

# 2635

**From:** Kaufman, Kim  
**Sent:** Monday, September 15, 2008 12:12 PM  
**To:** Gelnett, Wanda B.; Schalles, Scott R.; Wilmarth, Fiona E.; Johnson, Leslie A. Lewis; Emery, Heather; Outreach  
**Subject:** Fw: IRRC #2635 - Statutory Duty to Prescribe Standards

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

From: James Clark <JayClark@jamesclarklaw.net>  
To: Kaufman, Kim  
Sent: Mon Sep 15 12:04:52 2008  
Subject: IRRC #2635 - Statutory Duty to Prescribe Standards

Dear Mr. Kaufman:

Please accept this as written public comment.

The statutory authority for the Special Education for Gifted Students regulation is Section 13-1371 et. seq. of the Public School Code of 1949, as amended ("Exceptional Children Statute").

Pursuant to Section 13-1372(1), the State Board of Education has a duty to adopt and prescribe standards and regulations for the proper education and training of all exceptional students. The legislature has directed the State Board of Education, without any allowance for further delegation, to prescribe standards for gifted education in the Commonwealth, thus giving a single standard for all school districts in the Commonwealth to follow. Currently, there are 501 school districts in the Commonwealth. With the mobility of parents and the subsequent change from one school district to another, the need for a single set of standards is apparent.

As can be seen from the number of public comments provided on this issue, there is a recognition in the regulated community of a need for a single set of standards. This is especially true in the area of screening and identification of gifted students which is covered by Section 16.21. Several comments were provided specifically about locally created screening tools, such as various matrices that have been popping up into use around the Commonwealth. Many of these matrices are designed such that fewer students are being identified for the actual psychological testing necessary to determine IQ and giftedness.

It has been suggested that the child find, screening and identification processes should be treated similar to screening for vision problems, where the district is trying to locate each child with a special need.

The question which I offer for the Commission member's consideration is whether the agency has the statutory authority to delegate the adoption and prescription of standards for the screening and evaluation of gifted students to the 501 school districts.

The agency has stated the following in its responses to comments on Section 16.21:

- the Board believes that these matters [frequency and screening procedures along with the assessments used] are matters best left to the discretion of local educator and not required through regulation.

- it is not appropriate to regulate this activity [evaluation of the child find procedures]

- screening tools and evaluation procedures are left to the discretion of the school district.

- the Board has determined that eligibility criteria beyond what is outlined in final form Chapter 16 is best left to the local educators who are more cognizant of the available financial resources.

- methodology decisions are best left to the local educators and should not be regulated.

- Local school officials are best equipped to make this determination. They are aware of the resources of the school.

- methodology decisions [related to rate of acquisition and rate of retention] are best left to the local educators. The same response is given to the request that evaluation requirements prohibit a group evaluation method.

- The Board determined that these suggestions [relating to a request that the results of evaluation testing must provide instructional levels in all subject areas and be used in determining educational placement] also deal with the methodology and are best left to the local educators who are familiar with the financial status of the district and its ability to provide such services.

While I am disturbed by the State Board of Education's focus on financial considerations which are absent in the statute, for purposes of the present discussion, the legal question is not whether local districts are better equipped to make such decisions, but whether the statute gives the agency the ability to avoid setting such standards and delegating such duty without specific statutory language to do so. I believe that the answer to that legal question is no.

While not directly addressing the broad issue of delegation of prescribing standards in general, the agency in its response to comments on Section 16.21 does make a statement somewhat related to delegation when it responds on page 13 that "It was determined that identification of gifted students by individual school districts is appropriated and may be delegated by the Board." While I agree that the identification of gifted students must be done by school districts, I do not believe the statute allows the delegation of the duty to adopt and prescribe standards.

I should note here that this concern of inappropriate delegation to school districts is different and distinct from the concern which has been raised with regard to the delegation of duties to the Secretary of Education.

Respectfully, I request the Commission to determine that the final-form regulation is not in the public interest as it is inconsistent with the statute.

Thank you.

Sincerely,

James R. Clark, Esq.