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INDEPENDENT REGULATORY REVIEW COMMISSION
333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

November 2, 2000

Peter H. Garland, Ph.D., Executive Director
State Board of Education
333 Market Street, 1st Floor
Harrisburg, PA 17126

Re: Regulation #6-270 (IRRC #2144)
State Board of Education
Special Education Services and Programs

Dear Dr. Garland:

Enclosed are our Comments. They will soon be available on our website at www.irrc.state.pa.us.

Our Comments list objections and suggestions for consideration when you prepare the final version of this regulation. We have also specified the regulatory criteria which have not been met. These Comments are not a formal approval or disapproval of the proposed version of this regulation.

If you would like to discuss these Comments, please contact my office at 783-5417.

Sincerely,

Robert E. Nyce
Executive Director

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Enclosure

cc: Honorable Jess M. Stairs, Majority Chairman, House Education Committee
Honorable Nicholas Colafella, Democratic Chairman, House Education Committee
Honorable James J. Rhoades, Chairman, Senate Education Committee
Honorable Allyson Y. Schwartz, Minority Chairperson, Senate Education Committee
Eugene W. Hickok, Jr., Secretary, Department of Education
Nanette Kimmel, Administrative Officer, State Board of Education

Comments of the Independent Regulatory Review Commission

on

State Board of Education Regulation No. 6-270

Special Education Services and Programs

November 2, 2000

We submit for your consideration the following objections and recommendations regarding this regulation. Each objection or recommendation includes a reference to the criteria in the Regulatory Review Act (71 P.S. § 745.5a(h) and (i)), which have not been met. The State Board of Education (Board) must respond to these Comments when it submits the final-form regulation. If the final-form regulation is not delivered by October 2, 2002, the regulation will be deemed withdrawn.

1. General. - Clarity.

Course completion and diplomas

Section 14.39 relating to course completion and diplomas is being deleted. We have two questions regarding this deletion. Will a student who satisfactorily completes a special education program developed by an IEP team be issued a diploma? How will parents and school districts know what criteria is necessary for a child with a disability to graduate?

Calendar days and school days

In a number of sections, including Sections 14.131(a)(1), 14.154(d)(1) and 14.161(2), the regulation includes specific time frames. However, it is unclear whether these time frames refer to school or calendar days. These timelines should be clarified and made consistent throughout the regulation.

2. Section 342.1. Definitions. - Clarity.

Mental retardation

This definition is deleted from Chapter 342. It is defined in 34 CFR Section 300.7. The term is used in Section 14.132(2)(vii). Because the federal definition is less specific than the existing definition in Chapter 342, how will parents and school districts measure whether students have "subaverage general intellectual functioning"? Further, how will reliance upon the federal definition affect students currently in special education?

3. Section 14.101. Definitions. - Clarity.

Child with a disability

The proposed regulation incorporates by reference the federal definition of this term at 34 CFR Section 300.7. However, variations of this term appear throughout the regulation. For example, Section 14.121(c) refers to “students with disabilities.” The defined term “child with a disability” should be used consistently throughout the final-form regulation.

Early intervention services and Mutually agreed-upon written arrangement

The definitions of “early intervention services” and “mutually agreed-upon written arrangement” are not consistent with the definitions of these terms found in Section 875-103 of the Early Intervention Services System Act (Act) (11 P.S. § 875-103). The regulation should include or reference the definitions used in the Act or explain why the text of these definitions differ from their counterparts in the Act.

Parent

The federal regulations at 34 CFR Section 300.20 define the term “parent” in two subsections. Subsection (a) generally defines “parent” and Subsection (b) defines the term relating to “foster parent.” The federal definition provides “unless State law prohibits a foster parent from acting as a parent, a State may allow a foster parent to act as a parent.” The final-form regulation should address the role of foster parents in obtaining special education or early intervention services.

4. Section 14.102. Purpose. - Reasonableness; Clarity.

Subsection (a) uses the term “quality” to describe special education services and programs. The term “quality” is vague. It should be clarified or deleted from the final-form regulation.

Subsection (a)(2) provides for the incorporation by reference of an extensive list of federal requirements. We have two concerns with this section. First, the Board is incorporating by reference 25 different citations of 34 CFR Part 300. The extensive reference to the federal citations gives little guidance to school districts and parents. It would improve the clarity of this regulation if the incorporation by reference were moved to the corresponding sections of the regulation under the applicable subject areas wherever possible.

Second, Subsection (a)(2) uses the phrase “except as expressly otherwise provided in this chapter....” We were unable to find any sections in the proposed rulemaking where citations to 34 CFR were not incorporated by reference. For clarity, this phrase should be deleted.

Subsection (a)(3) uses the phrase “reach their potential.” This phrase is vague. It should be clarified or deleted from the final-form regulation.

5. Section 14.104. Educational plans. - Clarity.

Subsection (f)(1) states “services and programs are adequate in quantity and variety to meet the needs of students...” The terms “adequate” and “variety” should be clarified or deleted from the final-form regulation.

6. Section 14.121. Child find. - Consistency with statute; Clarity.

Subsection (a)

This subsection requires each school district to “locate and identify children thought to be eligible for special education...” Federal regulations, specifically 34 CFR Section 300.125(a)(i), adds the requirement that children with disabilities are also “evaluated.” For consistency with federal regulations, the Board should amend Subsection (a) to reflect that children thought to be eligible for special education are “identified, located and evaluated.”

Subsection (b)

This subsection requires school districts to conduct “awareness activities...” This subsection should include examples of “awareness activities.”

Subsection (c)

This subsection requires school districts to “provide annual public notification,... with circulation adequate to notify parents throughout the school district...” What constitutes “adequate” circulation?

7. Section 14.122. Screening. - Clarity; Reasonableness.

General

This section requires school districts to establish a system of screening. It is not clear from this section whether the school districts are required to involve parents in this activity. Are school districts required to notify parents before any intervention during the screening phase?

Subsection (a)

In Subsection (a)(1), how do school districts “identify and provide initial screening and direct intervention for students *prior to referral for a special education evaluation*”? (Emphasis added.) This should be clarified in the final-form regulation.

Subsection (d)

Subsection (d) provides “if screening activities have produced little or no improvement within 60 school days after initiation, the student shall be formally referred for evaluation...” A period of 60 school days could potentially extend to a total of 12 weeks or a three-month period of time. What is the basis for the 60-school day limit for screening? Would a lesser period of time following a teacher’s screening be sufficient to refer a student for an evaluation? For example,

would six weeks or 30 school days suffice? We request that the Board respond to these questions when the final-form regulation is submitted.

Further, Subsection (d) states that the “student shall be formally referred for evaluation....” Is there a distinction for “formally referred” as opposed to “informally”? If so, specific components of the formal referral process should be specified in the final-form regulation. If not, then the term should be deleted from the final-form regulation.

8. Section 14.123. Evaluation. - Reasonableness; Need; Clarity.

General

Existing Chapter 342 includes not only the disabilities that students would be tested for, but also the types of evaluations that would be used in assessing the presence of various disabilities. The proposed regulation incorporates by reference 34 CFR Sections 300.534(a)(1) and 300.531 – 535 (relating to evaluating students with disabilities). However, the CFR sections do not address specific disabilities or the methods for determining whether a child has a disability. The final-form regulation should include the provisions of 22 Pa. Code Sections 342.25(f) – (m) (relating to multidisciplinary evaluation). If these provisions are not included, an explanation should be provided in the preamble of the final-form regulation.

Subsection (a)

Subsection (a) requires a group of qualified professionals to review evaluation materials to determine whether a child has a disability. We have two concerns with this subsection and Section 14.124(a).

First, this group of qualified professionals, according to this subsection, “...shall include a certified school psychologist *when appropriate*.” (Emphasis added.) When would including a school psychologist be inappropriate in this setting? Who determines when the psychologist’s participation is “appropriate”?

Second, the term “group of qualified professionals” is vague. For clarity, the term “group of qualified professionals” should be defined in either this section, or Section 14.101 relating to definitions.

Subsection (b)

This subsection requires “the initial evaluation shall be completed and a copy of the evaluation report presented to the parents no later than 60-school days after the agency receives written parental consent.” We have two concerns with this subsection.

First, will parents be allowed to review and discuss drafts of the report with the school administration? If so, language should be included clarifying that parents have this right.

Second, why does a school district need 60 school days from the time it receives written parental consent to complete the evaluation and draft the report? We have the same concern with the 60-

day time frame for reevaluation in Section 14.124(b). Sections 14.123 and 14.124 in the final-form regulation should explain the process that occurs during the 60-school day time period.

9. Section 14.131. IEP. - Reasonableness; Need; Clarity.

Subsection (a)

“Notwithstanding the requirements incorporated by reference...” is confusing. As written, this provision does not provide sufficient notice of mandatory standards. Only those specific federal regulations that do not conflict with the Board’s regulations should be incorporated by reference.

As soon as possible

The existing 22 Pa. Code 14.32(i)(2) provides that “the IEP of each student shall be implemented as soon as possible, but no later than 10 school days after the completion of the IEP.” The proposed regulation does not directly address the implementation time frame. Instead, it incorporates 34 CFR Section 300.342(b)(1), through its general references in Section 14.102, which requires public agencies to implement a student’s IEP “as soon as possible.” The phrase “as soon as possible” in the federal regulations is vague, and leaves the time frame for implementation open to interpretation. The final-form regulation should retain the 10-school day time frame from the existing regulation, or the Board should explain why 10 school days is no longer appropriate.

Behavior management programs

Commentators have noted that behavior management programs are no longer included in the IEP. The federal regulations, at 34 CFR Section 300.347, specify the content of an IEP. Behavior management plans are not included. However, Section 300.346(a)(2)(i), relating to development, review and revision of an IEP, states, “In the case of a child whose behavior impedes his or her learning...consider, if appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior.”

The behavior management criterion for an IEP is not specifically included in Section 14.131 of the proposed regulation, or Section 300.347 of the federal regulation, even though the behavior of a student with a disability will be evaluated during the formulation of their IEP. Therefore, the Board should consider retaining “behavior management programs” as a component of the IEP or explain why this requirement is not retained.

Subsection (a)(1)

Subsection (a)(1) allows a parent to waive the rule requiring a copy of the comprehensive evaluation report to be disseminated to the child’s parents at least 10 days prior to the meeting of the IEP team. What is the process for a parent to waive this rule? This procedure should be clarified in the final-form regulation.

Subsection (a)(2)

Subsection (a)(2) outlines the process for students with disabilities that transfer from one school district in the Commonwealth to another. This subsection also provides that the student's new school district will provide services and programs specified in an interim IEP, "...until a new IEP is developed and implemented and until the completion of due process proceedings under this chapter." This subsection implies that due process hearings are an automatic part of transferring a student with disabilities to a new school district. If that is not the case, this provision should indicate that if due process proceedings occur, they must be completed before the new IEP is developed and implemented.

Subsection (a)(3)

Subsection (a)(3) states "If a student with a disability moves into a school district in this Commonwealth from another state, the new school district may treat the student as a new enrollee and place the student into regular education and is not required to implement the student's existing IEP." Why would a Commonwealth school district place a transferring student with a disability into a regular education program without an evaluation?

10. Section 14.132. ESY. - Clarity.

The regulation should indicate whether this section applies to eligible young children. An "eligible young child" as defined in Section 14.101, is "a child who is less than the age of beginners and at least 3 years of age and meets the criteria at 34 CFR Section 300.7 (relating to a child with a disability)." Since the definition of the term "child with a disability" includes the term "eligible young child," can an eligible young child qualify for ESY services?

11. Section 14.133. Behavior support. - Reasonableness; Clarity.

Subsection (e) includes a list of aversive techniques that are considered inappropriate and impermissible. Subsection (e)(7) includes "treatment of a demeaning nature." For greater clarity, the final-form regulation should include examples or a definition of "treatment of a demeaning nature."

Finally, for consistency, the term "behavior management" should be replaced with the IDEA 97 term-of-art "behavioral management" in this section, and throughout the regulation.

12. Section 14.141. Educational placement. - Reasonableness; Need; Clarity.

Paragraph (1)

Paragraph (1) defines a number of terms used in reference to educational placement. These terms include "itinerant," "part time" and "resource." "Itinerant" includes regular classroom instruction for most of the school day, "with special education services and programs provided by special education personnel inside or outside of the regular class for part of the school day." "Part time" includes special education services and programs outside of the regular classroom, "...but in a regular school for most of the school day, with some instruction in the regular classroom for part of the school day." "Resource" denotes regular classroom instruction for

most of the school day, “with special education services provided by special education personnel in a resource room for part of the school day.” These definitions are confusing. In the final-form regulation, the differences between these three terms should be clarified.

Caseload charts

Paragraph (2) requires each school district to “... establish caseloads for special education and submit a caseload chart to the Department for approval as part of their special education plan....” We have a number of concerns.

First, why is the Board replacing the former caseload requirements and allowing school districts to determine their own standards?

Second, Paragraph (5) states, “the Department may impose caseloads on agencies when the caseload is determined to be inadequate.” What criteria will be used in determining whether a school district’s caseload is inadequate? Criteria for the evaluation of caseload charts should be included in this section.

Third, Paragraph (4) provides that caseloads are not applicable to approved private schools. As “approved private schools” are included in the definition of “agency,” we question why these schools are not subject to the caseload requirement.

Paragraph (6)

Paragraph (6) requires each school district to establish an age range chart for both elementary school classes and secondary school classes and submit this chart to the Department for approval. Paragraph (6)(iii) requires school districts to provide justification for deviating from the Department’s recommended age ranges.

Commentators, including the House Education Committee, have stated that, even with the inclusion of Paragraph (6)(iii), age ranges included in 22 Pa. Code Section 342.42(f) should be retained. We agree and request that the Board consider retaining in this regulation the requirements of caseload and age range that are included in 22 Pa. Code Section 342.42(f).

13. Section 14.142. Caseload for special education. - Reasonableness; Clarity.

Caseload chart

This section includes a chart that “presents the recommended maximum caseload allowed on a single teacher’s roll for each school district.” This revised chart is different from the existing chart contained in Chapter 342 (22 Pa. § 342.42). We have several concerns about Section 14.142.

First, absent any federal or state requirement to do so, the Board should explain the need for altering the existing table in the final-form regulation.

Second, why are the ratios merely “recommended”? Under the existing regulation, the caseload was required for every school district in the Commonwealth. In this proposal, the ratios are

optional, and therefore, are included in the regulation to offer school districts guidance. A regulation contains mandates and has the full force and effect of law. Non-mandatory provisions should be contained in a separate guidance document. If the ratios are non-mandatory, the word “recommended” should be deleted.

Third, the existing caseload chart established the limited number of students in parentheses after each caseload ratio. This number denoted the “maximum number of exceptional students in the room with the teacher at any one time.” The revised caseload chart does not include that number. Why has that number been deleted in the caseload table?

Fourth, the existing caseload chart (22 Pa. Code § 342.42(j)) under “learning support” and “life skills support” included ratios for both part-time and full-time students in both elementary and secondary schools. The proposed rulemaking includes only elementary and secondary caseload ratios for “life skills” support, and even then it is only under the “full-time” category. Elementary and secondary caseload ratios are not included for “learning support.” Why are these ratios and specific educational program breakdowns not included in the final-form regulation?

Finally, the existing caseload chart included a range of students allowed on a single teacher’s class rosters. That range has been replaced by a single number. Why has a single number in the final-form regulation replaced the range of students?

14. Section 14.144. Facilities. - Clarity.

Paragraph (1)

This paragraph requires students with disabilities to be provided with “appropriate classroom space.” This requirement is vague and open to interpretation. For example, does this provision apply to the actual size and location of the classroom, or the facilities within the classroom? The Board should clarify the meaning of “appropriate classroom space” in the final-form regulation.

Paragraph (2)

This paragraph addresses the circumstances under which moving a class is permissible. Does this paragraph apply only to moves within a district, or are moves between districts allowed?

15. Section 14.152. Child find, public awareness and screening. - Clarity.

Subsection (a)

This subsection requires early intervention agencies to “adopt and use a system to locate and identify eligible young children....” Federal regulations, specifically 34 CFR Section 300.125(a)(i), add the requirement that children with disabilities must be “evaluated.” For consistency with federal regulations, Subsection (a) should be amended to reflect that early intervention agencies “identify, locate and evaluate eligible young children.”

Subsection (c)

This subsection requires early intervention agencies to “notify the public of child identification and the procedures followed to ensure confidentiality of information pertaining to eligible young children.” What type of notification is required? This requirement should be clarified in the final-form regulation.

16. Section 14.153. Evaluation. - Reasonableness; Clarity.

Paragraphs (4)(i), (ii) and (iii)

Paragraphs (i) and (ii) require an evaluation or reevaluation to be completed and a report presented to the parents within “60 days” of the request for evaluation or reevaluation. What process occurs during the 60-day period, and how was this time frame determined? Additionally, the time period should refer to school days consistent with the requirements for special education evaluation and reevaluation in Sections 14.123 and 14.124.

Paragraph (iii) requires reevaluations to occur at least once every two years. The existing requirement at 22 Pa. Code Section 342.53(i) is once every year. Why was the minimum time frame for reevaluations revised?

17. Section 14.154. IEP. - Reasonableness.

Subsection (d)(1) requires that the IEP be implemented “as soon as possible, but no later than 14 days after completion of the IEP.” What is the basis for the 14-day limit for implementation?

18. Section 14.155. Range of services. - Statutory authority; Clarity.

In its comments, the Pennsylvania Catholic Conference objects to the licensure requirements referenced in Subsection (a). Section 5 of the Private Academic Schools Act (24 P.S. § 6705) specifically exempts religiously affiliated schools from licensure requirements. Furthermore, Section 304 of the Early Intervention Services System Act (11 P.S. § 875-304) only requires mutually agreeable written arrangements and annual assurance that “the service provider is in compliance with the Commonwealth’s regulations and standards.” What is the statutory authority for requiring licensure of private preschools?

19. Section 14.156. System of quality assurance. - Reasonableness; Clarity.

Paragraph (2)(i)

This paragraph states that the caseload for supportive intervention “*should be* 10 – 40 children with no more than 6 eligible young children serviced in the same session.” (Emphasis added.) We have three concerns.

First, the term “supportive intervention” should be defined in the final-form regulation.

Second, this paragraph states what the caseload “should be.” As written, this provision appears to be a guideline, rather than a mandate. A regulation has the full force and effect of law. Non-

mandatory provisions should not be included in regulations. If the caseload range contained in this paragraph is a requirement, then the language should be revised to so indicate. If the caseload range is a recommendation, the language should be placed in a statement of policy.

Finally, how was the caseload range determined?

Paragraph (2)(ii)

Paragraphs (A), (B) and (C) list the staff-to-children ratios for children functioning at different developmental levels. How were these ratios determined?

Paragraph (2)(iii)

This paragraph specifies that for home based programs, the caseload ratio is 10 to 20 eligible young children per teacher. This ratio appears to include a broad range of children for which a teacher may provide services. Please explain how this ratio was determined.

Paragraph (2)(iv)

This paragraph provides that the speech and language itinerant program caseload for a single teacher is 10 to 50 eligible young children. This appears to be a broad range. How was this ratio determined?

Paragraph (2)(v)

Under this paragraph, for “early intervention programs where physical therapy or occupational therapy, or both, is specified on the IEP, individual caseloads are determined with consideration of the type of services delivered and the time required for those services.” For these situations, does the individual therapist determine the caseload?

20. Section 14.157. Exit criteria. - Reasonableness; Clarity.

Subsection (a)(1) cross-references 11 P.S. Section 875-301(1). However, this citation does not appear to relate to exit criteria. Is this citation correct?

Subsection (a)(2) establishes a four-month time period during which a child functions within the range of normal development as one of the criteria to exit the early intervention program. The existing time period is six months. Why is this time period is being reduced?

21. Section 14.158. Data collection and confidentiality. - Clarity.

The title of this section references confidentiality. However, there are no confidentiality provisions in this section. This section should be reviewed to reconcile this inconsistency.

22. Section 14.161. Prehearing conferences. - Clarity.

Inclusion of early intervention agencies

This section of the regulation addresses prehearing conferences as they relate to when “the parent disapproves the school district’s proposed action or refusal to act.” Do the provisions in this section also apply to early intervention agencies? If so, they should be added to this section. If not, please explain the options for parents when they disagree with the action or inaction of the early intervention agency.

Additionally, if early intervention agencies are included under this section, the term “young child” in the first sentence (relating to the purpose of the section) should be replaced with the defined term “eligible young child.”

Paragraph (2)

Under this paragraph, “When requested, the school district shall convene the prehearing conference within 10 days of receipt of the parent notice and shall be chaired by the superintendent or the superintendent’s designee.” There are two concerns.

First, a hearing officer has the discretion to schedule a prehearing conference with or without a party’s request. Therefore, the word “shall” should be changed to “may” in this paragraph.

Second, the regulation should clarify what constitutes “receipt” of a parent notice.

Paragraph (3)

This paragraph states that “if the prehearing conference does not result in an agreement, the provisions under 14.162 (relating to impartial due process hearing and expedited due process hearing) shall be applied.” In its comments, the House Education Committee notes that the Pennsylvania mediation system could be applied and that parents should not feel compelled to enter a due process hearing. Consequently, the House Education Committee suggests changing “shall be applied” to “may be applied.” We concur. Also, to improve clarity, a reference to the mediation process should be included in this subsection.

23. Section 14.162. Impartial due process hearing and expedited due process hearing. - Statutory authority; Reasonableness; Clarity.

Subsection (b)

This subsection consists of one long sentence, which is confusing and difficult to read. The clarity of this section could be improved by breaking the sentence into subparagraphs.

Subsection (c)

This subsection allows the school district or early intervention agency to request a hearing to proceed with an initial evaluation or educational placement when they have been unable to obtain consent from the parents. In its comments, the House Education Committee recommends

deleting the reference to early intervention agencies. The Committee notes that the early intervention system is optional, since parents may choose whether or not they want these services for their child.

What is the statutory authority for the early intervention agency to proceed with evaluation or placement in the absence of parental consent? If there is none, the reference to early intervention agencies should be deleted.

Subsection (d)

This subsection requires a hearing to be held at “a place reasonably convenient to the parents.” This provision should be revised to require the hearing to be held at both a place and time that is convenient for the parents.

Subsection (i)

The Board’s explanation of this subsection in the preamble does not clearly convey the intent of the regulatory language. We suggest that this discussion be redrafted to clarify that a party does not have to be represented by a lawyer in a due process hearing. A party may be accompanied, assisted or advised by a person with expertise in special education. However, only a lawyer may perform functions in the hearing that constitute the practice of law.