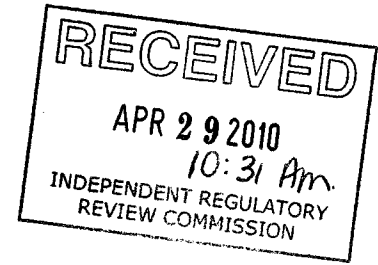


Todd M. Klunk  
Acting Deputy Secretary

April 29, 2010



2817

Mr. James Smith  
Independent Regulatory Review Commission  
333 Market Street, 14th Floor  
Harrisburg, PA 17101

Re: Pre-K Counts Final-Omitted Regulations  
IRRC Number 2817/#6-319

Dear Mr. Smith:

Below is the Department of Education's response to the concerns raised by the Disabilities Right Network of Pennsylvania in a letter sent to you on April 9, 2011. We are providing a legal response and a programmatic response that will address the concerns raised by DRN.

I. Legal Response

Title II of the Americans with Disabilities Act (ADA) provides, in relevant part that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12131.

The Disabilities Rights Network (DRN) asserts that Chapter 405 violates the ADA by contending that any numerical criterion violates the law, regardless of how it fits into the general regulatory scheme being pursued. However, as discussed below, Chapter 405, as revised during the tolling period, does not violate this anti-discrimination statute. Changes were made to two separate provisions of the regulation in order to address the concern over the language originally used. The fact that two changes were made is significant, as are the subjects of those particular provisions.

The provision originally complained of is section 405.51, which concerns **inclusion** and which was changed to read as follows:

A PA Pre-K Counts classroom should reflect the naturally occurring ratio of students with and without developmental delays and disabilities in the area served by the approved provider and should not contain more than 20% of students who have been identified by the start of the program year as having a developmental delay or disability. However, in attempting to promote inclusion in this way, approved providers shall not deny students admission to a classroom based on their disability or delay.

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This provision's purpose is to encourage approved providers to plan and develop their Pre-K Counts classrooms to be truly inclusive environments. To this end, the provision suggests that a Pre-K Counts classroom contain no more than 20% of students with disabilities or delays "by the start of the program year". However, as the final sentence indicates, the goal of inclusion cannot be achieved by denying students admission based upon their disability or delay. To the contrary, the provision mandates that approved providers shall not deny students admission to a classroom based on their disability or delay regardless of the suggested 20% "start-up" ratio.

The final sentence of section 405.51 is emphasized by the language which was added to section 405.24, which is the provision that delineates the rules for the **enrollment** of eligible students into a Pre-K Counts classroom. Subsection (d) was added, which unequivocally states: "An approved provider shall not deny a student admission to a program by reason of the student's disability."

Thus, the revised regulation cannot be clearer – no eligible student can be denied admission into class because of disability or delay. In the example mentioned in the comments submitted by DRN, the new child who would put the class over the 20% threshold would have to be admitted. Section 405.51 would be inapplicable because the school year is already underway and section 405.24(d) would require the student's admission.

In addition, it appears that DRN's concerns are largely about pre-school providers' implementation of the regulation in an illegal way. DRN cites several examples of how pre-school providers (only some of which could be approved providers) deny students with disabilities admission to their programs. This may or may not be true but it is not relevant for many reasons. What allegedly occurs now is occurring without the benefit of the regulatory direction contained in section 405.24(d) and in the last sentence of section 405.51. Also, many, if not most, pre-school providers are not public entities and may not be subject to the anti-discrimination laws.

Finally, both the Department and this Commission need only concern themselves with writing and approving regulations that, on their face, are consistent with law. Neither entity can control how the regulated community acts in every respect. Therefore, the fact that pre-school providers may discriminate by denying students with disabilities admission to their programs, while troubling, is of no consequence to the legality of the provisions contained in Chapter 405 which promote inclusion and forbid discrimination.

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## II. Program Response

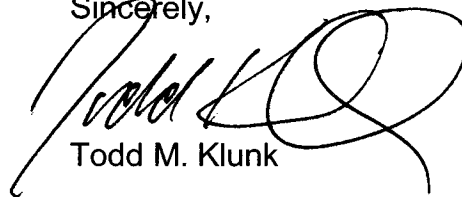
Included in the PA Pre-K Counts regulations are quality expectations that are essential to gain positive outcomes for our young children. Pennsylvania Pre-K Counts gives our at-risk children, such as those living in low-income families, those with special needs, and English language learners the strong start that research shows can help them overcome these risk factors and enter school ready to learn.

An important aspect of the quality expectations is to promote inclusive classrooms:

- Research has shown many positive effects of including children with disabilities in early childhood programs. The benefits accrue not only to children with disabilities but also to children with typical development, their families, classroom teachers, and the community at large.
- The quality expectations contained in the PA Pre-K Counts regulations require approved providers to: 1. collaborate with infant/toddler and preschool Early Intervention services to provide a smooth transition for children entering classrooms; 2. facilitate the Early Intervention services needed for children enrolled in PA Pre-K Counts classrooms; and 3. facilitate the identification of children who are not receiving Early Intervention services but are eligible.
- The PA Pre-K Counts program has been and continues to be a contributing factor to the increased population of Early Intervention children in typical early childhood settings. Historically, less than 50% of preschool children that receive Early Intervention services received their services in typical early childhood settings. Since the creation of the PA Pre-K Counts program and targeted efforts to promote inclusion in PA Pre-K Counts classrooms, 15% more preschool children receiving Early Intervention services are enrolled in typical early childhood classroom settings.
- PA Pre-K Counts serves a proportionate amount of children receiving Early Intervention services. Approximately 4% of Pennsylvania's three and four year olds participate in the PA Pre-K Counts program, and 7.5% of those children receive Early Intervention services. Across Pennsylvania, between 5%-7% of preschool children receive Early Intervention services.

Please contact me at (717) 346-9320 if you have any additional questions prior to our hearing.

Sincerely,



Todd M. Klunk

TK/kgv