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## INDEPENDENT REGULATORY REVIEW COMMISSION

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

March 5, 2010

Gerald L. Zahorchak, Secretary  
Pennsylvania Department of Education  
333 Market Street, 9<sup>th</sup> Floor  
Harrisburg, PA 17126-0333

Re: Regulation #6-309 (IRRC #2817)  
Pennsylvania Department of Education  
Pennsylvania Pre-K Counts Requirements, Standards and Procedures

Dear Secretary Zahorchak:

In our review of this regulation, we identified issues which could be resolved through the tolling process. We discussed these issues with your staff on February 17 and March 4, 2010. Based upon these conversations, we recommend that you consider tolling the review period for the following reasons:

1. Subsection 405.3(g) states, "Program providers must comply with program announcements issued by the Department." This would allow enforcement of documents that are outside the regulation. These documents also are not subject to review by the legislature, IRRC and the public and can be changed at any time. We note that Representative Clymer, Republican Chairman of the House Education Committee included this issue in his comments. In addition, we question whether the regulated community is aware of how easily and immediately their eligibility criteria for funds could be changed or redistributed to other providers without any notice or opportunity for their input. We also question why these guidance documents must be referenced as part of the regulation rather than used as application requirements or as part of the established contract with selected service providers. We recommend that § 405.3(g) be deleted.
2. Section 405.51 of the regulation states, "A Pre-K Counts classroom may not consist of more than 20% of the participants having been identified...as having a developmental delay or disability..." We questioned this provision in our meetings with the Department. Representative Clymer stated this provision appears to be a direct contradiction to federal regulations. Additionally, the Disability Rights Network of Pennsylvania is requesting tolling to delete Section 405.51 of the regulation because they believe this provision violates the Americans with Disabilities Act. The Department should either delete this provision or explain in detail how it is legally permissible and in the public interest.

3. Two regulatory definitions in Section 405.2 differ from the statutory definitions at 24 P.S. § 15-1511-D. In the regulatory definition of "*At-risk child*," the Department added the phrase "factors such as" which relegates the limits in the statutory definition to examples and also added the phrase "individual or" which expands upon the statutory definition. The regulatory definition of "*Eligible provider*" adds the phrase "guidance and announcements" to the statutory definition. The effect of this addition is that in order to qualify as an eligible provider, the entity must comply with all quality program standards (which is required by the statute) as well as "guidance and announcements," which are not included in the statute. We recommend that both of these terms use the definition "as defined in the Act" as was used for the definition of the term "*Eligible student*." If defined in this manner, these definitions would remain consistent with the Act should they be amended by the legislature in the future. If the Department maintains the amendments, it should explain in detail why the amendments are needed and in the public interest.
4. Subsection 405.31(e) requires providers to "coordinate and collaborate with Head Start agencies in a manner that reduces any possibility of lessening Head Start enrollment and funding." It is not clear what standard is set by the phrase "in a manner that reduces any possibility of lessening Head Start enrollment and funding." We recommend either deleting this provision or replacing it with a clear standard that providers can comply with.

In addition to the issues above, at the Department's request, we include the following issues for consideration in this tolling:

1. Definitions in Section 405:
  - a. *Act* - insert "-(b)" after "Subarticle XV-D."
  - b. *Approved provider* - insert "the" before "Act."
  - c. *Eligible student* - insert at the beginning "An eligible student."
  - d. *Identified developmental delay or disability* - the parenthetical after Chapter 14 should read (relating to special education services and programs).
  - e. *Teacher Aide* - at the end insert "primary" before the word "teacher" and delete "lead."
2. Section 405.3:
  - a. Renumber the subsections since there are two subsections numbered as (c).
  - b. In both the second Subsection (c) and in Subsection (e), change "eligible children" to "eligible student."
3. In Subsection 405.42(a), after Early Learning Standards, insert "in section 4.20 (relating to prekindergarten education)."

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4. Section 405.44:
  - a. In Subsection (a)(4), change “that” to “than.”
  - b. In Subsection (c), change “bi-annual” to “semi-annual.”
5. In Sections 405.46(b), 405.46(d), 405.47, 405.48, 405.49 and 405.50, before “providers” insert “approved.”

If you choose to toll the review period, your agency must deliver written notice to both the Standing Committees and the Commission on the same day. The written notice must be delivered before either Committee takes action on the regulation, or before the end of the Committees’ review period at 10:00 a.m. on March 10, 2010, whichever occurs first.

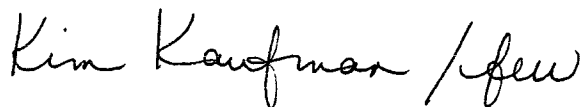
As required by Section 307.5 of our regulations, written notice must include:

1. A citation to the section(s) the Department is considering revising,
2. A description of the revisions the agency is considering, and
3. An explanation of how the revisions will satisfy the concerns listed above.

If your written notice includes revisions that are beyond the scope of our recommendations, the Commission may object to tolling the review period. We are required to notify you and the Committees within two business days after receipt of your tolling notice if we object. If the Commission objects to your tolling notice, the review period will not be tolled and your regulation will be considered by the Commission at our public meeting on March 11, 2010. If the Commission does not object, the review period is tolled for up to 30 days beginning with receipt of your letter and ending on the day you resubmit the regulation.

Please contact me if you have any questions.

Sincerely,

A handwritten signature in black ink that reads "Kim Kaufman /few". The signature is written in a cursive, flowing style.

Kim Kaufman  
Executive Director  
wbg

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cc: Honorable Jeffrey E. Piccola, Majority Chairman, Senate Education Committee  
Honorable Andrew E. Dinniman, Minority Chairman, Senate Education Committee  
Honorable James R. Roebuck, Jr., Majority Chairman, Education Committee  
Honorable Paul I Clymer, Minority Chairman, House Education Committee  
Robert A. Mulle, Esq., Office of Attorney General  
Harriet Dichter, Acting Secretary, Department of Public Welfare  
Ernest N. Helling, Assistant Chief Counsel, Department of Education  
Todd Klunk, Acting Deputy Secretary, Office of Child Development and Early Learning  
Department of Education  
Linda Brown Warren, Special Assistant, Office of Child Development and Early Learning,  
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Andrew C. Clark, Deputy General Counsel, Office of General Counsel