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March 17, 2008

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INDEPENDENT REGULATORY
REVIEW COMMISSION

via e-mail and First Class Mail

James Buckheit, Executive Director
State Board of Education
333 Market Street
Harrisburg, PA 17126-0333

Re: Delegation of Powers Delegated by the General Assembly

Dear Jim:

The purpose of this letter is to raise legal concerns about a subsection of Chapter 16 and one of the subsections in the proposed amendment. During the review of the amendments to Chapter 16, concerns were expressed about whether the State Board of Education has the power or authority to delegate any portion of the powers granted to it by the General Assembly to another body.

Under Article III, Section 14 of the Pennsylvania Constitution, the General Assembly is directed to provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth, which it has done through the Public School Code of 1949, as amended. Under Article II of the Public School Code, the General Assembly stated the powers granted to individual school districts. Under Article XXVI-B of the Public School Code, the General Assembly established the powers and duties of the State Board of Education.

The General Assembly has clearly stated with specific regard to Children with Exceptionalities that the "State Board of Education shall adopt and prescribe standards and regulations for the proper education and training of all exceptional children" as stated in 13-1372(1).

While the powers granted to the State Board of Education are certainly broad, the powers granted as agent for the General Assembly in carrying out its Constitutional obligations are not without limit.

It is well settled that powers delegated to administrative bodies may be expressly stated or necessarily implied in the legislative grant, see Pennsylvania Human Relations Commission v. St. Joe Minerals Corp., 476 Pa. 302, 310, 382 A.2d 731, 736 (1978). It has also been held that

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"[I]n determining the outermost limits of [a] Board's delegated authority . . . we must primarily consider the express language of its enabling statute, and, where the statute neither affirms nor negates the authority exercised by the agency, the manifest purpose of the legislation"
McKinley v. State Bd. of Funeral Dir., 11 Pa.Cmwlt. 241, 246, 313 A.2d 180, 183 (1973).
(Emphasis added).

In reviewing the Public School Code, no explicit authority can be found by which the General Assembly permits the State Board of Education to delegate any of the powers granted to it.

As to whether the State Board's broad powers include at its outermost limits the delegation of such powers, the State Board with the advice of legal counsel will need to make that determination; however, I do not believe the courts will accept that the purpose of the legislation is advanced by such further delegation. When taking into consideration the de minimus compliance performed by the Department of Education since 2000 and the "flexibility" addressed in the RAF submitted with the proposed regulations last year, a court may likely reject any assertion that these delegations are within the necessarily implied limits.

In reading the statute, the General Assembly likely did not expect the delegation of rule-making with regard to compliance for gifted education to be further delegated to the Secretary of Education. Quite to the contrary, the General Assembly, in the same section in which the State Board is directed to promulgate regulations, directed the Department to enforce the provisions of the statute.

The Pennsylvania Supreme Court has stated that "(i)t is axiomatic that the Legislature cannot constitutionally delegate the power to make law to any other branch of government or to any other body or authority. Gilligan v. Pennsylvania Horse Racing Commission, 492 Pa. 92, 95, 422 A.2d 487 (1980), citing State Board of Chiropractic Examiners v. Life Fellowship of Pennsylvania, 441 Pa. 293, 293, 297, 272 A.2d 478, 480 (1971); Archbishop O'Hara's Appeal, 389 Pa. 35, 131 A.2d 587 (1957). Presumably, the State Board of Education as agent for the General Assembly likewise is prohibited from delegating its power to the Executive branch.

With regards to the interaction between the State Board of Education and the Department of Education, the General Assembly clearly stated in 26-2606-B that "(s)tatements of policy, standards, rules and regulations promulgated by the board shall be binding upon the Department of Education." Further, "(t)he department shall submit to the board for approval, modification or rejection, all rules and regulations proposed by the department in the areas under the control of the board", which would include gifted education.

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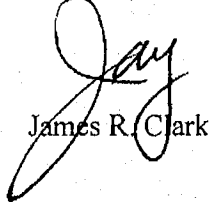
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Under the Chapter 16 amendment, the State Board attempts in Section 16.6(d) to delegate its rule-making authority with regard to compliance to the Secretary of Education, which as discussed above is prohibited.

Under current Section 16.21(d), the State Board's delegation of its rule-making authority with regard to identification of gifted students to the 501 individual school districts is not permitted. The specific language of concern is as follows: "Each school district shall establish procedures to determine whether a student is mentally gifted." The delegation of the process and thereby the determination of whether a student is mentally gifted rather than having a set of standards established by the State Board as required in the statute is inappropriate and also not a permitted delegation.

Thank you for your consideration of these legal concerns. Please forward this letter to the State Board members. Perhaps it would be prudent to share these legal concerns and to obtain legal counsel's opinion prior to the Board's final consideration of the amendment.

Sincerely,

A handwritten signature in black ink, appearing to read "Jay" or "James", with a large, stylized loop at the end.

James R. Clark

