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INDEPENDENT REGULATORY REVIEW COMMISSION

333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

July 16, 2008

James Buckheit, Executive Director
State Board of Education
333 Market Street, 1st Floor
Harrisburg, PA 17126

Re: Regulation #6-312 (IRRC #2696)
State Board of Education
Academic Standards and Assessment

Dear Mr. Buckheit:

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



State Board of Education #6-312 (IRRC #2696)

Academic Standards and Assessment

July 16, 2008

We submit for your consideration the following comments on the proposed rulemaking published in the May 17, 2008 *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 State Board of Education (Board) to respond to all comments received from us or any other source.

1. Chapter 4. Academic Standards and Assessment. – Statutory authority; Legislative intent; Protection of the public health, safety and welfare; Fiscal impact; Whether the regulation represents a policy decision of such a substantial nature that it requires legislative review; Reasonableness; Need; Implementation procedures.

Whether the regulation represents a policy decision of such substantial nature that it requires legislative review; Legislative intent.

The General Assembly has indicated its interest in the issue of graduation requirements. Act 61 of 2008 was signed into law on July 9, 2008. This Act includes the following language:

Notwithstanding any provision of law to the contrary, in the 2008-2009 fiscal year, a regulation to change or establish high school graduation requirements shall not be further promulgated, approved or proposed.

In addition, the Senate passed a bill (Senate Bill 1442) by a vote of 48-2 that would prevent the Board from adopting any “Statewide requirements for high school graduation...” without an act of the General Assembly. A similar bill was introduced in the House of Representatives (House) (House Bill 2452). Although that bill has not been acted on, it does have 114 co-sponsors, which is more than half of the total members of the House.

Finally, the House Education Committee submitted comments that urge the Board to “step back and re-evaluate these proposed regulatory changes.”

We believe the actions taken by the General Assembly and the House Education Committee indicate that the 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.

Protection of the public health, safety and welfare.

In the Regulatory Analysis Form (RAF), the Board has explained the compelling public interest that justifies the regulation as follows: “This proposed regulation is intended to restore value to the high school diploma and provide every student with an opportunity for success in college and work.”

Opposition to this regulation stems from the concern that these proposed changes will result in the creation of a “high-stakes test.” The House Education Committee indicated that “based on research and experiences with high stakes testing in other states, [these tests] can have significant negative consequences for students living in poverty, minority students, English language learners, and special needs students including increased high school dropout rates, and further narrowing of curriculum that focuses more on standardized testing of students.” Public commentators note that increased dropout rates and the lack of a high school diploma have negative effects on both the individual student and society as a whole.

The House Education Committee and public commentators have raised valid concerns about the impact of the proposed regulation on various categories of students and the potential for an increase in the drop-out rate. These issues are not addressed in detail in the RAF and Preamble. In light of these concerns, the Board should explain how the proposal adequately protects the health, safety and welfare of all citizens of the Commonwealth.

Fiscal impact.

Commentators question whether the Board has adequately addressed the fiscal impact of this regulation. While the RAF addresses costs related to state government, the RAF does not estimate the costs to local school districts for such procedures as validating the local assessment, administering and scoring the tests, record keeping, and compliance with federal law (with respect to special education students). Therefore, the RAF does not fully reflect the overall fiscal impact to school districts and the Commonwealth. The Board should consult with the regulated community to gain a more accurate

understanding of how this proposal will affect them fiscally. Those findings should be included in the RAF submitted with the final-form regulation.

Of particular concern is the cost school entities will incur to pay for the validation of local assessments. The Board has failed to quantify the potential cost for this validation, and commentators believe the cost will be such that it would eliminate the local assessment as a realistic option as a graduation requirement. In order for this Commission to determine if the proposal is in the public interest, this cost must be quantified.

In addition, commentators have suggested that if this proposal goes forward, it will result in litigation. The Board should factor this potential cost for both the Commonwealth and local government when calculating the fiscal impact of this proposal.

Need for the regulation.

If existing graduation requirements, which include local assessments, are not producing the necessary results, what has the Department done to ensure that the local assessments currently used by many school districts are valid? How many of the local assessments used by school districts have been evaluated by the Department to determine the validity of those assessments? What have the results of those evaluations been? 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.

Implementation procedures; Reasonableness.

Given the number of Graduation Competency Assessments (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. Tracking the progress of each student in each of the subject matters, scheduling students to take a test or retake a test (or a module of a particular test) and providing remediation are all significant tasks that will require a large amount of a school district's resources. 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.

Statutory authority.

The House Education Committee and public commentators have suggested that the Public School Code (Code) does not grant the Board the authority to

establish these graduation requirements. They believe that Section 1611 of the Code provides school districts the authority to make final graduation decisions for their students. 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?

2. Section 4.3. Definitions. – Clarity.

The Preamble states that a definition for the term Pennsylvania System of School Assessment (PSSA) will be added to the regulation. We note that the term is not defined in the regulation. We recommend that it be added to the final regulation.

3. Section 4.24. High school graduation requirements. – Protection of the public health, safety and welfare; Implementation procedures, Reasonableness; Need; Clarity.

Subsection (b)(1)(iv)(D)

This subsection allows a school entity to include Advanced Placement or International Baccalaureate exams in its graduation requirements. The exams must include academic content that is comparable to the appropriate GCA, and the student must score at a level comparable to proficient on that GCA. The Secretary will establish what that score must be.

We have four concerns on how this test will be administered. First, can a school include Advanced Placement and International Baccalaureate exams in its graduation requirements, or can only one of the exams be included?

Second, if a student takes one of these exams to fulfill graduation requirements but does not score at the proficient level, will the school have to provide supplemental instruction? If the student does not score at the proficient level, will there be an opportunity to take the test again?

Third, how will a school entity know if a particular exam is comparable to a GCA? Would it be possible for one of the exams to be the equivalent of two GCAs? For example, if a student passes an Advanced Placement mathematics exam, would that be comparable to passing the Algebra I, Algebra II and Geometry GCAs?

Fourth, what methodology will the Secretary use to determine the proficient level for a particular Advanced Placement or International Baccalaureate exam?

Subsection (b)(2)(v)

This subsection requires vendors validating local assessments to consider certain criteria when determining whether the local assessment is comparable to GCAs “**under § 4.51(e).**” (Emphasis added.) Why does this subsection refer to Section 4.51(e), when the subject of this section is the PSSAs, not the GCAs? Did the Board intend to reference § 4.51(f) (relating to the development of GCAs)? The Board should correct the citation in the final-form regulation.

Furthermore, why is local assessment being compared only to GCAs? Should the vendor also make comparisons to the PSSA? If so, the necessary criteria for comparison should be included in the final-form regulation. We have a similar concern with the language found in § 4.24 (b)(1)(iv)(C).

The term “related National and State criterion referenced assessments” found in Subsection (b)(2)(v)(E) is vague. The final-form regulation should define this term.

Subsection (c)

This subsection pertains to supplemental instructions. It states the following:

A student who does not score proficient or above on a PSSA administered in 11th grade or GCA administered in any grade shall be provided supplemental instructional support by the student's school entity. The supplemental instructional support must assist the student to attain proficiency in the State academic standards.

We have two concerns. First, why is supplemental instruction for students not scoring proficient or higher on the PSSA required only after 11th grade? Second, the regulation appears to be silent on requirements for supplemental instruction for students scoring less than proficient on local assessments. At what point would a school entity be required to provide supplemental instruction to these students?

4. Section 4.51. State assessment system. – Implementation procedures; Setting lesser standards of compliance for individuals; Clarity.

Subsection (b)

This subsection pertains to PSSAs. It states, in part, the following: “The Department will make samples of assessment questions, instrument formats and scoring guides available to the public after each administration of State assessments.” Why hasn’t the Board included similar provisions for the GCAs?

Subsection (f)(5)

Under this subsection, scores for the GCAs will be provided to schools “no later than 10 calendar days prior to graduation.” With all the required administrative procedures that go into preparing a school for graduation (i.e., grading tests, preparing diplomas and exit paperwork), we question whether this is a reasonable time frame for providing the scores.

Subsection (f)(6) and (f)(7)

Subsection (f)(6) refers to a “GCA Module.” However, the regulation does not define this term. The final-form regulation should include a definition for this term.

Under Subsection (f)(7), GCA modules “may” be designed in a manner “to allow students who do not score proficient or above to retake those portions of the test in which they did not score proficient or above.” The Preamble describes this provision as a requirement. However, the inclusion of the word “may” in the regulation makes this provision optional. We agree with the Board’s description of this provision in the Preamble and suggest that “may” be changed to “shall.”

Subsection (f)(8)

This subsection states that the Department will provide “guidance” to school entities as to accommodations for students with disabilities and English language learners, “when appropriate.” This is non-regulatory language that does not provide the regulated community with a clear understanding of their obligations or the potential costs associated with administering this provision.

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.

In addition, several commentators have suggested that exemptions and lesser standards of compliance are needed for some students, in particular special education and ESL students, when high-stakes consequences are attached to individual performance on mandatory assessments. We ask the Board to consider this suggestion, and if the Board decides not to adopt it, to provide a detailed explanation of how students with special needs will be accommodated.

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Facsimile Cover Sheet



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To: James Buckheit
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Date: July 16, 2008
Pages: 8

Comments: We are submitting the Independent Regulatory Review Commission's comments on the State Board of Education's regulation #6-312 (IRRC #2696). Upon receipt, please sign below and return to me immediately at our fax number 783-2664. We have sent the original through interdepartmental mail. You should expect delivery in a few days. Thank you.

Accepted by: Barbara Baker Date: 7/16/08