outcomes, which presently it is not. It is patently obvious that no one with a demonstrated bias should serve on the Appeals Panel or hold a contract as a hearing officer. There must be a mechanism for aggrieved individuals to file complaints and register comments with ODR. This must be done in order to assure fair and just handling of grievances, complaints and comments from affected parties.

**Autism Society of America  
– Pennsylvania Chapter –**

**Recommendations for Revisions to the Working Draft of the  
PA Special Education Regulations**

**April 2007**

**Autism Society of Pennsylvania Comments and Recommendations  
re: Working Draft of the State Education Regulation Revisions**

**Introduction**

April, 2007

The Autism Society of Pennsylvania is most appreciative at having been given the opportunity to present recommendations for the State Education Regulation revisions on behalf of school-age Pennsylvanians on the autism spectrum, as well as being invited to comment on your subsequent working draft. We are equally appreciative that several of our recommendations were included in this draft. To a grateful autism community in this state, it is an indication of increased recognition by the Board that characteristics unique to autism require autism-specific additions and adjustments within the Regulation.

We strongly urge that our recommendations be retained, namely the Massachusetts autism language on items to consider for the IEP; the ESY protections and early eligibility; and the strengthened behavior support language and stipulations.

**In addition to these updates you have already incorporated, below are recommendations in other key areas that we urge you to examine and reconsider for inclusion in the final Regulation revisions.**

The burgeoning incidence of autism, 1 in 150 births, has increased the challenge of the mandated burden upon our state education system to provide education appropriate to the needs of students with autism.

These additional recommendations, like those you've accepted, are offered to reduce this burden. They are logical, reasonable, and consistent with the Board of Education's function of putting in place standards and practices most likely to ensure appropriate education for all children in our state.

**Evaluation Timelines:**

- We respectfully request that the Board reconsider the proposal that Pennsylvania allow 60 school days for a special education evaluation. We have prepared a rank-ordered summary of the IDEA evaluation timelines for each of the 50 states, plus the District of Columbia (see **Appendix A**). Pennsylvania's proposed regulations leave it tied in *50<sup>th</sup> place* for how long it would take to evaluate our students suspected of a disability. Ten states have timelines approximately *half* as long as Pennsylvania's. Each day a child is waiting to be evaluated is a day of appropriate education lost to that child. (**§14.123 & §16.22(i)**).

**Definition of Autism:**

- The definition of autism should be modified in the Regulations to explicitly include the entire spectrum, including autism, PDD-NOS, Asperger's Syndrome, High Functioning Autism, and Rheft Disorder. If the definition does not include the



entire spectrum, then individualized services can never be appropriate. ('Definitions').

### **Disciplinary Considerations:**

- Children with autism have social delays and behaviors that can put them at grave risk for inappropriate disciplinary actions, such as repeated suspensions. Disability manifestations can result in criminal charges and incarceration. The following requirements will reduce the likelihood of damaging disciplinary measures:
  - require a functional behavior assessment and IEP meeting anytime a student is referred to police. (§14.133).
  - require inclusion of autism as a category where any removal from education for a disciplinary reason is a change in placement under §14.143, (the same as the category of mental retardation.)
  - require that Parents must be invited to any team training or consultations involving behavior support planning. (§14.133)
  - require disability specific training in the area of behavior supports for all staff. (§14.133)
  - require access for BHRS (behavior and mental support services and staff) for schools, per the BHRS plan. (§14.133)

### **Transition Imperative:**

- Require that an OVR representative be invited to be part of the IEP team for students of transition age. Most effective transition services are offered in real world, competitive employment and volunteer settings in the community or on-site vocational settings. (§14.131)

### **Extended School Year Imperative:**

- Require ESY services be consistent with all IEP goals, and allow for social and recreational experiences with non-disabled peers to the fullest extent appropriate. (§14.132)

### **Gifted with Disability:**

- Many students with autism are mentally gifted or have gifted areas of strength. Chapter 14 and 16 regulations must state that students may not be denied access to gifted programming or accelerated or enriched placements owing to a disability. Compliance complaints for gifted students with disabilities must be fully investigated. Identification procedures for gifted students must ensure that nonverbal, research based practices are employed to assess the cognitive strengths of students with autism without penalizing the students for their disability. (§16.22-3, §16.32 and we suggested adding a new section to chapter 14 regarding dually exceptional students.)

**Appendix A**  
**Current Timelines for an Initial Evaluation under the IDEA, by State**

A.

Of the 50 states and District of Columbia, only the District of Columbia has a longer timeline for an initial special education evaluation than PA. Six additional states have regulations that are equivalent to PA's 60 school day timeline from consent to evaluate. The remaining 43 states have shorter timelines. Ten states, including Michigan, Massachusetts, the Carolinas, Minnesota and Tennessee have timelines that are approximately half as long as PA's. Below, the states are ranked by length of timeline, from shortest to longest.

rank	state	timeline	notes
1	South Dakota	25 school days	S.D. State Performance Plan for Special Education
2	Tennessee	evaluate and implement IEP within 40 school days	Tennessee regulations 0520-1-9-05
3	Alaska	45 school days to evaluate and develop an IEP	
6	Massachusetts	30 school days	603 CMR 28.04
6	Michigan	30 school days	(MARSE) R340.1721c(2)
6	Minnesota	30 school days	
7	Washington	35 school days	WAC 392-172-104(2)(a)
11	Idaho	60 calendar days between consent & implementation of IEP, not including school holidays greater than 5 days	Idaho Special Education Interim Manual 2005: chapter 1(8)(E).
11	New Hampshire	45 calendar days	from Parent referral to referral meeting -- 45 calendar days.
11	North Carolina	45 calendar days	
11	South Carolina	45 calendar days	
12	Kentucky	60 school days for evaluation and implementation of IEP	707 KAR 1:320 (proposed regs keep this provision)
13	New Jersey	IEP implemented within 90 calendar days of consent to eval.	N.J.A.C. 6A:14-3.4(e)
14	New York	60 calendar days [State performance plan 2005-2010: <a href="http://www.vesid.nysed.gov/sp-edaled/spp/2007plan/childfind.htm">http://www.vesid.nysed.gov/sp-edaled/spp/2007plan/childfind.htm</a> ]	Proposed: 60 school days from consent for eval. to implementation <a href="http://www.vesid.nysed.gov/speciale d/idea/expresssterms307.htm">http://www.vesid.nysed.gov/speciale d/idea/expresssterms307.htm</a>
37	Alabama	60 calendar days	same in proposed regs 290-8-9.02(1)(b)
37	Arizona	60 calendar days	
37	Arkansas	60 calendar days	
37	Delaware	lesser of 45 school days or 90 calendar days (from Delaware ANSES)	Delaware proposed regulations keep this provision the same 925-2.3
37	Georgia	60 calendar days	proposed new regs keep this timeline, with the following rationale, "In the 2005-2006 school year, 85 % of the evaluations were completed within the 60 day timeline. To extend that timeline to more days or from calendar to school days, would delay getting services to students who are struggling learners."
37	Hawaii	60 calendar days	(HAR) §0-56-32
37	Illinois	60 calendar days	
37	Iowa	60 calendar days	
37	Maryland	60 calendar days from consent, 90 days from written referral, deadline whichever comes sooner	
37	Mississippi	60 calendar days	Proposed regs: 60 calendar days excepting school holidays over 3 days long [Mississippi draft policies 2006 Regarding children with Disabilities under the Individuals with Disabilities Education Act Amendments of 2004 (IDEA 2004)]
37	Missouri	60 calendar days	same in proposed regs
37	Montana	60 calendar days	
37	Nebraska	60 calendar days	
37	New Mexico	60 calendar days	
37	North Dakota	60 calendar days	In 2005-2006, 88% of evaluations made 60 day deadline; 95% either made cut-off or had an 'approved' reason for delay in eval. North Dakota FFY 2005 - 2010 State Performance Plan for Special Education
37	Ohio	60 calendar days	
37	Oklahoma	60 calendar days	
37	Texas	60 calendar days	
37	Utah	60 calendar days	
37	Vermont	60 calendar days	
37	West Virginia	60 calendar days	
37	Wisconsin	60 calendar days	
37	Wyoming	60 calendar days	Wyoming State performance plan <a href="http://www.k12.wy.us">www.k12.wy.us</a>
42	Colorado	45 school days	same in proposed regs
42	Connecticut	45 school days	proposed regs: 60 calendar days
42	Maine	45 school days	
42	Nevada	45 school days	
42	Rhode Island	45 school days	proposed 60 calendar days
43	California	60 calendar days except does not include vacations of 5 days or more	
50	Florida	60 school days	
50	Indiana	60 instructional days	
50	Kansas	60 school days	
50	Louisiana	60 business days	
50	Oregon	60 school days	581-015-0072 (13)
50	Pennsylvania	60 school days	proposed: 60 school days
50	Virginia	65 business days (from referral, not consent)	
51	District of Columbia	120 calendar days to evaluate and place student	