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July 30, 2007

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

Re: Revision of Chapter 14 of the Regulations of the State Board of Education

Dear Mr. Buckheit:

The Pennsylvania Association of School Administrators ("PASA") represents chief school administrators and other staff who have general responsibility for the operation of school programs. Our members have a vital interest in special education programs and the regulations which govern them. They are particularly sensitive to the need to meet the special needs of students with disabilities within the context of the full school program. They seek regulations that are clear to all, relatively easy to administer, and make pedagogical sense both for the students who directly benefit from special education programs and services and their classmates.

A committee of PASA members with direct experience in special education has reviewed Chapter 14 and is pleased to make the recommendations discussed below. As a general guide, the PASA committee focused on those state regulations required to be promulgated under IDEIA and offers language to clarify those federal regulations. The committee also recognized that Pennsylvania has a history of placing higher requirements on schools and granting greater rights under state law than required by federal law. PASA urges the State Board to exercise restraint in adding new or continuing old regulations in excess of the comprehensive federal scheme. This is consistent with the IDEIA requirement that each state minimize the number of rules, regulations and policies to which the local educational agencies and schools located in the state are subject under this title. (20 U.S.C. § 1407(a)(3)).

The federal government now directs public education, including regular and special education, in a way it did not when Pennsylvania first began its pioneering efforts in special education. The companion statutes of *No Child Left Behind* and the *Individuals with Disabilities Improvement Education Act* are a comprehensive scheme. Programmatically, the specific alignment of IDEIA with NCLB emphasizes the ascendancy of results and accountability over least restrictive environment. Whether a child achieves satisfactorily must now be determined by reference to proficiency, as that term is understood under *No Child Left*

Behind. For this reason and others, we suggest that the Board not expand the regulations to include the specific elements of the *Gaskin* consent agreement.

Despite the statutory commitment to special education, the federal government has never met its 40% share of the costs of special education; it now pays approximately 18%. In addition, the Commonwealth has abandoned its prior formula of paying excess costs associated with operating special education programs. Further, Act 1 now limits school districts' access to local resources. The program and procedural requirements governing special education must even more than in the past be sensitive to the availability of resources for schools and the competing needs of other school programs.

With this background, we offer the following comments on specific sections of Chapter 14 as published in proposed form on June 30, 2007.

Section 14.101. The Board has not proposed to amend the definition of developmental delay. We think it should be amended. The developmental delay category and the needs normally identified in preschool are not as precise as the disability categories in Part B. The definition of developmental delay is particularly broad in Pennsylvania's current regulations when compared with other states. We suggest that the definition should be amended to read "a delay of at least 33% in 1 or 25% in 2 or more developmental areas with a resulting adverse affect on the ability of the child to participate in developmentally appropriate activities and a need for special education."

Section 14.104(b) PASA recommends a revision of subsection (4) to track the language of 34 CFR 300.115 by deleting the phrase "as required by the student's IEP" and substituting the federal language "access to a full continuum of educational placements to the needs of children with disabilities for special education and related services" .

PASA also recommends that you amend subsection (5) by making it clear that the determination of disproportional representation is made by the Department of Education. It should read:

"Policies and procedures designed to prevent the inappropriate over-identification or disproportionate representation by race and ethnicity of children with disabilities, for those school districts which the Department has identified with statistically significant disproportionality in accordance with 34 CFR 300.646(a)

14.104(i) requires reporting of information in such form and at such times as required by the Secretary. This gives broad discretion to the Secretary to require burdensome reporting. The regulation should set a maximum of semiannual reporting.

14.105

(a) Proposed section 14.105(a) requires that instructional paraprofessionals "hired by a school entity on or after July 1, 2008 must have completed "at least 2 years of post-secondary study," or "possess an Associate Degree or higher." This requirement exceeds NCLB and

should be changed to mirror the language in NCLB. The regulation should recognize the difficulty school districts have in filling these positions and should not make the staffing of IEP's even more difficult.

The subsections of 14.105 are not parallel and should each represent an enumerated job or professional category.

(e) To parallel the other subsections, this subsection should be "special education teacher" and should begin with,

"A special education teacher is a school employee whose caseload shall be determined according to the following restrictions as set forth in the chart describing the percentage of time in an instructional day that students on the caseload are receiving "direct services." In interpreting the caseload charts, the following definitions apply;"

(e)(5) the decision/determination to withdraw approval is an adjudication. This should be recognized in the regulation by adding a sentence at the end of this subsection making that explicit. It could read: "The school district shall be afforded the right to an administrative hearing under the Administrative Agency Law prior to the withdrawal of the approval by the Department.

14.107

The complaint process should be promulgated by the Department as a standard pursuant to the Commonwealth Documents Law and not adopted as a Basic Education Circular, which does not afford the stakeholders the opportunity to comment on and review the proposed procedures. The regulation should explicitly require this formal process of adoption. There are important property rights at stake, which should trigger the safeguards of the Administrative Agency Law if, for example, a school district is ordered to provide or pay for compensatory education or is ordered to provide a less or more restrictive placement. Under federal regulation, a third party, who is not the parent, may file a complaint. Confidentiality guarantees and restricted access to confidential education records under FERPA must be embedded in the procedures. These are simply examples of the required recognition and conflict of parental, school district, and third party rights that must be addressed. The State Board should prescribe in this sub-section the minimal protections to be afforded in the process of investigating complaints, ordering corrective action, hearing appeals, and protecting the confidentiality of student records.

State Complaint Procedures. The current IDEIA regulations and the prior regulations both require and required the State to adopt written procedures for resolving a complaint. §300.151, .152. A complaint process has been implemented by the Division of Compliance ("DOC") without the districts having the benefit of written procedures. Internal procedures exist, but are not made available to the districts or parents.

The process of investigation and the manner of reconsideration are not uniform from region to region or investigator to investigator. During reconsideration, the supervisor may or

may not review independently the findings of the original investigator. In some circumstances, the same investigator may conduct the "independent" reinvestigation based on the exceptions filed. The timeline for a request for reconsideration is currently ten days from the date of the comprehensive investigation report ("CIR"), which may be earlier than the actual mailing date. This right of reconsideration is first communicated in the CIR.

The investigation process is flawed. The school district has no opportunity to interview the witnesses making allegations. The complaint itself may not be shared unless the school official knows to make such a request. Although the district may be ordered to take corrective action, no right to an administrative hearing is offered. The Department takes the position that the CIR is not an "adjudication" and may not be appealed to the Commonwealth Court. Although there is no written notice of the right, in at least some instances, the Department has granted an appeal to the agency head and an administrative hearing.

Regulations are required to address the following: requirements to determine the sufficiency of a complaint; the method and scope of investigation; the district's obligation to present witnesses; a district employee's right to have union representation at the questioning, how the confidentiality of the student's education records will be maintained if the complainant is a third party and, in such circumstances, district's obligation to notify affected parents; the timelines (based on mailing date) and the scope and standards for reconsideration; and the restricted nature of the remedies that will be demanded as corrective action.

The regulations should state that if the CIR orders compensatory education services to be provided or reimbursement to the parent for tuition paid to a private school, then the right to a hearing before the agency head under the Pennsylvania's Administrative Agency Law or for the district to request a due process hearing should be set forth in the regulation. The regulations should explain that, in such cases, either the due process hearing or the administrative hearing is *de novo,* that is, based on the record made at the hearing and standard of proof of those hearings.

These new written procedures and the transparency and interchange associated with the Commonwealth Documents Law should result in the perception of greater fairness and uniformity in the operations of the DOC investigators.

14. 108

PASA recommends the deletion of 14.108. The regulation essentially requires that each school district draft a policy of parental access to the classroom. Such a policy has major FERPA implications as well as necessitating, at a minimum, impact bargaining with the teachers' union. If parental access is to be required to classrooms, this is not a subject where the State Board should bestow special rights on parents of children with disabilities. This provision is misplaced in Chapter 14.

Section 14.122. Each state is required to establish criteria for eligibility under the category of "specific learning disability". Pennsylvania has experience using Response to

Intervention (RIP) models as part of the screening and evaluation process, as well as a discrepancy between a student's tested potential and performance. We support the language of the regulation which continues to encourage the use of response to instruction models but does not exclude the use of the data and analysis that comes from applying discrepancy definitions of specific learning disabilities. Most Pennsylvania school professionals are comfortable with the concepts of RIT and its tools through Pennsylvania's extensive experience with instructional support in regular education. We therefore suggest that the regular education assessment system be used to drive adjustments to core and remedial instruction and that the required use of the Instruction Support Team be limited to interventions around behavioral or functional performance.

Section 14.123(b). Thank you for retaining the Pennsylvania rule that the evaluation report must be completed and presented to the parents no later than 60 **school** days after the agency has received the formal written parental consent to perform the evaluation. The tolling of time by school days rather than calendar days is important.

An evaluation is a process, not an event. It takes time. And it takes time in the school culture where the student can be observed in the schools' academic and schools' social settings. This is even more important given the emphasis on response to intervention as a preferred strategy for evaluating specific learning disabilities.

Evaluations are labor intensive and involve a number of school professionals. It is especially difficult and an added cost to convene the multi-disciplinary team outside of the school calendar. Even where funds are available to pay for additional staff time, key professionals are frequently not available over the summer and other school holidays to participate in team meetings.

In many parts of the Commonwealth, requiring all evaluations to be completed in a shorter time simply is not feasible. There are substantial regional shortages in several of the professions needed to participate in the evaluation process—school psychologists, speech therapists in particular. A requirement to have all evaluations completed within 60 calendar days will result in additional costs to bring in additional staff where they can be found, and greater non-compliance where they can't. We commend you for maintaining the current requirement.

Section 14.131 (b) Transition services. We like Pennsylvania's current approach to transition services and our starting age of 14. The new federal requirements call for a more proscriptive transition process beginning at age 16. We recommend maintaining the current program for 14 and 15 year olds. It is very useful to begin a transition discussion with parents and within the IEP team at age 14. But we recommend **not** adopting the prescriptive content of the federal regulation until it is required for 16 year olds.

Section 14.133(a) The phrase "student with disabilities" should be used rather than simply "student." If the reference to "free from demeaning treatment" is maintained the phrase "demeaning treatment" should be defined.

(b) "Positive techniques" is defined by using the phrase again as part of the definition. This is not helpful in conveying meaning for a term of art. The definition of "Restraint" excludes "devices, objects or techniques prescribed by a qualified medical professional for reasons of safety." "Qualified medical professional" is not defined. Such exclusions should apply if recommended by a qualified educational professional, such as an occupational or physical therapist, for reasons of safety in the educational setting.

(c) (1) As written, this section is very confusing. This section anticipates agreement of the parties on the emergency use of restraints in the interest of the student's or other students' safety. If there is such an agreement in the IEP, and notice of the use in a particular situation should not necessitate consent for future uses. If the parent's refuse to consent there should be a provision for the districts' override of parental lack of consent in certain circumstances to protect others from physical injury or the student from self injurious behavior.

Section 14.142(f) establishes maximum age ranges for elementary and secondary special education classrooms. The current standard requires each student's IEP team to justify placement of an individual child outside the age range. This provision goes beyond IDEIA. Section 14.142(f) should be revised to allow school districts to request the Department of Education's approval of defined criteria to be applied by the IEP team to permit exceptions to the age range maximum. The revised regulation should establish criteria for Department approval of exceptions such as, functional and academic similarity among the children to be placed in the class, the absence of available alternatives within a reasonable distance from the homes of the children, and plans for instructional grouping within the class to take into the account the social and emotional differences that might exist between the youngest and oldest of the children.

Section 14.143 (a) PASA recommends that the State Board align its regulations with the federal definition of "change of placement" in 34 CFR 300.536. The State Board's definition is both over and under inclusive.

In the IDEIA and its implementing regulations, the area of disciplinary placements has been comprehensively regulated by the federal government. (Section 300.530 - .536) The federal balance has shifted toward school safety and case-by-case review of disciplinary situations. Pennsylvania's rigid requirement of an arbitrary 15 cumulative school days constituting a change of placement is contrary to the federal regulation. Section 300.536 specifically authorizes the public agency, on a case-by-case basis, to determine when a pattern constitutes a change of placement. The federal statute establishes that the first 10 days do not constitute "a change of placement." 300.536(a)(2); 300.530(b)(3). The 11th day may require a functional behavioral assessment or revision of the behavioral intervention plan. 300.530(b) (2)(d)(4). In the event that the school district on day 11 or earlier engages in a functional behavioral assessment and the development of a behavioral intervention plan, the behavior pattern has been addressed and the time clock should be reset. The behavioral intervention plan should be permitted to operate and be refined or amended without a presumption of change in placement. The ability to suspend will benefit both the student and

the school district in permitting time to either redesign the behavioral plan to change the behavior or to work "as is". Explicit language should permit a district that has made a material change in the IEP program or placement to address the behavior after the 10th cumulative school day to reset the clock until at least the 20 cumulative school days before an irrebuttable legal presumption of change in placement.

Section 14.143(b) is theoretically based on the PARC Consent Decrees. Those Consent Decrees are founded on constitutional due process and equal protection. The two Consent Decrees require the state to interpret specific provisions of the School Code to afford equal educational opportunity and access to students with mental retardation. The one day rule for "change of placement" obviously predates the comprehensive disciplinary scheme in IDEA and IDEIA defining change of placement for all students with disabilities. The PARC Consent Decrees interpreted sections of the School Code that were used to preclude access to elementary school, access to homebound instruction and access to tuition payment in private schools. Section 1318, the disciplinary section of the School Code, is not cited or discussed in the PARC Consent Decree. The legal basis is premised on equal protection of the laws and nondiscrimination against students identified with mental retardation. On the contrary, Section 14.143(b) distinguishes students with mental retardation from all other disabilities.

The PARC Consent Decrees dealt with the entry provision (Section 1304) that was used to exclude students with mental retardation from beginning school and compulsory education provisions (Section 1330 and 1326) that were employed to exclude students before and after a certain age from school. Nothing in the PARC Consent Decree deals with the School Code provision on suspension and expulsion and its use to remove special education students. Nothing in the PARC Consent Decree defines a suspension to constitute a "change of placement." That term can be defined by reference to federal law as 10 days, as it is for all other categories of disability. This is consistent with the incorporation of federal exceptional circumstances which are already a party of this regulation. There is no theoretical or legal basis in the PARC Consent Decree to distinguish students with the disability of mental retardation from all other students in the handling of disciplinary suspensions. As a result, this Section 14.143(b) should be omitted. The amendments in the proposed regulations referencing the federal discipline sections as controlling are an improvement as they recognize the supremacy of those explicit requirements and the discretion granted to school districts.

Section 14.145 LRE Requirements. Rather than simply incorporate by reference 34 CFR 300.114, this new regulation arguably creates a new state standard that may conflict with the federal regulation. Subsection(1) includes a reference to the child specific IEP, which is confusing in the context of the general requirement of LRE. Subsection (3) interprets the phrase "achieved satisfactorily" without reference to AYP as is required by federal law and substitutes the lowered expectation of "make progress in the goals included in the student's IEP." This state standard ignores NCLB and improperly elevates LRE above what progress should be deemed necessary for the student with disabilities. Under the federal law, LRE is not measured by progress toward the goals of the IEP. Subsection (4) repeats subsection (2) without adding meaning. In the context of the *Gaskin* monitoring, this new standard, which

conflicts with the federal standard, is particularly problematic. PASA recommends the deletion of 14.145.

14.146 Age Range Restrictions

The term "specialized settings" should be defined.

Section 14.154(g) - Pendency within Part C and Part C to Part B. The application of stay-put provisions in Sections 615(j) of IDEIA and Section 300.518(a) of the federal regulations should not be applied to early intervention services received by the child under Part C. The explicit federal language in the regulations applies only to a child's placement under Part B. It does not grant pendency rights in the transition within Part C or from Part C to Part B programs.

Under the prior regulations, the United States Court of Appeals for the Third Circuit ruled in *Pardini v. Allegheny Intermediate Unit*, 420 F.3d 181 (3d Cir. 2005) that children transitioning from Part C (early intervention programming) to Part B (preschool programming) should be able to assert pendency rights to Part C services described in their IFSP's. Because, the intervening regulations explicitly address penencey and do not require the state Departments of Education and Welfare to continue the implementation of the *Pardini* decision as the "policy of the Commonwealth", we believe that the State Board of Education has the authority to establish state policy that does not have stay-put requirements.

The significance of the intervening regulations is pointed out in the recent United States Supreme Court decision *Schaffer v. Weast.* Justice O'Connor's opinion explicitly acknowledges the significance of the version of the statute being interpreted by the court:

> *"Unless otherwise noted, all citations to the Act are to the pre-2004 version of the statute because this is the version that was in effect during the proceedings below. We know, however, that nothing in the recent 2004 amendments, 118 Stat. 2674 appears to materially affect the rule announced here."*

Contrary to the situation in *Weast*, there **have been material amendments** that affect the rule announced in *Pardini*. *Pardini* then is no longer controlling of the state regulations and should not be applied to expand the federal stay-put requirements.

There are good policy reasons to not require children receiving services under Part C to stay put when they become older and are eligible to move into a different array of programs. Chapter 14 should be explicitly revised to incorporate Section 300.518(c) of the IDEIA regulations. The cost associated with continuing services that have been offered in a different system with providers that are not part of the school system would represent a significant unfunded mandate.

Section 14.162. Impartial Due Process Hearing. Our members discussed several problems related to the consistency of the decisions of the due process hearing appeals

panels. We suggest that the regulations change the way the appeals panels are organized. Currently, Pennsylvania uses fixed panels. We think that this contributes to the lack of consistency in their decisions.

The fixed appellate panels create a perception of bias; a school district's or parent's attorney perceives certain panels as more favorable to the school district's interest or the parent's interest. The new regulations should create new operating procedures which require rotating the members on panels, review of all panel decisions and concurrence by some number of panel members beyond the panel actually deciding the case or at least by a review officer with the job description of insuring uniformity of the decisions.

Our second concern with the hearing process is the experience and training of the hearing officers. Because of what appears to be an over expansive definition of "conflict of interest," the hearing officers often have no experience either in education or as practitioners in the field of education law. This lack of experience inhibits good decision making. Hearing officers should be required to have experience as educators or education law attorneys or at least extensive professional development and continuing education to assure an understanding of the issues and the law. The State Board should set standards that encourage, not discourage, the selection of practitioners and require specific training for all hearing officers.

PASA supports a legislative overhaul of the hearing system into a one-tier model with extensively trained administrative law judges. In the interim, however, the implementation of the recommendations for rotating panels, a review of all decisions for consistency and required relevant experience for hearing officers would improve the quality of the opinions and the perception of fairness.

The regulations should explicitly recognize that any services ordered by a hearing officer or contained in an agreement or settlement approved by a hearing officer are costs that result from an administrative order for Act 1 purposes.

Finally we appreciate that the proposed regulations retain the assignment of burden of persuasion found in IDEA by the Supreme Court of the United States for special education cases in *Schaeffer v. Weast.*

Thank you for consideration of these recommendations. PASA looks forward to continuing to work with you on these issues as the Chapter 14 process goes forward.

Very truly yours,

Stinson Stroup

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