

2635

From: Kaufman, Kim
Sent: Monday, September 15, 2008 11:05 AM
To: 'James Clark'
Cc: Schalles, Scott R.
Subject: RE: IRRC #2635 - Date of Delivery of Final-Form Regulation

Dear Attorney Clark:

We have considered your recent concerns expressed on the Board of Education's final-form regulation #6-307 (IRRC #2635, Ch. 16-Special Education for Gifted Students).

On August 12, 2008, the Board delivered this final-form regulation, which was subsequently placed on IRRC's public meeting agenda for September 18, 2008. As is customary with many regulations, IRRC staff met with Board representatives on Sept. 4th to clarify our understanding of a few issues as well as the process in general. One of those issues included some of the information contained in the Board's comment and response document. IRRC noted that the Board summarized all of the comments received on the proposed rulemaking; however, we requested the Board explain some of its responses included in the document. IRRC further requested the Board follow up its clarification in writing, which it did on Sept. 10th, making no changes to the final-form regulation.

Accordingly, it is not necessary to reschedule consideration of this regulation to a future meeting.

In response to your other concern, when a regulation contains a typographical or other "technical" error as the one you pointed out in your September 14th email, it is typically corrected by the Legislative Reference Bureau (LRB) upon publication. Such matters are generally resolved between the promulgating agency and the LRB.

Thank you for sharing your concerns with us. We look forward to seeing you at IRRC's public meeting on September 18th.

Regards,

Kim Kaufman
Executive Director
IRRC

-----Original Message-----

From: James Clark [mailto:JayClark@jamesclarklaw.net]
Sent: Friday, September 12, 2008 8:24 PM
To: Kaufman, Kim
Subject: IRRC #2635 - Date of Delivery of Final-Form Regulation

Dear Mr. Kaufman:

Good afternoon. As a commentator on the above-referenced IRRC matter, I received in yesterday's mail the Responses to Official Public Comments Addendum, dated September 10, 2008.

This Addendum includes a response to concerns raised by the Commission in its comments to the State Board. Specifically, it addresses concerns about the lack of compliance monitoring done by the Secretary of Education since the implementation of the Chapter 16 regulations in 2000. Additionally, the Commission recommended that the regulations include monitoring methods and frequencies.

9/15/2008

This is a critical issue for the regulated community. This issue was raised by the House Education Committee and by Senator Williams along with numerous members from the gifted education community.

My purpose in raising the issue in this email is not to debate the policy but to raise a concern about the process.

In my review of the Regulatory Review Act and its regulations, I believe that it would be procedurally improper to include IRRC 2635 on the agenda for this week's Commission meeting.

Under 1 Pa.Code Section 307.2(c)(4), the agency (State Board of Education) must include its response to comments received with the delivery of the final-form regulation to the [Education] committees and the Commission. Under 71 P.S. Section 745.5a(b), these responses are "required material" that must be provided.

Failure to have included all of the responses must have the effect of delaying the delivery date until such time as all items are provided by the agency. In the instant case, the delivery date would, at the earliest, be September 10, 2008. Arguably, the delivery date has still not occurred as the September 10th response to comment was not delivered with the final-form regulation, but subsequent to.

The effect of permitting an agency to stagger the flow of the information and to thereby circumvent this requirement to include all of the required material, even by mistake, means that the committee and the regulated community are not given their full opportunity and right to participate in the regulatory process. As "silly" as it might seem to some, I hope that you will agree that the process by which we develop regulations for our Commonwealth is important.

As previously mentioned, the compliance issue is likely the issue of greatest concern to the regulated community and one of great disagreement over the amendment to the regulation.

As such, if the Commission determines the procedural concerns raised to be potentially valid, I respectfully request that the Commission notify the State Board of Education and the Education Committees that the delivery date is, at the earliest, September 10, 2008 and that IRRC 2536 will be removed from the agenda until such time as the Commission determines the appropriate delivery date.

Thank you for consideration of my comments, my concern, and my request to review the procedural issue.

Sincerely,

James R. Clark, Esq.