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INDEPENDENT REGULATORY REVIEW COMMISSION
333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

August 29, 2007

James Buckheit, Executive Director
State Board of Education
333 Market Street, 1st Floor
Harrisburg, PA 17126

Re: Regulation #6-306 (IRRC #2618)
State Board of Education
Special Education Services and Programs

Dear Mr. Buckheit:

Enclosed are the Commission's comments for consideration when you prepare the final version of this regulation. These comments are not a formal approval or disapproval of the regulation. However, they specify the regulatory review criteria that have not been met.

The comments will be available on our website at www.irrc.state.pa.us. If you would like to discuss them, please contact me.

Sincerely,

Kim Kaufman
Executive Director

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Enclosure

cc: Honorable James J. Rhoades, Chairman, Senate Education Committee
Honorable Raphael J. Musto, Minority Chairman, Senate Education Committee
Honorable James R. Roebuck, Jr., Majority Chairman, House Education Committee
Honorable Jess M. Stairs, Minority Chairman, House Education Committee

Comments of the Independent Regulatory Review Commission

on

State Board of Education Regulation #6-306 (IRRC #2618)

Special Education Services and Programs

August 29, 2007

We submit for your consideration the following comments on the proposed rulemaking published in the June 30, 2007 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the State Board of Education (Board) to respond to all comments received from us or any other source.

1. Section 14.101. Definitions. – Consistency with statute; Clarity.

Early intervention services

The existing definition correctly states that this term is “as defined in the Act.” The Board is proposing to add language to this definition. However, the additional language does not fully reflect all of the language in the Act’s definition (Early Intervention Services System Act (Act) (11 P. S. § § 875-101—875-503)). Therefore, we recommend either retaining the current definition, or alternatively reiterating all of the Act’s definition in the regulation.

Certificated staff member

This term is not defined, but is used in Section 14.105(a). The Board should add a definition for this term.

Definitions in other sections

Sections 14.105, 14.131 and 14.133 contain definitions that relate to those sections. Why weren’t these definitions included in Section 14.101?

2. Section 14.104. Special education plans. – Need; Clarity.

Subsection (e)

Why has the time period for developing an early intervention special education plan been changed from 3 years to every year?

Subsection (i)

This subsection mentions that each school entity shall maintain “information concerning students with disabilities.” This term is too vague, and language should be added to specify what information school entities must maintain.

3. Section 14.105. Personnel. – Need; Reasonableness; Implementation procedure; Economic and fiscal impact; Protection of the public welfare.

Instructional paraprofessional

Subsection (a) adds specific qualifications that must be met by an “instructional paraprofessional.” There are four concerns.

First, the Board states in its Regulatory Analysis Form (Number (14)) that there are several thousand paraprofessionals working with students with disabilities, and there is the possibility that some may need to be reassigned or could lose their jobs. While we recognize the overall intent is to improve the quality of education, the Board has not sufficiently explained the impact of the new qualifications. The Board should explain the anticipated impact of the qualifications on the number of available instructional paraprofessionals and whether there will be enough qualified paraprofessionals to adequately serve the needs of students with disabilities.

Second, several commentators questioned the need for these qualifications. The Board should further explain why these qualifications are necessary. Additionally, given that this proposed regulation was published in the June 30, 2007 *Pennsylvania Bulletin*, the Board should explain why the implementation dates of July 1, 2008, and July 1, 2010, are reasonable.

Third, in the Preamble to the regulation, the Board recognizes that: “[t]he most significant potential cost factor is that of establishing minimum requirements on the qualifications of instructional paraprofessionals who provide support to a student with disabilities under the direction of a classroom teacher in § 14.105.” The Board should further quantify these costs, both to the individuals who must meet the new qualifications and to the school districts that must hire them and pay their salaries.

Finally, the Board should review the qualifications and deadlines specified in the regulation for instructional paraprofessionals hired before July 1, 2008. The regulation requires them to qualify by meeting the standards of academic assessments specified in Paragraphs (3) or (4) by July 1, 2010. If a person needs additional education to pass the assessment, can he or she reasonably meet the July 1, 2010 deadline? Also, if a person fails the assessment, can he or she take it a second or third time?

Educational interpreter

Subsection (c)(1) specifies a passing score of 3.5 on the Educational Interpreter Performance Assessment. How did the Board determine that 3.5 is the appropriate test score for educational interpreters? What effect will this have on the availability of educational interpreters?

Other interpreting methods

Also relating to Subsections (c) and (d), several commentators questioned why Computer Aided Realtime Translation (CART) was not included in the proposed rulemaking. Given that the Board set standards for educational interpreters, are standards available for CART and would it be appropriate for the Board to also set standards for CART?

Formatting of Subsection (e)

The formatting of Subsection (e) differs between the version submitted by the Board and the version published in the June 30, 2007 *Pennsylvania Bulletin*. The Board's version shows three definitions, a chart and then other provisions. The *Pennsylvania Bulletin* version reformats and relocates some of these provisions. We note that the following three comments reference the *Pennsylvania Bulletin* version, as best as possible. In the submittal and publication of the final-form regulation, this formatting should be reviewed.

Maximum caseload

Subsection (e)(ii)(A) is a chart of the maximum caseload allowed on a single teacher's roll for each school district. What will be the fiscal impact to schools of the proposed changes to the caseload chart? How did the Board determine the maximum caseloads, including the Level IV caseload and the Level II caseload?

Supplemental Services

As printed in the June 30, 2007 *Pennsylvania Bulletin*, this definition is located at the end of Section 14.105. In the final-form regulation, this definition should be included with the other definitions listed at the beginning of Subsection (e).

Itinerant services

Subsection (e)(D) references "itinerant services." This term is not defined, as the term "itinerant" was removed from § 14.141 in the proposed rulemaking. The final-form regulation should provide a definition for this type of service. //

4. Section 14.106. Access to instructional materials. – Reasonableness; Clarity.

Vague language

Subsections (a), (b), (c) and (d) use the vague term "timely." The interpretation of this term is subjective and does not give the regulated community guidance regarding how to comply with this standard. This term should be replaced with clear time requirements.

5. Section 14.107. Complaint Procedure. – Clarity.

Notice

This section includes the requirement for the Pennsylvania Department of Education

(Department) to establish a complaint procedure “consistent with 34 CFR 300.151- 300.153” and disseminate notice of the complaint procedure. Since the federal regulation also indicates to whom notice should be disseminated, the final-form regulation should also reflect that requirement.

6. Section 14.122. Screening. – Clarity.

Appropriate instruction in math

Paragraph (c)(1) requires “verification that the student was provided with...appropriate instruction in math.” We note that within Paragraph (1) the verification for reading includes the essential components of reading instruction. However, that same paragraph does not specify any criteria to evaluate appropriate math instruction. The final-form regulation should specify what constitutes “appropriate instruction in math.”

Research-based intervention

Paragraph (c)(4) requires “research-based intervention” to increase the student’s rate of learning. This phrase also appears in Sections 14.125(a)(2)(i) and (a)(2)(i)(B). There are two concerns. First, it is not clear what a “research-based” intervention is. Second, if a criterion of “research-based” intervention is used, would it have to be approved or sanctioned by the Board as effective? The regulation should more clearly specify what intervention is acceptable.

7. Section 14.123. Evaluation. – Clarity.

Professional employee or administrator

Subsection (c) states: “[i]f a request is made orally to any professional employee or administrator of the school entity, that individual shall provide a copy of the evaluation request form....” Since neither the term “professional employee” nor “administrator” is defined, it is unclear who specifically has this responsibility. The regulation should specifically designate who has this responsibility within the school so that school entities can comply and parents clearly know to whom they must make an oral request.

8. Section 14.125. Criteria for the determination of specific learning disabilities. – Clarity.

Qualified personnel

Subsection (a)(4)(i) refers to “qualified personnel.” Since there are many different variations for what is “qualified,” the term as used is vague and should be defined.

9. Section 14.132- ESY. – Reasonableness; Clarity.

Parent notification

Paragraph (d)(1) requires parent notification to ensure their participation, but does not specify how far in advance that notice must be issued. We recommend adding a minimum lead time for notice to provide sufficient opportunity for parent participation.

Also, the regulation requires notice to parents to “ensure” their participation. The term “ensure” means “to guarantee” or “make certain of.” Therefore, as written, we question how the school entity could accomplish this standard. We recommend replacing the term “ensure” with another term.

Vague language

Subsection (e) uses the phrase “timely manner.” This phrase should be replaced with clear time requirements.

10. Section 14.133. Behavior support. – Protection of the public health, safety and welfare; Need; Reasonableness; Feasibility; Clarity.

Restraints in general

The proposed amendments relating to restraints in Section 14.133 have resulted in substantial public comment and concern. The public concerns include issues related to face down prone restraints, the 30 consecutive second time period and any use of restraints at all. We recognize that the proposed provisions are intended to impose limitations on the use of restraints and require disclosure if they are used. However, there are troubling aspects related to the use of restraints in general. Therefore, the Board needs to provide an overall explanation of restraints and how the use of restraints as described in the regulation meets the criteria of protection of the public health, safety and welfare; need; and reasonableness. We will review this explanation, as well as the Board’s response to commentators, to determine whether the final regulation is in the public interest.

Definition of “positive techniques”

This definition in Subsection (b) lacks clarity because it uses the term being defined in the definition. This definition should be rewritten for clarity.

Definition of “restraints”

We have three concerns with this definition in Subsection (b). First, while we do not believe this was intended, the inclusion of the phrase “that last longer than 30 consecutive seconds” in the definition technically means a device is only a restraint during its use after 30 consecutive seconds. The definition should identify what specifically is a restraint. Substantive provisions and time specifications should be located in the body of the regulation.

Second, why is a time period of 30 consecutive seconds needed? The Board needs to explain the basis for choosing “30 consecutive seconds” and why it is a safe and appropriate time limit.

Third, this provision appears to be unenforceable and impractical. Commentators observed that repeated use of these devices would be permitted as long as 30 consecutive seconds was never exceeded. Given the circumstances envisioned, such as aggressive behavior, how would the 30 consecutive second time period be measured, documented and enforced?

Parental notification

Subsection (c)(1) states:

When there is evidence to suggest that the emergency use of restrictive procedures, such as restraints may be necessary to ensure a student's safety or the safety of others, parental consent **should** be obtained. If a restrictive procedure is needed on an emergency basis, parents **should** be informed and consent for future uses be obtained within 10 school days following the need for the use of a restrictive procedure. The need for restrictive procedures for safety **should** be noted in the student's IEP. (Emphasis added.)

There are three concerns. First, the term "should" is nonregulatory language which indicates that these provisions are optional. It is inappropriate to include optional provisions in a regulation. Regulations establish binding norms of general applicability and future effect. These provisions need to be rewritten to set clear compliance standards.

Second, this provision requires parental consent for future use of restraints "within 10 school days" of the use of an emergency restraint. However, it is not clear when parents are to be notified of the use of the emergency restraint. Does the 10 school day period apply? The final-form regulation should clarify the time frame for and required form of parental notice.

Finally, related to our first concern, Subsection (c)(1) states that: "[t]he need for restrictive procedures for **safety should be noted** in the student's IEP." (Emphasis added.) However, subsection (c)(2) refers to restraints and the "**[e]xplicit provisions** of the existing IEP." (Emphasis added.) The regulation needs to specify whether it is necessary to detail restraint procedures in the IEP.

Face down prone restraints

Subsection (e) states:

The use of face down prone restraints is prohibited in educational programs, unless determined necessary by a physician and documented in the student's current IEP.

We have three concerns. First, the regulation prohibits the use of face down prone restraints, but allows an exception if "determined necessary by a physician and documented in the student's IEP." If a physician determined this type of restraint is necessary and it could be documented in the student's IEP, can a school entity still find this type of restraint to be unacceptable or too hazardous?

Second, the Board should explain how the restrained person's health, safety and welfare would be adequately protected by the school entity staff.

Third, the regulation allows any physician to make the determination that restraint is necessary. Why doesn't the regulation require a determination by the student's personal physician?

11. Section 14.145. LRE Requirements. – Clarity.

“To the maximum extent and as provided in the IEP”

Paragraph (a)(1) provides that each school entity shall ensure that “to the maximum extent and as provided by the IEP, the student with a disability is educated with students who are not disabled.” The Individuals with Disabilities Education Act (IDEA) requires that “to the maximum extent **appropriate**, children with disabilities...are educated with children who are not disabled...” (20 USC 1412(a)(5)(A)) (Emphasis added.) The associated federal regulation also requires public agencies to ensure that “to the maximum extent **appropriate**, children with disabilities...are educated with children who are nondisabled.” (34 CFR. 114(a)(2)(ii)) (Emphasis added.) There were public comments submitted both in favor of the Board’s language and questioning the Board’s language. The Board should explain why it has not included the word “appropriate” in Paragraph (a)(1).

Paragraph (a)(2)

A commentator noted that words appear to be missing from this paragraph. We agree that this provision is not clear. The Board should review this provision and make corrections as appropriate.

If the child can...make progress in the goals included in the student's IEP

Paragraph (a)(3) states:

A student may not 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.

A commentator is concerned that this provision could be interpreted to allow minimal progress in an IEP to be used as justification to keep a student in a regular education classroom. The Board should explain who makes the determination that the student “can make progress, with supplementary aids and services” and how that progress will be evaluated.

12. Section 14.155. Range of services. – Clarity.

Subsection (a)

Based upon the location of the brackets, it is unclear what provisions the Board intends to delete from this regulation. As published in the *Pennsylvania Bulletin*, the proposed amendment makes the provision repetitive. The final-form regulation should be more specific as to what provisions are intended to remain in this subsection.

13. Miscellaneous Clarity

The following is a list of vague language in the regulation. The Board should clarify this language in the final-form regulation.

- Section 14.106(c) and (e) use the phrase “reasonable steps.”
- Section 14.108 states that parents will have “reasonable access” to classrooms.
- Section 14.122 (c)(3) mentions “systematic observation.”
- Section 14.124 (b) mentions “reasonable efforts” to obtain parental consent.
- Section 14.133 (a) mentions “demeaning treatment” and “aversive techniques.”

Finally, under Section 14.131(a)(1)(iii), a comma should be added between the words “communication” and “accessing” in the first sentence.

**James Buckheit, Executive Director
State Board of Education #6-306
IRRC # 2618
Special Education Services and Programs**

Date:

J. Buckheit

8/29/07