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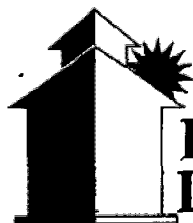
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MESSAGE: Attached are our comments for the Chapter 4 regulations.

→ Attached is a 12 -page letter.

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Quality & Fairness in
Pennsylvania's Public Schools

EDUCATION LAW CENTER

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By first class mail, fax, and email.

June 13, 2008

Jim Buckheit
State Board of Education
333 Market Street, 2nd Floor
Harrisburg, PA 17126-0333

Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

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

The Education Law Center (ELC) is a statewide non-profit legal 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 submit comments concerning the Chapter 4 regulations establishing high-stakes assessments, proposed by the State Board of Education.

ELC shares the ambition of the State Board of Education that all students should graduate from high school with the knowledge and skills allowing them to succeed in life. And ELC acknowledges that state assessments have a legitimate role in measuring student performance and identifying students in need of extra assistance. Current Pennsylvania law establishes state assessments for this purpose. However, the regulations proposed by the State Board would go far beyond this purpose and, for the first time, establish a mandatory system of high-stakes graduation tests used by the state to deny diplomas to students. This major change in state policy would have a significant impact on every student, teacher, and public school in Pennsylvania.

There are strong legal and policy arguments against the proposed Chapter 4 regulations. ELC believes that the regulations should not be approved for the following reasons:

- The regulations exceed the authority of the State Board of Education by improperly establishing state-level power to deny high school graduation diplomas to individual students and by unlawfully removing the existing statutory authority of local school districts to make final graduation decisions for their students;
- The regulations impose immense unfunded costs and time-consuming administrative tasks on local schools, on educators, and on the state;
- The regulations create unnecessary and wasteful student assessments, duplicating the function of existing state assessments and academic standards;
- The regulations harm the academic and career interests of students by imposing extreme consequences (denial of graduation) based on state assessment results, when

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hundreds of school districts are under-funded by the state and when hundreds of thousands of students will not receive the instruction and support services needed to learn the material being tested;

- The regulations violate the rights of students to receive fair and equitable treatment in public schools, especially children with disabilities, English language learners, students living in poverty, and students forced to attend schools already identified by the state as ineffective for failing in multiple years to make adequate yearly progress; and
- The regulations are not necessary for the purpose stated by the State Board. Working within their proper authority, the State Board and the Pennsylvania Department of Education can take many other actions to support student achievement, improve school quality, and strengthen the value of high school diplomas issued by local school districts throughout the state. Valid state action toward these objectives could include enhanced monitoring of school districts, improved technical assistance from the state for struggling schools, and expanded support services and training for teachers and local school officials.

ELC will address these issues in the context of the Independent Regulatory Review Act (IRRA). 71 P.S. § 745.1. Our fundamental contention is that when the proposed Chapter 4 regulations are evaluated in light of the IRRA, they do not meet the standards required by the Act. ELC believes that the proposed regulations violate the Act – not just in cursory, insignificant, or limited ways – but so fundamentally and extensively that the Commission should consider rejecting the regulations in the strongest possible terms. We will order our comments by each relevant section of the Act.

A final introductory note – ELC encourages the Commission to review the proposed regulations in comparison to similar proposals potentially forwarded for review by other administrative agencies. The unprecedented shift in authority, the huge unfunded costs, the duplication of existing requirements, and the obvious negative consequences on individuals would demand the Commission's closest scrutiny if imposed by regulations forwarded by state agencies attempting to govern other industries or professions. From this perspective, the State Board of Education should be given no greater deference than other agencies just because it asserts that it acts to help children.

A. IRRA Criteria Regarding Statutory Authority for the Regulation

"Upon a finding that the regulation is consistent with the statutory authority of the agency and with the intention of the General Assembly in the enactment of the statute upon which the regulation is based, the Commission shall consider the following [criteria] in determining whether the regulation is in the public interest." 71 P.S. § 745.5b(b).

Considerations:

1. The regulations do not identify a relevant statute upon which the State Board of Education has based the proposal. The primary statute listed – 24 P.S. § 26-2604-B(b)(2)(v) and (vii) – only provides indistinct authority for the State Board to set policy regarding the requirements for graduation and academic subjects to be taught. A secondary statute listed – 24 P.S. § 26-2603-B(i) – merely requires the State Board to adopt a master plan – not the formation of regulations – making recommendations for

the guidance of the Governor and the General Assembly regarding "student testing and assessment".

The cited statutes do not authorize the State Board to establish regulations for student assessment, for removing from local school districts the ultimate control over the granting or denial of student diplomas (See 24 P.S. §§ 16-1611, 1613, giving local school districts authority over graduation diploma decisions), for mandating supplemental instructional support or remediation for students failing the tests, or most other provisions contained in the proposed regulations.

The General Assembly has not enacted statutes authorizing these regulations nor the subject matter contained therein, and thus the State Board has acted precipitately. The Commission must reject a regulation that lacks such specific statutory authority.

2. There is no state or federal law which gives the State Board the power to require a certain level of performance on a state or local assessment in order to receive a high school diploma. While No Child Left Behind requires states to perform an assessment of students, the law does not require that these assessments be tied to the conferral of a high school diploma. 20 USC § 6311(b)(3)(B) and (I). State law authorizes the State Board to form a master plan recommending student assessment, but the General Assembly has not allowed for the use of statewide tests to do more than measure the progress of students or schools. See 24 P.S. 26-2603-B(i)(3). No statutory authority in Pennsylvania allows the state to use assessments to decide which students can graduate and receive diplomas. The Commission must reject a regulation that lacks such specific authority in state or federal law.
3. The proposed regulations are not consistent with the overall statutory authority granted to the State Board of Education by the General Assembly. The General Assembly has given the State Board the power to "adopt broad policies and principles, and establish standards governing the educational program of the Commonwealth." 24 P.S. § 26-2603-B(a). Local school districts are then empowered by the General Assembly to implement both state statutes and the policies of the State Board with discretion as "necessary and proper for the management of school affairs." See *Woodland Hills Sch. Dist.*, 747 A.2d 433, 435 (Pa. Commw. Ct. 2000).

"The General Assembly has vested local school districts with the authority to set up its own requirements for graduation from its schools and to confer academic degrees on those who successfully complete such requirements." *Id.* While the State Board can set broad standards for graduation, 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. See 24 P.S. §§ 16-1605 (the power to "change" courses of study), 16-1611 (the power to "confer academic degrees"), and 16-1613 (the power to determine which students are "satisfactorily completing" high school). The State Board's own regulations are consistent with these statutes and empower local school districts to "specify requirements for graduation." 22 Pa. Code § 4.24(a).

In attempting to promulgate a new regulation that essentially removes the existing statutory authority of local school districts to make decisions about student graduation and the granting of high school diplomas, the State Board has acted inconsistently with its own statutory authority and has exceeded the intention of the General Assembly. Under these circumstances, the Commission must reject the regulation.

B. IRRA Criteria Regarding Economic or Fiscal Impact of the Regulation

"Economic or fiscal impacts of the regulation." 71 P.S. § 745.5b(b)(1).

Considerations:

1. The Commission must recognize the tremendous financial burden the proposed regulations will impose on local school districts and on the Commonwealth. The regulations will force local school districts to cover most of the cost of implementing the various new programs and services associated with the regulations. There are innumerable "hidden" costs affiliated with implementing the regulations such as professional development and supervision, adjusting academic curricula and classroom lesson plans, academic remediation, and other support programs for students at risk for failing. In addition, school districts that want to either continue using or create their own local assessments will have to pay for the initial exam development and validation every five years by an outside contractor. The State Board does not have the power to allocate state funding to school districts to cover these myriad costs, so the regulations amount to a huge unfunded mandate by the Board.

A recent study of three states with exit exams by the Center for Education Policy found that local school districts paid for 96% of the costs associated with high stakes assessments.¹ Indiana has appropriated \$557 per student just to annually update its exit exams and another \$111 per student to provide teacher training for the exams.² These two functions alone would amount to an annual cost of at least \$250 million in Pennsylvania, without considering any of the other necessary expenses of imposing high-stakes exams.

The Commission should reject the proposed regulations due to their immense financial impact on the state and on local school districts, especially when the General Assembly has neither specifically authorized such new programs nor appropriated related funding.

2. Without state appropriations to pay for the costs of the proposed high-stakes student assessments, there will be significant fiscal and economic consequences for local school districts and their residents and taxpayers. Budgets are already tight in most school districts. The Costing-out Study commissioned by the General Assembly in 2007 found that 471 out of the 501 school districts in Pennsylvania are under-funded. See Augenblick, Palaich, and Associates, "Costing Out the Resources Needed to Meet Pennsylvania's Public Education Goals," Nov. 2007. Many districts cannot raise property taxes any further without driving away local businesses and discouraging homeowners from living there. The huge unfunded costs imposed on local school districts by the proposed Chapter 4 regulations risk harmful fiscal and economic consequences for communities throughout Pennsylvania, especially low-wealth communities already taxed-out and struggling to provide quality public schools. The Commission should reject the proposed regulations due to this significant fiscal and economic impact.

¹ Hoor Bhanpuri and Susan K. Sexton, "A Look at the Hidden Costs of High School Exit Exams," *CEP Policy Brief*, 2006.

² *Id.*

3. The proposed regulations and the related background materials submitted by the State Board to the Commission do not assert that any new funding will be provided by the General Assembly for the new assessments, programs, services, and requirements imposed by the regulations. Instead, the State Board states that funding appropriated by the General Assembly for other purposes will cover all of the state and local costs associated with implementing the proposed regulations. This claim is misguided in several ways. First, expansive new programs of such a radical nature as created by the proposed regulations will certainly incur immense extra costs, as documented by the experience in other states. See Hoor Bhanpuri and Susan K. Sexton, "A Look at the Hidden Costs of High School Exit Exams," *CEP Policy Brief*, 2006. Second, the State Board has no authority to redirect funding appropriated by the General Assembly for other purposes. This is unlawful and unfair to local school districts. Third, the Costing-out Study completed by the State Board in November 2007 found that 471 out of 501 school districts in Pennsylvania are already severely under-funded. Augenblick, Palaich, and Associates, "Costing Out the Resources Needed to Meet Pennsylvania's Public Education Goals," Nov. 2007. Without new funding specifically appropriated for the purpose of implementing the proposed regulations, the new programs desired by the Board amount to a vast unfunded and unauthorized mandate. Placing the expensive new fiscal requirements of the proposed regulations on top of existing demands and current funding levels will cause tremendous financial hardship at both state and local levels. The Commission should reject the proposed regulations for failing to properly address these issues.
4. The background materials submitted by the State Board to the Commission along with the proposed regulations estimate that the cost to state government over the first five years will total at least \$156 million. State government costs are estimated to be at least \$40 million per year thereafter just to "administer, score and report the ten tests . . . each year." The Board's estimates ignore other significant costs to state government imposed by the regulations, such as technical assistance and support to be provided by the state for school districts and educators. Finally, the Board claims that there will be no negative economic or fiscal impact of the regulations on school districts and the local communities affected by these issues. Instead, the Board asserts – contrary to common sense and the experience documented in other states – that school districts will save money because of new services provided by the state. The Commission should reject the proposed regulations due to the severe inadequacy and inaccuracy of these fiscal impact estimates.

"The nature of required reports, forms or other paperwork and the estimated cost of their preparation by individuals, businesses and organizations in the public and private sectors." 71 P.S. § 745.5b(b)(1)(iii).

Considerations

5. In order to comply with the proposed regulations, the Commonwealth and local school districts will have to produce numerous reports and maintain volumes of records associated with the new exams. For example, the new exams must be received, stored, administered, shipped, and scored, all requiring paperwork and handling by multiple individuals at thousands of schools and at the state level. Performance reports for each completed assessment will have to be created for each student after each exam is administered and graded. The performance reports will be sent to and

reviewed by individual teachers, schools, districts, and the student's family. Districts and schools will have to keep records of which exams students have passed and which exams or portions of exams must be retaken. School districts will also have to pay for counselors, administrators, teachers, and support staff to review test results, manage exam records over time, meet with parents to explain test results, and determine which students have met the new state criteria for graduation. The Board has not documented the nature of these paperwork and administrative tasks and the related costs at all levels of the education system. The Commission should reject the proposed regulation due to the great potential for large, unfunded, and unplanned administrative requirements and collateral costs.

"The nature and estimated cost of legal, consulting or accounting services which the public or private sector may incur." 71 P.S. § 745.5b(b)(1)(iv).

Considerations:

6. The proposed regulations will require significant legal and consulting costs in several different ways.
 - a. The regulations will directly impact all children with disabilities, English language learners, and other students with protected educational rights under state and federal law. The state and individual school districts will be forced to incur both large initial and on-going legal and consulting expenses to ensure that the regulations are implemented in compliance with these student rights, such as ESEA, IDEA, and Title VI. The Commission should reject the proposed regulations due to the certainty that they will create significant and unfunded legal costs for the state and local school districts.
 - b. Litigation over the formation and implementation of high-stakes testing has occurred in many other states. There will be litigation costs associated with inevitable challenges to the implementation of the proposed regulations in Pennsylvania. Even if major class action litigation were not filed in Pennsylvania or against any individual school district based on the impact of the new assessments and graduation requirements, each school in Pennsylvania will be faced with constant "legal" challenges in various degrees of formality from parents alleging unfair implementation of the new high-stakes graduation exams. These significant unfunded costs will be ongoing year-after-year and should compel the Commission to reject the regulations.
7. The state will incur significant consulting costs in the development of the graduation competency assessments. A total of \$234 million was spent nationally on consultants for state assessment systems in a single year (2000).³ Texas spent \$11 million for testing consultants in 2001. *Id.* The proposed Chapter 4 regulations also require that local assessments must be approved by a state selected vendor. Local districts will be forced to incur these approval costs every five years. The state will have to shoulder the cost of screening and selecting potential vendors. The Commission should reject the proposed regulations due to these unfunded requirements which force the annual

³ Caroline M. Hoxby, "The Cost of Accountability," NBER Working Paper No. W8855 (April 2002).

expenditure of millions of dollars on consulting services to create, validate, and update the new assessment scheme.

8. The proposed regulations will have significant and unfunded accounting consequences. The regulations require hundreds of thousands of students each year in thousands of schools and hundreds of school districts to take multiple state assessments and re-take either entire exams or portions of exams. This amounts to an unprecedented imposition of accounting services, processes, and expenses for the calculation, recording, review, compilation, and communication of student scores and results. The Commission should reject the proposed regulations because they do not plan for and fund such significant accounting complexities.

C. IRRA Criteria Regarding Exemptions or Setting Lesser Standards of Compliance

"The impact on the public interest of exempting or setting lesser standards of compliance for individuals or small businesses when it is lawful, desirable and feasible to do so." 71 P.S. § 745.5b(b)(1)(v).

Considerations:

1. Exemptions and lesser standards of compliance are needed for some students when high-stakes consequences are attached to individual performance on mandatory assessments. Students with disabilities and English language learners should receive accommodations and exemptions because they are disadvantaged on exams through no fault of their own. Denying these students the appropriate accommodations and exemptions would violate state and federal laws and the equal protection principles of the U.S. and Pennsylvania Constitutions. See U.S. Const. amend. XIV., Pa. Const. Art. I § 6. Students who attend under-funded schools or schools already identified by the state as failing to make adequate yearly progress (AYP) should also receive accommodations and exemptions because they are similarly disadvantaged at no fault of their own.

In short, students in certain disadvantaged circumstances must not be penalized when they do not have a fair opportunity to learn the material being tested. The proposed regulations do not contain sufficient exemptions for students with disabilities and would risk unfairly penalizing them. The regulations completely fail to address the needs of English language learners, merely indicating that the Pennsylvania Department of Education "will provide guidance" to schools on this issue. Finally, the regulations do not address the needs of students attending under-funded schools and students attending schools failing to make AYP. Many other states such as Arizona, California, and Georgia have established exemptions and lesser standards addressing the needs of these students, through statute and regulation containing much more specificity than the proposed Pennsylvania regulations. The Commission should reject the regulations as they do not provide sufficient exemptions and lesser standards and threaten the legal rights of disadvantaged students.

2. Some limited exemptions and lesser standards are loosely included in the proposed regulations for special education students, but the Board has not provided any evidence of the impact of these exemptions and lesser standards on students with and without disabilities. The Board has the responsibility to demonstrate the positive and negative effects on (i) students who receive accommodations on graduation exams and (ii) on

their teachers and peers. For example, will the threat of not graduating scare parents into seeking to enroll their children in special education programs in order to qualify for testing accommodations? How will teachers respond to a situation where some of the students in their classroom may not graduate unless they learn the material and pass the exams, while students with disabilities in the same classroom may not face the same consequences? How will these alternative standards affect the attitude and academic motivation of students with disabilities, their peers, and their teachers? The Commission should not approve the regulations unless the Board can show that it has considered the potential impact of exemptions and lesser standards and taken such impact into consideration in the terms of the proposed regulation.

D. IRRA Criteria Regarding Conflict or Duplication of Statutes or Existing Regulations

"Possible conflict with or duplication of statutes or existing regulations." 71 P.S. § 745.5b(b)(3)(i).

Considerations:

1. The proposed regulations are in direct conflict with the Public School Code. Article XVI of the Public School Code gives each local school board – not the Commonwealth or a state agency – the power to determine whether students are qualified to graduate and to confer academic degrees. 24 P.S. §§ 16-1611(a), 1613(a). The proposed regulations would conflict with the School Code and exceed the State Board's regulatory authority, because they would empower the state to determine who will receive a diploma and effectively usurp the existing statutory authority of school districts to make these decisions.

While the State Board does have the authority to form a master plan recommending student assessment – 24 P.S. § 26-2603-B(i) – it does not have the authority to attach high stakes consequences for students to the assessments. A Pennsylvania statute giving the State Board the power to regulate the evaluation of students through testing, 24 P.S. § 1-116(b)(1), makes it clear that the purpose of assessments is to provide the state and local school districts with information about the educational performance of students and schools. The statutory definition of state assessments ("PSSA test") specifies that their sole purpose is "to determine only academic achievement relating to objective academic standards" – not to establish state-level power to deny graduation diplomas. 24 P.S. § 1-102. The General Assembly has also designated the use of state assessments for the limited purpose of identifying students qualifying for extra assistance through state-funded tutoring programs – not to punish students by overruling local school district decisions that students are prepared for graduation. 24 P.S. §§ 15-1502-C, 15-1512-C. The Commission should reject the proposed regulations because they conflict with local school districts' ability to confer degrees and attempt to give the state excessive power in the use of assessments.

2. The proposed regulations create an unnecessarily duplicative system of assessments. The state already has a system of student testing and school accountability through the Pennsylvania System of School Assessment (PSSA). 22 Pa. Code § 4.51. The PSSA system is a sufficient method of assessing and evaluating students and the PSSA assessments will remain fully in effect under the newly proposed Chapter 4 regulations. PSSAs were developed over the last decade with the explicit approval of the General

Assembly, 24 P.S. § 1-102, the investment of tens of millions of dollars, and the effort and training of thousands of teachers and school administrators. Most importantly, the PSSA system was designed to reflect the statutory authority of local school districts in making the ultimate decision about which students are prepared to graduate, by specifically allowing districts to use local assessments – and not merely PSSA results – to determine student performance. 22 Pa. Code §§ 4.24(a) and 4.52.

The proposed Chapter 4 regulations are gravely misguided because they conflict with and duplicate the PSSA system established by the General Assembly and by existing regulations. New assessments are unnecessary to ensure that students and schools are high performing. PSSA results already identify which students are in need of remediation and which schools are in need of reform. The State Board itself commissioned a study in 2005 which validated these conclusions about the PSSA system.⁴ The state is fully capable of using PSSA results to implement and fund programs to meet student and school needs as identified with current assessments; students, educators, and school districts would welcome this kind of assistance from the state. The State Board is exceeding its authority and wasting taxpayer dollars by attempting to jerry-rig a new and expansive assessment system on top of the PSSAs. The Board is also exceeding its authority and establishing conflicts with existing law by attempting to eliminate school district authority to both use local assessments and make graduation decisions at the local level. The Commission should reject the regulations based on this overwhelming assortment of conflicts and duplications.

E. IRRA Criteria Regarding Clarity, Need, and Reasonableness

"The clarity, feasibility and reasonableness of the regulation to be determined by considering the following: Clarity and lack of ambiguity; Need for the regulation; and Reasonableness of requirements, implementation procedures and timetables for compliance by the public and private sectors." 71 P.S. § 745.5b(3).

Considerations:

1. The proposed regulations lack clarity in describing what they require and how they will be implemented. The regulations state that PDE "shall provide support" to school districts in aligning instruction to state exams, developing tutoring and remediation programs, and professional development. The regulation does not detail for how long or how extensive the state support and local activities will be nor does it detail who will be responsible for the cost of these services. In addition, the proposed regulations state that students who do not pass the GCAs, PSSAs, or local assessments "shall be provided supplemental instructional support by the student's school entity." The regulations do not specify the extent of this support nor do they specify the expected amount of time that students can receive this support. The proposed regulations should also provide greater detail of the level of accommodations that children with disabilities, English language learners, and students at under-funded schools will receive on the

⁴ "Relationships Among Pennsylvania System of School Assessment (PSSA) Scores, University Proficiency Exam Scores, and College Course Grades in English and Math," Human Resources Research Organization (HumRRO), for the Pennsylvania State Board of Education, September, 2005.

exams. The Commission should reject the regulations because they are ambiguous in these crucial ways and do not provide PDE, local school districts, educators, and students with sufficient information about how high stakes testing will be implemented in Pennsylvania.

2. The State Board has not demonstrated a need for the proposed regulations. Based on the existing PSSA system and current test results for students and schools, the state already knows which students and schools are failing. In addition, school districts currently provide local assessments to supplement the PSSA system and improve their determinations about which students are prepared to graduate. Given what currently exists, a new, elaborate, and costly high stakes testing system is not needed. The state has a legitimate role and responsibility to provide the resources, the technical assistance, and the support programs truly needed by struggling schools to help disadvantaged students, rather than establishing a duplicative series of student assessments and usurping local school district authority to issue graduation diplomas.

The State Board claims that the proposed regulations are needed because school districts are using local assessments along with other information to determine that students are prepared for graduation, even when some students do not achieve proficient scores on all PSSA exams. This claim is unjustified and unsubstantiated for several reasons. First, current law not only allows but encourages school districts to use local assessments for this purpose. Districts are even directed that "[t]he local assessment system shall be designed to include a variety of assessment strategies" including non-traditional performance-based testing methods such as portfolios and projects. 22 Pa. Code § 4.52(e). Second, there is no evidence that local assessments utilized by school districts are any less valid for measuring student achievement than the PSSA. In fact, many school district officials testified at State Board hearings on this issue that their local assessments were superior to the PSSA because they were designed and implemented by educators at the local level to accurately measure what their students are taught. Third, there is also no data showing that students who graduate using local assessments are any less successful after graduation than other students.

The Commission should reject the regulations because the State Board has neither demonstrated sufficient need for the regulations nor demonstrated how these proposals would effectively improve failing schools.

3. The State Board has failed to examine alternative ways to meet a potentially valid need to strengthen the local assessments used by school districts under current law. Perhaps there is a legitimate need for the state to evaluate local assessments and help those districts with weak local assessments to strengthen this program area. But the State Board has completely overlooked this more narrow and more practical option and overstepped its authority in promulgating new high-stakes assessments that are both unnecessary and counter-productive to the current system integrating local and state assessments. In fact, the background documents submitted by the State Board to the Commission acknowledge that the Board did not consider any nonregulatory alternatives or alternative regulatory schemes. The Commission should reject the proposed regulation because much less expensive, less intrusive, and less far-reaching options exist to meet the potential need for strengthening local assessments.

4. The State Board places unreasonable consequences on students who do not meet the requirements in the proposed regulations but who are otherwise qualified for graduation. Students who do not score proficient on the GCAs, PSSA, or local assessment will not receive a high school diploma.
 - a. It is unreasonable to punish students and potentially inflict permanent damage on their lives by withholding a graduation diploma, if students have not received an adequate opportunity to learn the academic material being tested. The state has a responsibility to ensure that all students have access to quality teachers, appropriate class sizes, sufficient textbooks and learning materials, and a safe school environment. Without these fundamental elements of a quality education, students cannot be expected to perform with proficiency on state assessments. Under these conditions it is unreasonable to hold students accountable for failures of the educational system that are not within their control. The Commission should reject the proposed regulations on this basis.
 - b. It is also unreasonable to deny students a diploma based on state assessment results without providing some process for students to appeal this decision. The regulations completely fail to provide for due process and appeals procedures. Students and their parents should have an opportunity to contest assessment results and state-imposed graduation decisions.

Other states have taken a proactive approach to this problem:

- In California, students and parents can file an official complaint when insufficient instructional materials are provided, students attend unclean and/or unsafe school facilities, and/or there are teacher vacancies and/or misassignments. California students can also appeal if they are not provided with sufficient remedial services.⁵ The local education agency is required by California law to respond to these complaints.
- Mississippi provides an appeal for a "substitute evaluation process" which allows a student to show competency in a subject area through grades, class work, or other alternative evidence.⁶ Several states, such as Alabama, New York, and North Carolina, also allow failing students to request and then take a substitute test if they do not pass the traditional exit exam.
- In addition, full exemption from assessments may be officially requested by students in other states through due process in certain situations.⁷

Without a similar process for students to complain of education deficiencies or testing problems, or to contest the denial of a diploma, the proposed regulations place an unreasonable burden on students who do not meet the new graduation requirements and should be rejected by the Commission.

5. The proposed regulations establish an unreasonable timetable for implementation. Students currently in the 6th grade will be faced with the denial of their diploma based on

⁵ See Uniform Complaint Procedures, California Department of Education, *available at* <http://www.cde.ca.gov/re/cp/uc/index.asp>.

⁶ See MS State Board of Education Policy Manual, State Board Policy 7610 (2001).

⁷ Both Georgia and Alaska allow students to request a waiver from the test in certain situations. See e.g., O.C.G.A. 50-13-0009.1; 4 AK ADC 06.772.

GCA results. The GCAs will not be fully developed, teachers will not have the opportunity to adjust their instruction, and required interventions and support programs will not be established in time to ensure that the academic needs of students are reasonably met. The inequitable nature of this timetable is exacerbated because the state must first provide sufficient resources to all school districts, especially in low wealth communities with a limited tax base, before all students will have access to adequate opportunities to learn what will be tested. The Commission must reject a regulation with such unreasonable expectations for implementation.

F. IRRRA Criteria Regarding Legislative Review

"Whether the regulation represents a policy decision of such a substantial nature that it requires legislative review." 71 P.S. § 745.5b(b)(4).

Considerations:

The proposed regulations represent a policy change of a substantial nature.

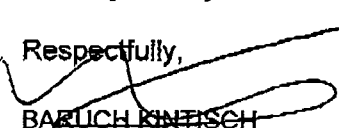
First, Pennsylvania has never before made high school graduation strictly contingent on state assessment results. Current regulations, consistent with statutes adopted by the General Assembly, not only allow but also encourage school districts to use a variety of local assessments in addition to state assessment (PSSA) results to "[d]etermine the degree to which students are achieving academic standards". 22 Pa. Code § 4.52(a)(1). The proposed regulations would effectively abolish the local assessment option by imposing unprecedented and severe restrictions – eliminating the use of portfolio and performance-based assessments, requiring local assessments to essentially replicate GCAs, and requiring expensive validation procedures every five years regardless of whether any local assessment problems exist. These changes would create bona fide high-stakes testing in Pennsylvania for the first time.

Second, the proposed regulations shift the power to confer diplomas from local school districts to the state. The regulations require students to meet graduation criteria set by the State Board and eliminate the authority of local school districts to determine whether students are prepared for graduation. Current law gives local school boards the authority over graduation decisions and the granting of high school diplomas. 24 P.S. §§ 16-1611(a), 1613(a).

The historic establishment of high-stakes testing and the shift of power over granting diplomas are of such a substantial nature that these policies should properly originate with a statutory change by the General Assembly and not through mere regulation. The General Assembly is currently considering legislation making it clear that the State Board is promulgating the new graduation test regulations without statutory authority. The Commission should reject the proposed regulations because they represent a significant change in the manner by which Pennsylvania students attain a high school diploma and such a substantial change should be first approved by the General Assembly.

Thank you for your consideration. Please let us know if we can help in any way.

Respectfully,


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