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MARY S. WYATTE, CHIEF COUNSEL

**INDEPENDENT REGULATORY REVIEW COMMISSION
COMMONWEALTH OF PENNSYLVANIA
333 MARKET STREET
14TH FLOOR
HARRISBURG, PA 17101**

irrc@irrc.state.pa.us
<http://www.irrc.state.pa.us>
(717) 783-5417
Fax (717) 783-2664

January 21, 2004

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

Re: Regulation #6-280 (IRRC #2367)
State Board of Education
Pupil Personnel Services and Students

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 regulation 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 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 James R. Roebuck, Jr., Democratic Chairman, House Education Committee
Honorable James J. Rhoades, Chairman, Senate Education Committee
Honorable Allyson Y. Schwartz, Minority Chairman, Senate Education Committee
Honorable Vicki L. Phillips, Secretary, Department of Education

Comments of the Independent Regulatory Review Commission

on

State Board of Education Regulation No. 6-280

Pupil Personnel Services and Students

January 21, 2004

We submit for your consideration the following comments that include references to the criteria in the Regulatory Review Act (71 P.S. § 745.5b) which have not been met. The State Board of Education (Board) must respond to these comments when it submits the final-form regulation. The public comment period for this regulation closed on December 22, 2003. If the final-form regulation is not delivered within two years of the close of the public comment period, the regulation will be deemed withdrawn.

1. Section 12.4. Discrimination. – Clarity.

This Section uses the term “handicaps.” A commentator suggests that this term be replaced with “disability.” We agree and recommend that the final-form regulation include this change.

2. Section 12.6. Exclusions from school. – Clarity.

Subsection (a) uses the term “exceptional students.” Based on discussions with Board staff, we understand this term applies to students with disabilities who are eligible for special education services. For clarity, the Board should replace “exceptional students” with “students with disabilities.”

Paragraph 2 of Subsection (e), relating to the education of expelled students, states:

“Within 30 days of action by the school board of directors, the parents or guardian shall submit to the school district written evidence that the required education is being provided as described in paragraph (1) or that they are unable to do so. If the parents or guardian are unable to provide the required education, the district then *shall* make provision for the student’s education.” (emphasis added)

The Board has indicated that districts do not have a responsibility to provide the required education until after the 30 days has expired, regardless of when the parent or guardian notifies them that they cannot provide the education. The second sentence quoted above could be interpreted to require a district to provide the required education as soon as they receive notification from the parent or guardian that they are unable to provide the required education. The final-form regulation should clarify when a district is required to begin providing the required education.

3. Section 12.8. Hearings. – Clarity.

Subsection (b)(ii) requires that “sufficient notice of the time and place of the hearing shall be given.” The final-form regulation should specify the minimum time period that qualifies as “sufficient notice.”

4. Section 12.9. Freedom of expression. – Clarity.

Subsection (a) references the United States Supreme Court case *Tinker v. Des Moines Community School District*, 393 U.S. 503 (1969). *Tinker* was later distinguished by the United States Supreme Court in *Bethel School District v. Fraser*, 478 U.S. 675 (1986). Therefore, we recommend that the *Tinker* citation be replaced with the *Bethel* citation.

5. Section 12.32. Elements of the plan. – Reasonableness; Clarity.

Subsection (a) requires the plan for student services to “conform to guidelines issued by the Department of Education.” Requiring compliance with “guidelines” is problematic because guidelines are non-binding. Based on discussions with Board staff, we understand there are multiple state and federal statutes, regulations and associated directives with which school districts must comply. Since these laws, regulations and directives change frequently, Board staff explained that it would be difficult to maintain a complete and accurate list of these documents in the regulation. Instead, the Board instructed the Department of Education to compile a complete list of these documents in guidelines which will be published in the *Pennsylvania Bulletin*.

We recognize the difficulty in maintaining an accurate list of laws and directives which may change frequently. However, we note that Subsection (b) specifically references the federal Family Educational Rights and Privacy Act of 1974. If a complete list of applicable laws, regulations and directives will be published in a forthcoming guidance document, it is potentially confusing to specifically identify only one of the applicable laws in Subsection (b).

As an alternative, the Board should consider amending the language in Subsection (a) to require compliance with applicable state and federal laws, regulations and associated directives which will be “identified in guidelines issued by the Department of Education.” Consistent with this approach, the Board should also delete Subsection (b) to eliminate potential confusion regarding which laws apply.

6. Section 12.42. Student services. – Reasonableness; Clarity.

Subsection (b)

This subsection identifies services that must be provided by local education agencies in planning their student services programs. These services include “developmental services,” “diagnostic, intervention and referral services” and “consultation and coordination services.” Clarity would be improved by defining these terms, including the specific types of services encompassed by each of them.

Subsection (d)

This subsection requires parents to be informed when “student assessments using individual standardized psychological tests are administered.” It also grants parents “the right to challenge the appropriateness of any individual standardized tests via procedures established by the local education agency.” Commentators have raised several concerns with this subsection.

The Pennsylvania School Boards Association (PSBA) questions how “appropriateness” will be defined and what forum or procedure will be used to entertain challenges. PSBA further comments that to the extent the testing is related to identification for special education or modification of a student’s existing Individualized Education Plan, the forum for resolving disputes is contained in the federal Individuals with Disabilities Education Act (IDEA) and the Board’s existing Chapter 14 regulations. If the Board anticipates only special education challenges, PSBA suggests that Subsection (d) should expressly state that the parents’ due process rights fall under IDEA.

The Education Law Center (ELC) comments that allowing parental challenges “via procedures established by the local education agency” appears to conflict with the complaint process for psychological testing established under IDEA. ELC further comments that Subsection (d) “may also conflict with 20 USC § 1232h which prohibits schools from requiring students to submit to certain types of psychological evaluation.”

The Pennsylvania Psychological Association (PPA) also requests further clarification regarding a parent’s right to challenge the appropriateness of psychological tests. PPA states that it is unclear if the regulation refers to challenging a single test that may be administered to multiple students, or tests that are administered to a single student.


We agree with the commentators that Subsection (d) needs further clarification. Specifically, the Board should clarify if the psychological testing and parental challenges apply to areas other than special education. If so, the Board should identify other instances in which psychological testing would be used and specify the procedures to challenge this testing. If Subsection (d) applies only to special education services, the Board should reference the IDEA requirements and Chapter 14 appeal procedures that apply.

7. Miscellaneous clarity issues.

- Sections of this proposed rulemaking use the terms “school board,” “board of directors,” “board of school directors,” “local education agency” and “governing body of every local education agency.” For clarity, we recommend that one term be defined and used consistently throughout Chapter 12.
- Throughout the proposed regulation, there are references to both “parents” and “parents or guardians.” For consistency, the regulation should refer to “parents or guardians” throughout Chapter 12.

Regulation #6-280 (IRRC #2367)
State Board of Education
Pupil Personnel Services and Students

James Buckheit, Executive Director



Date: 1/26/04