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Sent: Friday, October 16, 2009 4:56 PM
To: IRRRC; 'Wynn, Deborah'
Subject: ELC Comments on Chapter 4
Attachments: ELC Comments on Chapter 4 Final Form 10-16-09.pdf

Are attached. Thank you for your consideration.

Baruch

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October 16, 2009

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RE: 22 PA Code Chapter 4 Regulation for Academic Standards and Assessment (#006-312), Final Form Submitted by the State Board of Education.

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The Education Law Center (ELC) is a statewide non-profit advocacy and educational organization, dedicated to ensuring that all of Pennsylvania's children have access to a quality public education. We appreciate this opportunity to offer comments concerning the Chapter 4 regulation submitted in final form by the State Board of Education.

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In setting out several years ago to form these regulations, the State Board of Education had good objectives for strengthening the achievement of students graduating from high schools. ELC shares these general objectives with the State Board. The Board officers, members, and staff have invested considerable thought and effort over the years in developing the policies included in the regulation. Although ELC disagrees with these particular policy choices, we continue to admire the Board's commitment to improving public education.

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The final form regulation presented to the Commission fails in many ways to meet the standards needed to achieve approval. In 2008, the Commission concluded that the regulatory review criteria were not met by the proposed version of this regulation. The Commission's original concerns have not been addressed. Instead, the regulation has grown over time into a massive and mandatory new state testing structure which negatively interferes with the classroom grading decisions of individual teachers, with the graduation decisions of local schools, and with the educational opportunities of all students. As a result, the Commission should disapprove the final form regulation.

A detailed analysis is below, but a couple of preliminary points are relevant to our inquiry. The route leading to the submission of the final form regulation has gotten far off track in terms of the substance of the regulation, the failure to comply with legal authority and regulatory review standards, and the process through which the regulation made its way to the Commission. At this point, the final form regulation is so flawed that it must be disapproved. It represents an unnecessary, costly, ineffectual, and legally problematic method of addressing student achievement issues.

Instead of implementing educational priorities specifically authorized by the General Assembly, the State Board of Education has chosen to craft its own new, expansive, and extremely costly set of student assessment programs and related services. The State Board has no power to create such new policies, especially because the Board

cannot send funding to pay for its ideas to local school districts or to the Department of Education. In the real world, the education system does not have any excess capacity to absorb and implement the immense new state testing system contained in the regulation.

In addition, there is absolutely no evidence that schools are incapable of improving student achievement without a new state testing system. In fact, student achievement in Pennsylvania has been rising in recent years under the current system. And research about the experience in other states with high stakes graduation tests reveals mostly failure at a high cost.

On the other hand, basic improvements other than more testing are needed within the Commonwealth's public education system. The interactions of ELC with students, parents, and educators throughout the state lead us to conclude that teachers often cannot meet student needs without reduced class sizes. Students cannot learn the academic standards for research skills, science, and math when they attend schools without libraries, laboratories, or working technology. English language learners and students with disabilities cannot achieve – no matter how many times they are tested – without much better supports and services to help them reach their potential.

We believe that disadvantaged students and schools in Pennsylvania will be particularly harmed, not helped, by the final form regulation. The massive new testing regimen will divert scarce resources that could be used for improved instruction, facilities, and support in struggling schools. Educators will do the job expected of them only if the state first provides them with the necessary resources, instead of burdening them with more regulatory interference. In these ways, the State Board has overreached its statutory authority and promulgated a flawed policy.

The situation in this case is further complicated by significant problems with the Board's process for promulgating the regulation. In short, an inadequate process has led to a regulation which does not meet the standards for Commission approval. The final form regulation: (i) does not address the concerns raised by the Commission in 2008; (ii) contains substantive and material drafting errors; (iii) differs in significant ways from the document actually voted on by the State Board in August 2009; (iv) includes several major provisions that are recently added and never subjected to public hearings and comment; (v) has been presented to the Commission along with supplemental materials that do not accurately describe the need for, cost and impact of the regulation; and (vi) contains provisions that are highly arbitrary and potentially discriminatory.

For these various reasons, as detailed below, ELC encourages the Commission to disapprove the regulation and instruct the State Board to address the real needs of students and schools in ways that stay within the Board's legal authority and proper regulatory processes.

A. The final form regulation does not address the concerns raised by the Commission in 2008.

In its July 16, 2008 comments on the proposed version of Chapter 4 regulations, the Commission identified "the regulatory review criteria that have not been met." The final form regulation currently pending before the Commission fails to address these problems. Therefore, the regulation does not meet the criteria established by the Regulatory Review Act and must be disapproved by the Commission.

1. *Statutory Authority.* The Commission stated in its 2008 comments:

“While 24 P.S. §26-2603-B(i)(3) permits the Board to adopt a master plan that includes recommendations on student testing and assessment, it is unclear whether these provisions of the Code relate to high school graduation requirements. Therefore, what is the Board’s statutory authority for promulgating these requirements?”

The Regulatory Analysis Form and supplemental materials submitted by the State Board to the Commission along with the final form regulation contain almost the same explanation for “the statutory authority for the regulation” as the Board submitted with its proposed regulation in 2008. The Board has now merely added a citation for 24 P.S. § 2604-B, in addition to referring to 24 P.S. § 2603-B. Neither citation provides statutory authority for the expanded and varied content of the final form regulation.

The submitted regulation has become even more complex and intrusive than the proposed version that, in 2008, the Commission found to lack clear statutory authority. ELC believes that the State Board lacks statutory authority to impose any of these recently added requirements. Current Pennsylvania law vests local schools, administrators, and classroom teachers with the authority to make most decisions about course enrollment, course grades and passage, high school graduation, and student remediation and support. The State Board has no authority to interfere with these issues and remove the ability of local schools and educators to make the final decisions for individual students.

For example, state law vests local school districts with the ultimate control over the granting or denial of student diplomas. See 24 P.S. §§ 16-1611, 1613. In interpreting these statutes, Pennsylvania courts have concluded that the State Board has limited authority to set broad standards for graduation, but that the General Assembly has granted individual districts the power to adjust the broad standards to local needs and to determine whether students meet the resulting requirements. *Woodland Hills Sch. Dist. v. S.F.*, 747 A.2d 433, 435 (Pa. Commw. Ct. 2000).

The final form regulation pending before the Commission would completely remove the discretion of local school districts to make adjustments and decisions about the class grades earned by students, whether individual students may receive a high school diploma, and other related issues. Such interference is not authorized by statute, and thus Pennsylvania regulations have never before attempted to impose these kinds of state mandates on teachers, administrators, and local schools.

The Regulatory Analysis Form and supplemental materials submitted along with the final form regulation do not even attempt to address the Board’s authority for most of the following issues. The regulation should be disapproved due to the Board’s lack of statutory authority to:

- i. Force all public school entities to test all students with the new Keystone Exams in ten high school subjects, and to validate local assessments conforming to the same standards as the Keystone Exams. Section 4.24. The Board lacks statutory authority to impose either the state or local exams under the proposed conditions, and thus also lacks authority to require both. It should be emphasized that the assessment mandates in the regulation are not “voluntary” and will amount to a mandatory requirement for most school districts to implement both the Keystones and local assessments in order to ensure regulatory compliance.

- ii. Force all public school entities to offer the Keystone Exams three times per year in all ten mandated subjects. Section 4.51(f)(5). The current PSSA system involves testing in four subjects with re-testing once per year in just two subjects.
- iii. Force all public school entities to offer Keystone re-takes in multiple sub-modules for each of the ten exams multiple times per year. Section 4.51(f)(6). This will result in major administrative complications, which are not part of the current PSSA system.
- iv. Force all public school entities to offer the Keystone Exams in three subjects (Algebra, Literature, and Biology) in addition to local assessments in these subjects and in addition to all other assessment requirements in the final form regulation, after the U.S. Department of Education approves Pennsylvania's expected application to use these three primary subject exams for purposes of determining adequate yearly progress under the No Child Left Behind Act. Section 4.51(f)(12).

Note that if the U.S. Department does not approve this application, the regulation as presented would force all public school entities to offer the PSSA (the current exam) in reading and math in addition to all of the other assessment requirements in the regulation. Section 4.51(f)(13). This could mean that students would take three different assessments (PSSAs, Keystones, and local assessments) in two subjects, as well as two different assessments (Keystones and local assessments) in eight other subjects.

The State Board has no authority to mandate such duplicative testing.

- v. Force all teachers in public schools teaching in the ten newly mandated subject areas to use the Keystones as one-third of the final grade in their classes, thus requiring teachers to give a failing course grade to any student failing the Keystone. Section 4.24(b)(iv)(A). (Even a student with a "100" class average would fail the course after receiving a "0" – the mandatory below basic score – on the Keystone Exam. Although not set out in the regulation, teachers would also be required to give a failing course grade to many students with "A" or "B" averages and with a low, but passing Keystone score.)

The state has never before interfered in this manner with the grading discretion and methods used by teachers for individual classes and students. Teachers may have worked years in developing fair and effective testing and grading systems for their own classes, but the State Board would replace these decisions made by professionals in the field with its own unauthorized judgment.

- vi. Force all public school entities to provide extra tutoring or other supplemental instruction to students not scoring proficient on a Keystone Exam or a local assessment. Section 4.24(i). This would often amount to the mandatory repetition of one or more entire courses, based on the current practices voluntarily adopted in many schools for students struggling the most to pass the PSSA.
- vii. Force all public school entities to provide state-designed project-based assessments to serve as course-credit make-ups for failed Keystone modules. Sections 4.51(n) and (o).
- viii. Force all public school entities to deny a graduation diploma to students not passing enough Keystone Exams or validated local assessment alternatives and thus not receiving a passing grade in the related coursework. Section 4.24(b). State statutes prohibit this kind of interference with the graduation decisions of local school districts,

and thus the current system in practice provides local schools and educators with the final say over these decisions.

- ix. Force all public school entities to assess students and deny a graduation diploma to students failing to demonstrate proficiency in all of the state academic standards which are not subject to one of the ten Keystones subject exams. Section 4.24(b)(1)(iii). These other subjects include: Arts and humanities; Career education and work; Health, safety and physical education; and Family and consumer science. Section 4.12(a) of the *current regulations in force*. This provision in the final form regulation would change the current regulation standards, which allow a school district the discretion to select additional state standards beyond the PSSA subjects to use when making graduation decisions. Section 4.12(a) of the *current regulations in force*. This aspect of the State Board's expansion of mandatory graduation requirements has been overlooked in much of the debate over the final form regulation.
- x. Force all public school entities to provide faculty guidance for student work on a "culminating project". Section 4.24(b)(1)(ii). This is a separate graduation requirement from the ten assessments, with the regulation newly mandating such "faculty guidance".

As with the other items listed above, there is no state authority for mandating teachers or schools to perform this task.

2. *Legislative review and intent.* The Commission stated in its 2008 comments:

"[T]he proposal is a policy decision of such a substantial nature that it requires legislative review. We urge the Board to work closely with both chambers of the legislature and the House and Senate Education Committees to ensure that the final-form regulation is consistent with the intent of the General Assembly."

Since these comments were written, the General Assembly has taken some inconclusive actions that reflect the intent of different factions within the legislature. Resolutions for and against the final form regulation have been introduced, although no single resolution has been approved by the General Assembly as a whole. The cosponsors for legislation opposed to the regulation far outnumber those supporting the regulation. Most bills on other education issues have been blocked in the House of Representatives due to the threat of amendments offered by those opposed to the regulation.

In short, the General Assembly has been unable to clearly adopt or express its intent on this issue. A couple of legislative hearings in recent months provided forums for different points of view. Chairperson Torsella has conducted closed door, invitation-only meetings with selected legislators and interest groups. But the State Board has not been able to "ensure that the final-form regulation is consistent with the intent of the General Assembly."

The General Assembly may or may not choose to continue working on this issue in the future. Until the legislature provides specific authority for the new programs and mandates in the regulation, the Commission should find that the regulation lacks statutory authority and is not consistent with legislative intent. The final form regulation should be disapproved on this basis.

3. *Fiscal impact.* The Commission found in its 2008 comments that the Regulatory Analysis Form (RAF) did not estimate the costs for validating the local assessment, administering and scoring the tests, record keeping, compliance with federal law for special education students, and potential litigation. The Commission concluded, "Those findings should be included in the RAF submitted with the final-form regulation."

The final-form regulation and supporting documentation submitted by the State Board does not include most of the missing information requested by the Commission. The RAF also fails to include any information about new costs associated with recently added provisions in the final form regulation such as faculty guidance for culminating projects, mandatory proficiency in the arts and health subjects for graduation purposes, and school management of state-designed course-credit make-up projects. In addition, the cost information presented by the Board is inaccurate and presented without sufficient documentation and explanation.

In general, the Board claims that the regulation will result in either no costs or large cost savings to local school entities and to the state. The reply in Item 17 of the RAF states, "All resources associated with the regulation will be provided by the state or developed by the school district; there is no cost impact on individuals." Item 18 states, "Districts already have considerable state resources to support this work. . . . By utilizing the Keystone exams . . . districts may be able to reduce ongoing efforts and expenditures" These conclusions are unsupported and unfounded, given past experience in Pennsylvania and in other states and given the huge expansion in student assessment and remediation imposed by the regulation.

The General Assembly has not appropriated any funding for the various Keystone costs to local school districts. The resources appropriated by the legislature are already fully committed to existing state and local needs for programs such as tutoring, teacher training, and high school improvement. In fact, the recently adopted budget for 2009-10 cuts funding for these three programs by 17%, 41%, and 55%, respectively. Large increases will be needed in the future if the Keystone regulation is implemented. If the state fails to provide additional funding, then local school entities will be required to increase property taxes or cut other programs in order to fulfill the various mandates of the Keystone system. The RAF fails to acknowledge or cost out any of these points.

The fundamental flaw in the State Board's cost analysis is that the Board has no authority to appropriate funding or to commit either the state or local school entities to future levels of funding. In this way, the Board is exceeding its role in setting state policy and imposing the costs associated with such policy.

Most of the cost estimates in the RAF are incomplete, unsubstantiated, and inaccurate. A few examples include:

- The best known cost is the price for state contracts to initially develop the Keystone Exams. Item 18 in the RAF states that the costs through 2014 would be \$176.4 million. Since Section 4.51(f)(11) in the final form regulation includes plans to develop only the first seven Keystone Exams by 2014, it would appear that the cost to develop the final three exams is not included in the RAF and would increase the overall price tag by at least thirty percent.
- Item 18 in the RAF also estimates \$25,000 as the cost for a local school district to develop a single local assessment. Compare this to the state's cost for developing a single Keystone exam, approximately \$25.2 million. Since the regulation requires local

assessments to be validated as meeting the same standards as Keystone Exams, why would the development costs be one thousand times lower? (And if it is possible to develop a valid assessment for \$25,000, then why would it be in the public interest for the state to spend over \$25 million for an equivalent test?)

- Item 18 in the RAF estimates the per student cost of extra tutoring and supplemental instruction at \$600 per student. This cost is unsubstantiated and varies greatly from data about existing student remediation programs in Pennsylvania. Looking, for example, just at the partial costs for remediating students at risk for failing the PSSA in the York City School District (YCSD) in 2008-09, the PA-PACT Plan filed with the state by YCSD shows that nearly \$5 million was spent on tutoring and supplemental instructional services for 1,930 students. This averages out to \$2,591 per student. Similar data is available for nearly every school district in Pennsylvania, contradicting the uncorroborated estimate for tutoring costs in the RAF.

Many additional fiscal impact issues remain undocumented and unaddressed by the State Board, including:

- As requested by the Commission, what are the state and local costs of administering and scoring the tests, record keeping, compliance with federal law for special education students, and potential litigation, as well as other "hidden" costs for adjusting academic instruction, technical assistance for administrators, student re-testing and credit make-up work, and faculty guidance for culminating projects?
- If additional resources are needed above current appropriations for test administration, record keeping, student tutoring, teacher training, and other mandates in the final form regulation, what are these actual costs? The Board should not merely assume that current appropriations will cover the cost of such things.
- If students are prevented from graduating by the new regulatory rules, what are the costs expected from this? How much would it cost for thousands of students to stay in high school for an additional year or two? (The average annual total school expenditures in Pennsylvania are about \$11,000 per student.) Who would pay these costs? What are the costs to communities and to the state for student dropouts unable to obtain a graduation diploma due to the new rules, in terms of unemployment, loss of tax revenue, and social welfare programs?
- The regulation does not mandate school use of the new state model curriculum and instructional diagnostics being developed along with the Keystone Exams, so why does the RAF assume that there will be an annual savings of up to \$9 million per year based on replacement of local curriculum and diagnostic programs with the state models? And even if some school districts choose to use the state models, aren't these districts likely to be the ones currently unable to spend resources on these things, thus resulting in no real cost savings?

4. Other 2008 Commission comments which are not addressed in the materials submitted along with the final form regulation. The State Board did not provide any of the following requested information, requiring the Commission to disapprove the final form regulation.

- "Given the number of GCAs that will be required and the number of times those tests will be administered, it is unclear how school districts will be able to implement the regulation. . . . A detailed explanation of how a school district is expected to implement

this regulation and why the Board believes this approach is reasonable should be included in the Preamble to the final-form regulation.”

This criticism has grown in importance along with the number and complexity of the Keystone Exams, which replaced the GCA model originally contained in the proposed version of the regulation.

- “The final-form regulation should provide clear and binding standards for how the school district will accommodate the needs of special education and English as Second Language (ESL) students with respect to administration of the GCAs and any resulting remediation.”

This criticism has also grown in importance, now that the Keystone system involves not only standardized testing but also interference with the course grades assigned by classroom teachers for all students.

- “What types of corrective action has the Department taken to improve the local assessments of school districts that are failing? Before the Board moves forward with this proposal, we ask for a more thorough explanation of why the current system is not adequate to address the problem the proposal seeks to address. If the Board determines that regulatory changes are needed, it should consider administering those changes on a case-by-case basis, not as a statewide mandate.”

The State Board provides lots of data with the final form regulation package, relating to graduation rates, PSSA passing rates, and remediation in college. This data does not support the need for the regulation and does not account for what it purports to explain. There is no proof presented that students demonstrating their knowledge on local assessments are any less prepared to graduate high school or attend college than students passing the PSSA state assessment. In fact, the full evidence could show that local assessments are equal or better predictors of future success than the PSSA. And no data is presented to show how the students taking college remedial courses performed on either state or local high school assessments. The state has not presented the data necessary to truly understand these issues. Most importantly, none of this data indicates that the state has taken any corrective action to address real student achievement or local assessment problems on a case-by-case basis.

It is also worth noting that the supplemental materials submitted with the final form regulation include a Penn State University report evaluating the local assessments currently used by school districts. Despite this report, the final form materials do not address what action the state has taken to improve local assessments on a case-by-case basis or to address the large achievement gaps shown to exist by the current PSSA testing system in many individual school districts.

At most, the Penn State report provides an inconclusive evaluation of local assessments. First, most of the problems identified in the report are related to test administration rather than test design. Test administration issues should not be relevant to consideration of this issue, because the final form regulation does not include any provisions detailing test administration procedures for either Keystone Exams or local assessments. In other words, Keystone Exams as presented in the regulation might also fail the Penn State criteria for valid test administration. Second, most of the test design problems identified in the report were due to lack of information. School districts

had not provided the consultants with enough information to qualify for the highest design scores and there is no indication that the state made an effort to obtain additional information, which may have been available in many cases.

B. The final form regulation includes several major provisions that are recently added, that were not included in the proposed version of the regulation, that have never been subjected to agency hearings and comment, and that do not meet the standards required by the Regulatory Review Act.

The submitted regulation does not merit any deference due to its "final form" status. Recently added provisions in the final form regulation include more than half of the total content of the regulation. Section 4.3 contains four new definitions, including three separate "Advisory Committees." Section 4.4 contains new provisions for "diagnostic supports" and "technical guidance to school districts . . . in developing local assessments." Sections 4.24 and 4.51 entirely replace the initially proposed system of "Graduation Competency Assessments" with a new wide-ranging system of "Keystone Exams." The Keystone system includes new provisions impacting student grades assigned by classroom teachers, student options for testing out of coursework, validation of local assessments, testing waivers for emergency student circumstances, supplemental course-credit make-up assessments, potential replacement of the 11th grade PSSA exams, and other smaller provisions.

The extent of these recently added provisions raises the question of whether the final form regulation in this case has gone beyond the proper scope of revisions to the proposed version of the regulation. The terms of the Regulatory Review Act do not specify a limit to the changes an agency can make to a proposed regulation when preparing a final form regulation. But some limit must be implied in the Act, since otherwise agencies could avoid compliance with the Act's public review requirements for proposed regulations by completely replacing all proposed provisions with new provisions in the final form.

Even if the final form regulation here does not exceed the proper scope of revisions to the proposed version, the Commission should thoroughly scrutinize the changes under the full scope of regulatory review standards and disapprove those changes requiring additional work by the State Board. ELC believes that many of the new provisions in the final form regulation have been hastily conceived and have not been subjected to open public hearing or comment, resulting in violation of regulatory review standards in many of the same ways that the Commission initially criticized the proposed regulation.

The Commission should also instruct the State Board to correct the various drafting errors with substantive implications as contained in the final form regulation. For example, Section 4.51(d) of the current Chapter 4 regulation in force requires "annual" administration of "state assessments" and limits such assessments in high school to "grade 11" and to the subjects of mathematics, reading, writing, and science. The final form regulation intentionally leaves this subsection in place without change, as shown by the marking ("****") inserted between subsections 4.51(c) and (e). This creates a conflict between the requirements of 4.51(d) and many of the new Keystone mandates for testing in ten high school subjects at least three times per year in grades 9, 10, 11, and 12.

In addition, several of the provisions in the final form regulation are internally inconsistent and likely to result in unfair outcomes for students. For example, the final form regulations leave

Section 4.52(e) in place without amendment, listing the “variety of assessment strategies” allowed for local assessments. One of the permitted strategies is “diagnostic assessments”. Does this mean that students can skip the Keystone Exams if they receive passing scores on the diagnostic assessments being developed by the state as preparatory tools under Section 4.4(e)(1)?

The Commission should disapprove the regulation and order the Board to rectify these problems.

C. The final form regulation differs in significant ways from the document voted on by the State Board in August 2009.

The regulation presented to the Commission is considerably different from the document officially approved by vote of the State Board of Education. The dozens of changes made to the regulation after its official Board approval in August – exceeding far over 100 total changes – essentially create a new document unapproved by the Board. These changes include both undeniably substantive alterations as well as many potentially non-substantive alterations.

For example, Section 4.51(f)(9) as voted on by the Board stated:

“In consultation with educators, students, parents and citizens, the Department shall develop and recommend to the Board for its approval specific criteria for advanced, proficient, basic and below basic levels of performance.” (*emphasis added*)

The document submitted to the Commission does not include this sentence. Instead, the document was changed after the Board vote to include a new definition in Section 4.3 for a “Performance Level Advisory Committee.” Nine different kinds of members are named and listed for the Committee in the new definition. But the structure of the language is changed to remove the word “shall”. The words “student” and “parent” – or any possible synonyms – are also not included in the new definition. The obvious result is that the mandatory inclusion of students and parents in reviewing the performance levels no longer exists in the document submitted to the Commission. The insertion, also after the Board vote, of “others” in the list of Committee participants does nothing to restore the mandatory requirement for student and parent participation which existed in the regulation when voted on by the Board.

It is also noteworthy that the lengthy definitions for three committees with different roles in the Keystone Exam system were all drafted and inserted in Section 4.4 after the Board vote in August. Much of the language in these definitions was moved from other sections, but significant re-writing also occurred and resulted in changes in word choice and sentence structure, the inclusion of new provisions, and the removal of other provisions. Similar alteration throughout the document adds up to more than 100 total changes made after the Board vote on the regulation. Such wholesale revisions cannot be fairly characterized as “immaterial technical and editorial changes”, as asserted by Chairperson Torsella in his October 5, 2009 letter to Representative Clymer (on file with the Commission).

Only through proper review, consideration and official voting procedures can the Board itself determine which of these changes are and are not substantive. Neither the Commission nor Chairman Torsella should usurp the lawful role of the agency’s board in determining how to view the dozens of changes made after the August vote. However, the Commission is responsible under the Regulatory Review Act for ensuring that the submitted regulation was lawfully

promulgated by the agency. Given the unprecedented number of alterations and the potential that at least some of these changes may alter the substance of the regulation in fact or by Board perception, the Commission is obligated to disapprove the regulation and order the Board to take appropriate action to ensure that lawful promulgation occurs.

D. The final form regulation contains provisions that are highly arbitrary and potentially discriminatory, making it likely for litigation to occur.

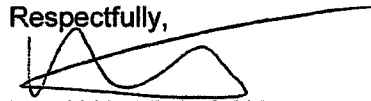
Regulations that are poorly written, hastily promulgated, and not subjected to public review are more likely to contain arbitrary provisions with the potential to lead to discriminatory results. The Keystone regulations contain several examples of this kind of problem.

1. It is fundamentally unfair for the state to hold students accountable for learning without providing them with an adequate opportunity to learn. The final form regulation would wrongly deny a diploma (and passing course grades) to tens of thousands of students whose only school option is a public school that has already been identified by the state as failing to make adequate yearly progress, sometimes for years. Similarly, many schools in high-poverty communities do not have the resources or the qualified faculty needed to offer Advanced Placement or International Baccalaureate courses, thus limiting the assessment options available under the regulation.
2. The final form regulation fails to include the standards needed for schools to make informed and consistent decisions about the inclusion of students with disabilities and English language learners in the Keystone system. This lack of standards is likely to result in arbitrary and inconsistent administration of the new instructional and testing system for these students. The Commission reached this conclusion about the proposed regulation and nothing has changed in the final form version to alleviate this problem.
3. The regulation does not contain a fair appeal process for student testing problems. The emergency waiver provision in Section 4.24(j) establishes a limited pathway for student exemptions from the testing requirements if needed as an accommodation for “serious illness, death in immediate family, family emergency, frequent transfers in schools, or transfer from an out-of-state school in 12th grade.” But the regulation does not contain any appeal or waiver mechanism to address the needs of students facing equally meritorious in-school circumstances such as disruptive or invalid testing conditions, inadequate assignment of highly qualified teachers in tested high school courses, and lack of science labs or other instructional resources necessary for learning the tested material under state academic standards.
4. The supplemental instruction/tutoring provision in Section 4.24(i) states only that this support “must assist the student to attain proficiency in the State academic standards.” None of the terms in this subsection are defined, making it likely that some students will receive much different opportunities for supplemental instruction than others. In addition, the remedial provisions of the regulation – Sections 4.24(i) and 4.51(n) and (o) – will by default not apply for high school seniors. Seniors failing a Keystone Exam would not have time to take advantage of these remedial options prior to graduation, and the regulation contains no provisions addressing the needs of these students after completion of 12th grade without achieving passing Keystone scores.

For all of these various reasons, but primarily because the regulation provides a costly and time consuming diversion from the school reforms that are most needed by children, ELC encourages the Commission to disapprove the regulation and thus encourage the State Board to tackle other reforms for which it has statutory authority and which will more directly benefit students and schools.

Thank you for your consideration.

Respectfully,

A handwritten signature in black ink, appearing to read 'Baruch Kintisch', written over a horizontal line.

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