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Pennsylvania School Boards Association

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INDEPENDENT REGULATORY
REVIEW COMMISSION

July 27, 2007

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Mr. Kim Kaufman
Independent Regulatory Review Commission
333 Market St. 14th Floor
Harrisburg, PA 17101

Dear Mr. Kaufman:

Enclosed are the comments of the Pennsylvania School Boards Association regarding the State Board of Education's proposed revisions to the Chapter 14 regulations for special education services and programs, as published in the June 30, 2007 issue of the *Pennsylvania Bulletin.*

The association appreciates the opportunities that the State Board has provided to the many stakeholders in this process, and believes that the board has done a commendable job in crafting this proposal within the timeframe that was necessary to meet federal compliance requirements.

Our comments are presented following many thoughtful discussions with school directors and administrators, school solicitors and others who work directly with special education issues. PSBA's goal is to assist in the development of these revisions to Chapter 14 in a manner that will enable public schools to provide students with the services they need using procedures and rules that are clear and appropriate.

Thank you for your consideration of these comments. Please contact me if you have any questions or would like to further discuss any specific issues.

Sincerely,

Emily Leader
Deputy Chief Counsel

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INDEPENDENT REGULATORY
REVIEW COMMISSION

Comments on Proposed Rulemaking of the
State Board of Education

22 PA. Code, Chapter 14

Special Education Services and Programs

[as published for public comment in the Pennsylvania Bulletin,
June 30, 2007, 37 Pa. B. 2961]

Comments prepared by
Emily Leader, Deputy Chief Counsel
Pennsylvania School Boards Association

The Pennsylvania School Boards Association welcomes this opportunity to comment on the Pennsylvania State Board of Education's proposed revisions to Chapter 14 of Title 22 of the Pennsylvania Code relating to Special Education Services and Programs.

We have worked with many different people during this process, including school district lawyers and administrators. We have also considered the comments from other groups that have given input during this process. In the course of this many concerns have been laid to rest and some have surfaced.

Summary of PSBA's Comments on the Chapter 14 Revisions

There are sections in the proposed amendments where, in an effort to highlight certain requirements of IDEA and the Early Intervention Services Systems Act, the language used arguably misstates or oversimplifies the requirements of the law. This creates unnecessary ambiguity and opens the door for litigation over the meaning of the language and whether it accords different rights from those in the primary sources.

There are a number of places where the proposed amendments attempt to address the legal requirement that disabled students be educated with nondisabled students in a way that misstates the requirement, creating a likelihood of litigation against school districts when a particular student should, in fact, be receiving special education outside of a regular education classroom.

PSBA strongly supports the State Board's decision to retain the 60 school days period for completion of evaluations. Completion of a thorough and appropriate evaluation is necessary to the development of an appropriate IEP.

We continue to question the practicality of the provision requiring schools to provide parents with a written evaluation request form if they orally request their child be evaluated. We are unsure what will constitute an oral request and anticipate litigation over the duration of compensatory education and for violation of this provision based on true miscommunication or misunderstanding. PSBA urges the board to consider that the true issue here is one of ensuring school entities conduct adequate child find and ensure parents are routinely and generally made aware of the procedures for securing a child's evaluations. This provision as written is unworkable.

There is concern about the state board's decision not to incorporate by reference 34 CFR 300.518, an action which would resolve anticipated litigation over the status of children transitioning from early intervention, Part C programs to Part B preschool programs and beyond when parents dispute the new program.

In order to mitigate the increased costs associated with recruiting qualified paraprofessionals, PSBA seeks further clarification on which individuals will be considered "instructional" paraprofessionals requiring higher qualifications. There is serious concern about the availability of qualified applicants and the expense associated with these new qualifications.

PSBA suggests that the language on parents' access to classrooms in conformance with school policy should be moved to Chapter 4 as it does not just apply to students with disabilities.

PSBA urges the state board to adopt regulations relating to the minimum qualifications, training, standards of conduct and evaluation of hearing officers and members of the Special Education Appeals Panel (appeals panel). PSBA seeks regulation prohibiting the practice of using fixed appeals panels and a move toward requiring a majority of the entire membership of the appeals panel sign off on decisions in order to create a body of law school districts and parents can follow.

PSBA Comments on Specific Sections

§14.101. Definitions

Early intervention services –

This proposed definition creates ambiguities and a potential conflict between the regulation and the underlying statutes. The definition section of the Early Intervention Services Systems Act ("Act") includes a comprehensive, 38-line definition of early intervention services, 11 P.S. §875-103. This definition in turn incorporates whole sections of the IDEA regulations. The effort to summarize this complex definition fails to include many relevant components and is potentially misleading. For example, the provision regarding least restrictive environment ("LRE") as it applies to eligible young children is very nuanced, stating that such services:

> 7) Are provided in the least restrictive environment appropriate to the child's needs. Infants, toddlers and eligible young children who will be served in a non-home-based setting must, to the maximum extent consistent with the child's abilities, receive early intervention services in a setting with nonhandicapped children. Each infant's or toddler's IFSP and each eligible young child's IEP must contain the recommended service option placement and the rationale for why it represents the least restrictive environment.

11 P.S. §875-103. In the proposed definition, words like, "appropriate to the child's needs," and "to the maximum extent consistent with the child's abilities" are missing, and the only effort to reference a necessary continuum of placements is a nod to the fact that LRE might be in the child's home. Thus, the requirements of 34 C.F.R. 300.115 (continuum of alternative placements) and 34 C.F.R. 300.116 (Placements) are inadequately represented in this definition.

It is our conclusion that there is no adequate way to convey all aspects of the definition of early intervention services in a summary definition. PSBA urges the board to withdraw the definition in the proposed regulations and insert the definition, "<u>As defined in the Act at 11 P.S. §875-103.</u>"

§14.102. Purposes. (a)(1) (iii) and (iv); (a)(2)

(a)(1)(iii) PSBA appreciates that this language closely conforms to 34 C.F.R. §300.114, the Federal regulation setting forth the "least restrictive environment" standard.

(a)(1) (iv) This does not make sense as written. The apparent intent, which is fine, is to make clear that once a child's individualized education program has been developed by the IEP team, that child shall have available a continuum of placement options that will make it possible to properly implement the IEP. Instead, this suggests that an individual IEP must contain a continuum of placements. This section better express the purpose if it tracks the language of the federal regulation, "Each school entity must ensure that its students have access to a continuum of alternative placements to meet the needs of children with disabilities for special education and related services."

(a) (2) PSBA fully supports the state board's decision to incorporate by reference numerous sections of the federal regulations as an efficient and clear way of ensuring compliance with state and federal law. However, we have serious concerns about the decision not to incorporate 34 C.F.R. 300.518 into the Chapter 14 regulations.

The United States Court of Appeals for the Third Circuit ruled in *Pardini v. Allegheny Intermediate Unit,* 420 F3rd 181 (3rd Cir. 2005) that children transitioning from the more home-based therapeutic Infants-and-Toddlers program under Part C of the IDEA to the more school-based preschool program under Part B, retain the right to have these more therapeutic Part C services maintained during the litigation of any dispute with a Part B agency about preschool services. This ruling was contrary to the long-standing position of the United States Department of Education that IDEA's "stay put" or "pendency," provision does not apply to the transition from Part C to Part B services. Because the court held otherwise, preschool service providers now find themselves providing expensive therapies, often home-based -- which are not appropriate to preschool-aged children receiving Part B services -- either to avoid protracted litigation or during the pendency of litigation over the preschool program. The final regulations implementing IDEA 2004 explicitly addressed this issue at 300 C.F.R. §300.518(c) and makes clear that stay put does not apply to transition from Part C to Part B services. However, the State Board did not incorporate this provision by reference. The Department of Public Welfare oversees Part C programs while Part B programs fall under the Pennsylvania Department of Education's jurisdiction. If left as it, it is likely that Part B funding will be diverted to providing Part C services to preschool-aged children. PSBA anticipates that this will further spill over into school-aged children's IEPs, as parents continue to dispute a program and retain pendency in Part C programs. There is a significant cost to providers that is not accounted for in Part B funding, but more importantly, this ignores the IDEA's inherent scheme that anticipates services should shift at age three from intensive therapeutic modalities to preschool services geared to readying a child for school.

§14.104(b)(4) Special Education Plans (paragraph on continuum of placements)

Again, this is confusing as written and it should read, "The full continuum of alternative placements available to the school district to meet the needs of children with disabilities for special education and related services."

§14.105 Personnel (a) (paraprofessionals); (e) definitions and caseload chart

(a) PSBA anticipates that school districts will incur significant increases in costs in connection with the requirements for instructional paraprofessional qualifications and will find it very difficult to find qualified applicants for these positions. At a minimum, this should be clearly limited to those paraprofessionals providing direct instruction to children and should exclude personal aides or paraprofessionals who support a student, teacher or classroom but do not provide any direct instruction.

(e) It is PSBA's understanding that this section will be revisited in that there is confusion and controversy throughout the education community on its meaning and implementation. PSBA will actively work toward an acceptable revision. It is crucial that any revisions carry out the stated intent of the State Board, that this section will translate into a staffing equivalent to the current Chapter 14 caseload provisions found at §§14.141 and 14.142. In fact, given that school entities understand and have implemented the current chart for many years, the best resolution appears to be to retain the current chart, possibly changing the terms used in the headers to more contemporary language that means the same thing.

§14.108. Access to Classrooms.

PSBA notes that if the board determines parents should have reasonable access to their child's classroom(s) this is really a general education issue more properly placed in Chapter 4.

§14.123. Evaluation. (b); (c) (60 school days) (oral requests)

(b) We commend the board for retaining a 60 school day period for completing an evaluation. PSBA recognizes that a number of groups have argued for a shorter period on the grounds that a student will receive required services sooner. However, a proper evaluation may require multiple kinds of tests, classroom observation, acquisition and retention testing conducted over a period of days or weeks and so forth. The present system has served students well, ensuring that proper and thorough evaluations are completed in a reasonable time frame.

(c) It is unclear to PSBA what constitutes an oral request for an evaluation such that the requirements of this provision are triggered. Our concern is that litigation will arise over the amount of compensatory education due to a student, based on an allegation that a parent requested an evaluation orally and the school district failed to provide them with a form within five days. This also references an "evaluation request form," which does not currently exist. Is the intent that a "Permission to Evaluate" form be given to the parent orally seeking an evaluation? We believe that a strong child find effort, together with ongoing parent education is the proper way to ensure parents know how to secure an evaluation. The provision as written is simply unworkable.

§14.131. (c) IEP (re: LEA team member)

PSBA disagrees with some comments that the state regulation should specify that the LEA representative must be a specific administrator. The regulation is clear as to the

knowledge this team member must have. If an individual assigned to this position does not meet the criteria of 34 CFR 321(a)(4), this is a compliance issue.

§14.133. Behavior Support.

It is PSBA's position that the current federal regulations on behavior support are now strong enough to address student and school needs. These have been incorporated into the proposed amendments and properly serve the needs of students and school entities.

§14.145. Least Restrictive Environment.

PSBA strongly supports both the philosophy and requirements of IDEA's least restrictive environment maxim. However, it is our position that some of the requirements of this section go beyond or fail to properly articulate the LRE requirements of 34 CFR 300.114 as interpreted by *Oberti v. Board of Education of Clementon*, 995 F. 2d 1204 (3rd Cir. 1993). *Oberti* set the legal standard for determining whether the LRE requirements of IDEA have been met in an individual case. No subsequent Third Circuit or United States Supreme Court case has expanded or overruled *Oberti.* The amendments as written are likely to cause students to be placed inappropriately in violation of IDEA and to retain them in classes when it is clear that they are no longer deriving meaningful educational benefit from an IEP even though it was supported with appropriate supplemental aids and services. Specifically, the paragraphs do not mention that placements are to be made to the maximum extent "appropriate" the student will be educated with nondisabled peers.

As written, the amendments suggest that the proper standard for determining whether a student can be educated in a regular education setting is if the student can, with appropriate aids and services, make progress in the goals included in the student's IEP. While it is true that a student must make progress toward the goals in an IEP to receive a free and appropriate public education, it is our concern that people will argue de minimus or trivial progress in the IEP supports maintenance of a student in a regular education class. For any student to receive FAPE, the IEP must provide significant learning and confer meaningful benefit, gauged in relation to a student's potential. *See, Ridgewood Board of Education v. N.E.,* 172 F. 3rd 238, 247 (3rd Cir. 1999). To ensure that students are in fact provided with FAPE in the LRE appropriate to their needs, PSBA requests the following changes to subparagraphs §14.145 (a) (1) and (3):

(1) To the maximum extent appropriate, children with disabilities must be educated with children who are nondisabled.

(3) A student with disabilities shall only be removed from a regular education setting if the student cannot derive significant learning and meaningful educational benefit from specially designed instruction and supplemental aids and services provided pursuant to an appropriate IEP.

PSBA further notes that §14.145 (a)(2) seems to be missing some words and does not make sense. Because of a lack of certainty what was intended to be communicated in this paragraph, we do not offer any proposed revision.

§14.146. Age Range Restrictions.

The term, "specialized settings," which is new to this section needs to be defined. It only appears to be defined in the Early Intervention section of the regulations.

_§14.162. Impartial Due Process Hearing and Expedited Due Process Hearing.

There is a split among school entity attorneys in Pennsylvania regarding the continued viability of the Special Education Appeals Panel. Some believe this inexpensive process is of value to parties, but that the system should be revamped to create precedential decisions that parties could rely on in pursuing cases. Others argue this system is no longer viable at all due to perceived bias, regular splits of opinion among the panels that result in confusion and uncertainty, occasionally injudicious behavior and the sense that one can routinely predict, based on which panel gets a case, whether the school district or the parent will win. The current proposal restores the second tier appeal. PSBA urges that language be added to forbid the practice of having fixed panels and require that a majority of Appeals Panel members must sign off on decisions. Qualifications for Appeals Panel members should be established by regulation, together with annual training requirements identical to those recommended below for hearing officers. Appeals Panel members should be subjected to peer review of decisions and conduct.

Regulations should also set out and strengthen the qualifications, objectivity and continuing education of special education hearing officers. Hearing officers should be required to follow articulated standards of conduct and be subjected to peer review of hearing decisions and conduct. Parents, parent attorneys, advocates, LEAs and their attorneys should be involved in the revision and maintenance of a fair and high quality hearing and appeals system.

Hearing officers and Appeals Panel members should be required to annually receive a specified number of hours of training on legal and educational issues as follows:

- Trainings to include at least:
    1. Update of legal developments;
    2. Update from the Pennsylvania Department of Education, whose representatives shall be invited to present and or attend every training;
    3. Internal operating procedures;
    4. Early childhood development;
    5. Educational assessment; and
    6. Areas of hearing officer qualification as identified in IDEA and implementing regulations.
- Training regarding educational practices and theory to be coordinated with state and PaTTAN trainings in order to ensure maximum consistency among educators, state standards, LEA practices, and hearing officer decisions.

- Individual hearing officers and Appeals Panel members must participate in at least ___x__ hours of special education trainings offered through PaTTAN each year.

With regard to the incorporation of the administrative procedures of Title I Pa. Code Part II, PSBA sees this as a promising step in the right direction. However, due to the specialized nature of due process hearings and the timelines involved, some of the provisions should be expressly modified to fit the unique nature of these hearings. For example, it might not be possible to submit written motions five days before a hearing when the hearing must be held within thirty days of filing the complaint. This will require more in depth analysis to ensure the federal procedural requirements incorporated by reference into these amendments mesh with the state rules of administrative practice and procedure.