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

February 6, 2008

Honorable Gerald L. Zahorchak, Secretary
Department of Education
333 Market Street, 10th Floor
Harrisburg, PA 17126

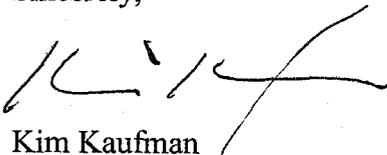
Re: Regulation #6-308 (IRRC #2653)
Department of Education
Charter School and Cyber Charter School Services and Programs for Children with
Disabilities

Dear Secretary Zahorchak:

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
wbg
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

Department of Education Regulation #6-308 (IRRC #2653)

Charter School and Cyber Charter School Services and Programs for Children with Disabilities

February 6, 2008

We submit for your consideration the following comments on the proposed rulemaking published in the December 8, 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 Department of Education (Department) to respond to all comments received from us or any other source.

1. Section 711.1. Definitions. - Clarity.

Cyber charter school

This section defines a “cyber charter school” as that which: “[u]ses technology to provide a **significant portion** of its curriculum and to deliver a **significant portion** of its instruction to its students through the Internet or **other electronic means...**” (Emphasis added.) We have two concerns. First, what would constitute a “significant portion” of curriculum as well as instruction? Second, the phrase “other electronic means” is vague and should be further defined.

IDEA

The citation noted in this definition (20 U.S.C.A. §§1400—1485) differs from the citation noted in the Preamble (20 U.S.C.A. §§ 1400—**1419**) (Emphasis added.) The Board should review the citation in this definition, and make the appropriate changes to the final-form regulation.

Regional charter school

The following sentences are being added to this existing definition: “[a] regional charter school shall be organized as a public, nonprofit corporation. Charters may not be granted to any for-profit entity.” This language is substantive. In order to assist the regulated community with compliance and to improve clarity, this language should be moved to the body of the final-form regulation.

2. Section 711.2. Purposes and intent. - Clarity.

The term “pre-referral intervention strategies” is used in Subsection (e), but it is not defined. The final-form rulemaking should include a definition for this term.

3. Section 711.5. Personnel. - Reasonableness; Clarity.

Educational interpreters.

Subsection (b) pertains to educational interpreters. We raise three issues. First, we recommend that the final-form regulation define the term “educational interpreter.”

Second, what are the bases for both the required minimum of 20 hours of staff development activities and for a score of 3.5 on the Educational Interpreter Performance Assessment? What effect will these requirements have on the availability of educational interpreters throughout the Commonwealth?

Finally, the phrase “staff development activities” is vague, and should be defined in the final-form regulation.

4. Section 711.10. Complaint procedure. - Clarity.

This section states that the Department will establish a complaint procedure “consistent with 34 CFR 300.151--300.153.” Since the federal regulation already indicates to whom notice should be disseminated, the phrase “and disseminate notice of that procedure” should be deleted. See 34 CFR 300.151 (a)(2).

5. Section 711.23. Screening. - Clarity.

Subsection (c)(1) requires “[v]erification that the student was provided with...appropriate instruction in math.” We note that within Subsection (c)(1) the verification for reading includes the essential components of reading instruction. Why does that same paragraph not specify any criteria to evaluate appropriate math instruction?

Subsection (c)(4) also requires “research-based intervention” to increase the student’s rate of learning. This phrase is also used in Section 711.25 (2)(i)(B). There are two concerns. First, it is not clear what a “research-based intervention” is, and therefore this term should be defined in the final-form regulation. Second, if a criterion of “research-based intervention” is used, would it have to be approved or sanctioned by the Department as effective?

6. Section 711.24. Evaluation. - Clarity.

Under Subsection (a), what are “qualified professionals”? The Department needs to define this term in the final-form regulation.

7. Section 711.25. Criteria for the determination of specific learning disabilities. - Implementation procedures; Clarity.

This section requires charter schools and cyber charter schools to include procedures for determining specific learning disabilities in their charter **application**. (Emphasis added.) We have three concerns. First, the final-form regulation should explain how **existing** charter and cyber charter schools will inform the Department of their implementation procedures. (Emphasis added.) Second, how would a school prove that a student received “high quality instruction” under Paragraph (2)(i)(A)? Finally, what are “qualified personnel” as mentioned in Paragraph (4)(i)? The final-form regulation should provide further clarification of these terms.

8. Section 711.42. Transportation. - Clarity.

Subsection (c) states that: “[i]f transportation is required as a related service in the IEP of the student with disabilities, who is enrolled in a cyber charter school, the cyber charter school shall provide the required transportation.” Unlike Subsection (a) which provides transportation for students with disabilities who are charter school students, this subsection does not place a limit on the distance the cyber charter school is permitted to travel in order to pick up the students. To improve consistency, we recommend that this subsection also include a distance limit.

In addition, the following sentence is non-regulatory language and should be deleted from the final-form regulation: “[t]he act does not require that a student’s school district of residence provide transportation for cyber charter school students.”

9. Section 711.45. Access to instructional materials. - Clarity.

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

10. Section 711.46. Behavior support. - Protection of the public health, safety and welfare; Need; Reasonableness; Feasibility; Clarity.

Restraints in general

This section relates to behavior supports, in particular in the form of restraints. The proposed amendments to Chapter 14 (“Special Education Services and Programs”), contain similar language which resulted in substantial public comment and concern. The public concerns included issues related to face down prone restraints, the 30 consecutive second time period and any use of restraints at all. Some of these same comments also were raised in response to this proposed regulation.

As we suggested in our comments on Chapter 14, the Department should 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 Department’s response to commentators, to determine whether the final-form 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 to improve 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 Department 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. It seems 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 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 non-regulatory 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 clarify when restraint procedures must be included in

the IEP, for example if restraint procedures are used in an emergency, should they then be added to the student's IEP?

Face down prone restraints

Subsection (e) states:

The use of prone (face down) restraints is prohibited in educational programs, unless specifically directed 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 "specifically directed by a physician and documented in the student's current 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 Department 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. Miscellaneous Clarity.

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

- Sections 711.23(b)(2), 711.23(c)(5) and 711.25 (4)(ii) use the phrase "reasonable intervals."
- Section 711.25 (2)(i) uses the phrase "scientific, research-based intervention" and Sections 711.25 (1) and 711.25 (4)(i) use the phrase "scientifically based instruction."
- Sections 711.45 (c) and (e) use the phrase "reasonable steps."
- Section 711.46 (a) mentions "demeaning treatment" and Section 711.46 (f)(7) mentions "treatment of a demeaning nature."
- Section 711.46 (b) mentions "systematic application" in the definition of "behavior support."

IRRC #2653 (#6-308)
Department of Education
Charter School and Cyber Charter School Services and
Programs for Children with Disabilities

Honorable Gerald L. Zahorchak, Secretary

Jane Schopf
Date: 2/5/08