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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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409 M.D. 2023

PENNSYLVANIA SCHOOL BOARDS ASSOCIATION, INC., *et al.*,
Petitioners

v.

DR. KHALID N. MUMIN, SECRETARY OF EDUCATION OF THE PENNSYLVANIA DEPARTMENT OF EDUCATION, *et al.*,
Respondents

BRIEF IN SUPPORT OF APPLICATION FOR SUMMARY RELIEF FILED BY RESPONDENTS DR. KHALID N. MUMIN, SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF EDUCATION, AND THE PENNSYLVANIA DEPARTMENT OF EDUCATION

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STATEMENT OF JURISDICTION

Pursuant to section 761(a)(1) of the Judicial Code, 42 Pa.C.S. § 761(a)(1), this Honorable Court has jurisdiction over actions brought against Commonwealth agencies.

STATEMENT OF SCOPE AND STANDARD OF REVIEW

Pennsylvania Rule of Appellate Procedure 1532(b) provides that "[a]t any time after the filing of a petition for review in . . . an original jurisdiction matter[,] the court may on application enter judgment if the right of the applicant thereto is clear." Pa.R.A.P. 1532(b). Summary relief is proper where "the case is clear and free from doubt, that there exist no genuine issues of material fact to be tried and that the movant is entitled to relief as a matter of law." *Equitable Gas Co. v. Public Util. Comm'n*, 880 A.2d 48, 52 n. 5 (Pa. Cmwlth. 2005) (citing *Pennsylvania Indep. Petroleum Producers v. Dep't of Envtl Res.*, 525 A.2d 829, 832 (Pa. Cmwlth. 1987)). A fact is considered to be material if its resolution could affect the outcome of the case under the governing law. *Hospital & Healthsystem Ass'n v. Commonwealth*, 77 A.3d 587 (Pa. 2013). Any evidence must be viewed in the light most favorable to the non-moving party. *Northwestern Youth Services, Inc. v. Dep't of Public Welfare*, 1 A.3d 988 (Pa. Cmwlth. 2010), *aff'd*, 66 A.3d 301 (Pa. 2013).

QUESTIONS PRESENTED

Does the Petition for Review present an actual case or controversy?

Suggested answer: No

Do Petitioners present a claim that is ripe for review?

Suggested answer: No

Do Petitioners have standing?

Suggested answer: No

Does the Petition fail to state a claim for which relief can be granted?

Suggested answer: Yes

Did Petitioners exhaust all administrative remedies prior to filing the Petition?

Suggested answer: No

STATEMENT OF THE CASE

In order to receive federal funding under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C., Ch. 33, §§ 1400-1500, states must make a free appropriate public education ("FAPE") available to "all children with disabilities residing in the state between the ages of 3 and 21, inclusive." 20 U.S.C. § 1412(a)(1)(A). Section 602 of IDEA defines FAPE as "special education and related services that: (a) have been provided at public expense, under public supervision and direction, and without charge; (b) meet the standards of the State educational agency; (c) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) are provided in conformity with the individualized education program required under [20 U.S.C. § 1414(d)]". 20 U.S.C. § 1401(9).

Additionally, Pennsylvania is obligated to develop and publish a Model Policy, titled Individuals with Disabilities Act, Part B, Policies and Procedures ("Model Policy"), under 34 CFR §§ 300.101-300.176. 34 CFR § 300.100. Effective September 5, 2023, PDE amended its Model Policy setting forth PDE's interpretation of the IDEA requirements related to the provision of FAPE. Simultaneously, and to provide adequate notice about the amended Model Policy, PDE informed Local Education Agencies ("LEAs") and other interested parties about the updated Model Policy and the impact the Model Policy could have upon

LEAs via a Penn*Link[1], webinars, and other guidance documents referenced in the Petition for Review.

On September 11, 2023, Petitioners - the Pennsylvania School Boards Association, Inc. ("PSBA"), a non-profit Pennsylvania corporation whose membership includes multiple school entities; the School District of Pittsburgh ("Pittsburgh"); the Central Bucks School District ("Central Bucks"); and the Upper Darby School District ("Upper Darby") - filed a Petition for Review ("Petition") in this Court's original jurisdiction seeking equitable declaratory and injunctive relief, asserting that PDE's guidance documents interpreting IDEA illegally "require" Pennsylvania LEAs to provide FAPE until a student's 22nd birthday (rather than through the end of the school term in which the student reaches 21 years of age), and that PDE's actions violate state law and regulation.

Currently before this Honorable Court are Petitioners' and PDE's Cross-Applications for Summary Relief.

[1] Penn*Links are electronic correspondences disseminated to Local Education Agencies and related stakeholders.

SUMMARY OF ARGUMENT

IDEA directs states to provide FAPE to all eligible learners between the ages of 3 and 21, *inclusive* . . ." 20 U.S.C. § 1412(a)(1)(A). Title 22, Chapter 14 of the Pennsylvania Code ("Chapter 14"), 22 Pa. Code §§ 14.101 – 14.163, specifically regulates the implementation of FAPE in Pennsylvania, and adopts numerous sections of IDEA's implementing regulations founds at 34 CFR Part 300 (relating to assistance to states for the education of children with disabilities), including the provision of FAPE through a student's 22nd birthday. *See*, 34 CFR §§ 300.101, 300.102; *see also*, 22 Pa. Code § 14.102(2)(x).

Not only is the Model Policy at issue required by the regulations implementing IDEA, 34 CFR §§ 300.100 - 300.176, it is consistent with Chapter 14, including the requirement that FAPE be provided to students through age 21, inclusive. *See,* 22 Pa. Code §14.102(a)(2)(x) (incorporating by reference 34 CFR §§ 300.101, 300.102).

The Petition fails to acknowledge or expressly challenge the updated Model Policy. Rather, Petitioners seek to enjoin PDE from "enforcing" or further disseminating its guidance regarding the Model Policy. *See, generally* Petition for Review. While not specifically challenging the requirements of IDEA, nor PDE's obligation to ensure that the Model Policy is consistent with IDEA, Petitioners assert that PDE's dissemination of information about the amendments to the Model Policy

violate the Commonwealth Documents Law and the Regulatory Review Act. Petitioners' assertions are meritless.

PDE's application for summary relief should be granted because there are no genuine issues of material fact[2] and Petitioners have failed to state any cognizable claim as a matter of law.

[2] Petitioners failed to file a response under Pennsylvania Rule of Appellate Procedure 123(b) contesting any of the averments in PDE's Application for Summary Relief, and thus do not appear to contest any facts averred therein.

ARGUMENT

I. PDE'S APPLICATION FOR SUMMARY RELIEF SHOULD BE GRANTED BECAUSE THERE EXISTS NO ACTUAL CASE OR CONTROVERSY.

It is well established that to be justiciable, an actual case or controversy must exist at all stages of litigation and review. *Commonwealth v. Packer Twp.*, 60 A.3d 189, 192 (Pa. Cmwlth. 2012). If no actual controversy exists, a claim is not justiciable. *Cherry v. City of Philadelphia*, 692 A.2d 1082, 1085 (Pa. 1997).

Here, there exists no actual controversy that might be resolved by this Court. The Department of Education has the power "[w]henever required, to give advice, explanations, construction, or information, to the district officers and to citizens relative to the school laws, the duties of school officers, the management of the schools and all other questions and matters calculated to promote the cause of education." 71 P.S. § 352(d). Under the IDEA, Pennsylvania is obligated to develop and publish a Model Policy, titled Individuals with Disabilities Act, Part B, Policies and Procedures, under 34 CFR §§ 300.101-300.176. 34 CFR § 300.100. LEAs may, *but are not required to*, implement the Model Policy. Contrary to Petitioners' attempt to assert otherwise, the advice contained in the Model Policy did not constitute an order, directive, requirement, or mandate. Rather, the Model Policy sets forth PDE's interpretation of the IDEA requirements related to the provision of FAPE.

Here, the Model Policy simply sets forth PDE's interpretation of the plain meaning of IDEA specifically, the interpretation of the words "ages 3 to 21, **inclusive**" (emphasis added) and how LEAs might ensure compliance with IDEA. The policy neither prohibits nor compels LEAs to act, but instead advises as to PDE's interpretation. *See*, *Eastwood Nursing & Rehab. Ctr. v. Dep't of Pub. Welfare*, 910 A.2d 134 (Pa. Cmwlth. 2006) (mere statements of policy do not run afoul of the Regulatory Review Act).

Indeed, PDE's interpretation and advice is founded upon compelling legal developments. All three circuit courts to have considered this issue have analyzed the language of the word "inclusive" in IDEA and all three have held that the addition of the word "inclusive" means that FAPE must be provided until the last day of a student's 21st year, as articulated in PDE's Model Policy. *See A.R. v. Connecticut State Bd. of Educ.*, 5 F.4th 155, 1157-58 (2d Cir. 2021); *E.R.K. ex rel. R.K. v. Hawaii Dep't of Educ.*, 728 F.3d 982, 986 (9th Cir. 2013); *K.L. v. Rhode Island Bd. of Educ.*, 907 F.3d 639, 641 (1st Cir. 2018). Those circuit courts arrived at their holdings by analyzing the spirit of "public education" under IDEA. *K.L.*, 907 F.3d at 645. The analysis centered around whether a state provided a free public education to nondisabled students aged eighteen **through** twenty-one. (emphasis added) *See, K.L.*, 907 F.3d at 642; *E.R.K.*, 728 F.3d at 987. The three circuit courts that have considered this issue agree that "public education" under IDEA is any

education including adult education offered to 21-year-olds that is: (1) elementary or secondary in nature; (2) provided at the public's expense; and (3) under public direction. *See, K.L.*, 907 F.3d at 647; *E.R.K.*, 728 F.3d at 988; *A.R.,* 5 F.4th at 164-66. The circuit courts held that since Connecticut, Rhode Island, and Hawaii had programs in place for "public education" after the age of twenty-one, those states had a duty to provide FAPE to disabled children until their 22nd birthday. *See, K.L.*, 907 F.3d at 650, 652; *E.R.K.*, 728 F.3d at 989; *A.R.*, 5 F.4th at 155. Faced with Pennsylvania's similarity to such states, and litigation challenging PDE's alleged failure to properly guide LEAs regarding IDEA's requirements, PDE resolved such litigation by agreeing to provide more judicious guidance to LEAs. While Petitioners assert that they would have litigated the matter differently, such disagreement does not give rise to an actual case or controversy.

Of course, PDE did not create the statutory language at issue and PDE has no mechanism to revise or curtail the federal statute. Thus, the Model Policy is not an agency regulation that would be reviewable by this Court.

Moreover, the Model Policy is consistent with Chapter 14, including that FAPE be provided to students through age 21, inclusive. *See,* 22 Pa. Code §14.102(a)(2)(x) (incorporating by reference 34 CFR §§ 300.101, 300.102).

Because neither the Model Policy, nor the challenged communications regarding Model Policy, are orders, directives, requirements, or mandates, but are

instead "advice...[and] not an order, directive, requirement, or mandate requiring the School District...to implement...mandates within their schools" there exists no actual case or controversy regarding PDE's challenged actions. *R.M. v. Ortega*, 2022 WL 17347632, *12 (Pa. Cmwlth. 2022). Thus, Petitioner fails to present the Court with an actual case or controversy, and, therefore, PDE's Application for Summary Relief should be granted.

II. PDE'S APPLICATION FOR SUMMARY RELIEF SHOULD BE GRANTED BECAUSE PETITIONERS' CLAIMS ARE NOT RIPE FOR REVIEW.

The United States Supreme Court has articulated a two-part inquiry for determining whether an agency action is ripe for review. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). A court must evaluate the fitness of the issues for judicial review and the hardship to the parties of withholding review. *Id*. The fitness criterion is satisfied if the issues are purely legal and constitute final agency action. *Id*. The hardship analysis considers what hardships the parties will suffer if review is delayed." *Township of Derry v. Pa. Dep't of Labor & Industry*, 932 A.2d 56, 57-58 (Pa. 2007). The doctrine of ripeness arises out of a judicial concern not to become involved in abstract disagreements of administrative policies. *Texas Keystone, Inc. v. Pa. Dep't of Conservation & Natural Res.,* 851 A.2d 228 (Pa. Cmwlth. 2004). The doctrine demands a concrete contest, where there is a final agency action so that the courts can properly exercise their function. *Id*. Court rulings

applying the ripeness doctrine are "premised on policies of sound jurisprudence; courts should not give answers to academic questions, render advisory opinions, or make decisions based on the assertions of hypothetical events that might occur in the future. *Philips Bros. Elec. Contrs., Inc. v. Pa. Tpk. Comm'n*, 960 A.2d 941, 945 (Pa. Cmwlth. 2008).

"Although the Declaratory Judgments Act is to be liberally construed, one limitation on a Court's ability to issue a declaratory judgment is that the issues involved must be ripe for judicial determination, meaning that there must be the presence of an actual case or controversy." *Brouillette v. Wolf*, 213 A.3d 341, 357 (Pa. Cmwlth. 2019). "A declaratory judgment must not be employed to determine rights in anticipation of events which may never occur . . . or as a medium for the rendition of an advisory opinion which may prove to be purely academic." *Gulnac by Gulnac v. S. Butler Cty. Sch. Dist.*, 587 A.2d 699, 701 (Pa. 1991).

Here, the Model Policy concerns PDE's interpretation of IDEA, a federal statute. 20 U.S.C. § 1400(d)(1)(A). The Petition does not allege that Petitioners suffer any particular hardship as a result of the Model Policy. While Petitioners may choose to act in accordance with the challenged guidance, they are free to not do so. Ultimately, if Petitioners choose not to act in accordance with the challenged guidance, any potential harm would result from potential non-compliance with federal IDEA requirements, rather than state law or PDE's actions. Further,

Petitioners have not alleged that they have been, can be or will be subject to any imminent enforcement from PDE, or even that the challenged communications propose such enforcement. Consequently, Petitioners have not—and cannot yet—present a justiciable claim as a matter of law. Petitioners' claims are therefore not ripe, and therefore PDE's Application for Summary Relief should be granted.

III. PDE'S APPLICATION FOR SUMMARY RELIEF SHOULD BE GRANTED BECAUSE PETITIONERS LACK STANDING.

In order to have standing to bring a claim, a plaintiff must "establish that he [or she] has a substantial, direct, and immediate interest in the outcome of the litigation." *Pittsburgh Palisades Park, LLC v. Com.*, 888 A.2d 655, 660 (Pa. 2005). For a party to possess standing, he alleged injury "must be real and concrete, such that the party initiating the legal action has, in fact, been aggrieved." *Commonwealth, Office of Governor v. Donahue*, 98 A.3d 1223, 1229 (Pa. 2014). The interest must also be direct and immediate; the asserted violation must share a causal connection with the alleged harm that is neither remote nor speculative. Id.

The burden of establishing standing to sue lies squarely on the party claiming subject matter jurisdiction. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983). The core concept of standing is that a person who is not adversely affected in any way by the matter he seeks to challenge is not aggrieved thereby and has no standing to obtain a judicial resolution of his challenge. *Fumo v. City of Phila.*, 972 A.2d 487, 496 (Pa. 2009) (internal citations and quotation marks omitted).

First, Petitioners are not and cannot be harmed in any way by requirements imposed by the IDEA, let alone by PDE's admonition to adhere to such requirements. *See Brayman Const. Corp. v. Commw. Dep't of Transp.*, 30 A.3d 560, 568 (Pa. Cmwlth. 2011) ("no harm can come to [Respondent] by requiring it to comply with the law").

Second, IDEA itself precludes LEAs from possessing standing to challenge interpretations made by State Education Agencies ("SEAs"). Ultimately, the challenge that Petitioners bring seeks to "remedy" Respondents' interpretation of and advice provide under the IDEA. Federal courts have roundly concluded that such challenges must fail.

Indeed, the very section of the IDEA that Petitioners cite in favor of standing has been interpreted to the contrary. *See, Lawrence Twp. Bd. of Educ. v. New Jersey*, 417 F.3d 368, 371 (3d Cir. 2005) ("while section 1415(b)(6) is crafted more broadly than other sections, this fact alone does not indicate an intent to permit a private right of action by an LEA against a state."). In contrast to Petitioners' arguments, the IDEA provides that procedures shall be established and maintained ". . . to ensure that *children with disabilities and their parents* are guaranteed procedural safeguards with respect to the provision of [a FAPE]." 20 U.S.C. § 1415(a) (emphasis added). Similarly, section 1415(a)(6) provides that "children with disabilities and their parents are afforded the procedural safeguards required by section [1415]." 20

U.S.C. § 1415(a)(6)(A). No similar standing is conferred upon LEAs, like some Respondents.

Other Circuit Courts have not been persuaded that LEAs have standing under IDEA, particularly for budgetary disputes. *See Andrews v. Ledbetter*, 880 F.2d 1287 (11th Cir. 1989); *Board of Ed. of Oak Park v. Kelly E.*, 207 F.3d 931 (7th Cir. 2000); *County of West Chester v. New York*, 286 F.3d 150 (2d Cir. 2002). The Eleventh Circuit held:

> "It is clear that the Act's procedures…are set up to resolve disputes regarding particular individualized education programs. Within this defined context, an LEA has the right to challenge provisions of a handicapped child's IEP, including appealing a state educational agency's administrative hearing decision regarding such provisions. However, nothing indicates that Congress intended to grant an LEA statutory standing to bring suit to compel a state agency to fulfill its statutory duties."

Ledbetter, 880 F.2d at 1290.

Moreover, no Petitioner has a substantial, direct, and immediate interest in this case because no one represents that they have been aggrieved by the Model Policy or PDE's communications regarding the Model Policy. PDE's communications regarding the Model Policy place no legal burden or restriction on any Petitioner. Even if the Model Policy is declared void, there would be no real effect on Petitioners because IDEA, and the IDEA's requirement that FAPE be provided to eligible students through their 22nd birthday, does not change. Thus, no Petitioner has the standing to challenge the Model Policy or PDE's communications

regarding the Model Policy, and, therefore, PDE's Application for Summary Relief should be granted.

IV. PDE'S APPLICATION FOR SUMMARY RELIEF SHOULD BE GRANTED BECAUSE PETITIONERS FAILURE TO STATE A CLAIM FOR RELIEF.

Pennsylvania Rule of Appellate Procedure 1532(b) provides that "[a]t any time after the filing of a petition for review in . . . an original jurisdiction matter[,] the court may on application enter judgment if the right of the applicant thereto is clear." Pa.R.A.P. 1532(b). Summary relief is proper where "the case is clear and free from doubt, that there exist no genuine issues of material fact to be tried and that the movant is entitled to relief as a matter of law." *Equitable Gas Co. v. Public Util. Comm'n*, 880 A.2d 48, 52 n. 5 (Pa. Cmwlth. 2005) (citing *Pennsylvania Indep. Petroleum Producers v. Dep't of Envtl Res.*, 525 A.2d 829, 832 (Pa. Cmwlth. 1987)).

Agency action must comply with the procedures of the Regulatory Review Act if it creates a binding norm or substantive rule, but not if it is making a general statement of policy. *Home Builders Ass'n of Chester & Del. Counties v. Commonwealth*, 828 A.2d 446, 449 (Pa. Cmwlth. 2003). Pennsylvania defines "statement of policy" to mean "any document, except an adjudication or a regulation, promulgated by an agency which sets forth substantive or procedural personal or property rights, privileges, immunities, duties, liabilities or obligations of the public of any part thereof, and includes, without limiting the generality of the foregoing,

any document interpreting or implementing any act of Assembly enforced or administered by such agency." 45 P.S. § 1102(13). Pennsylvania defines "regulation" to mean "any rule or regulation, or order in the nature of a rule or regulation, promulgated by an agency under statutory authority in the administration of any statute administered by or relating to the agency, or prescribing the practice or procedure before such agency." 45 P.S. § 1102(12).

This Court has noted that the definition for a statement of policy was "so expansive that any pronouncement could fall within this definition; however, the definition of 'regulation' was not defined by what it was but rather by how it was issued- through a process that included public notice of a proposed rule, making a request for written comments by any interested party, giving due consideration to such comments and holding hearings as appropriate which was not required for a statement of policy." *Home*, 828 A.2d at 450.

Thus, the Pennsylvania Supreme Court has adopted the federal "binding norm" test to determine whether a document "should have" been promulgated as a regulation. *Id*. In applying this test, this Court held "[t]he critical distinction between a substantive rule and a general statement of policy is the different practical effect that these two types of pronouncements have in subsequent administrative proceedings…A properly adopted substantive rule establishes **a standard of conduct which has the force of law**…The underlying policy embodied in the rule

is not generally subject to challenge before the agency." Id. at 450-51 (emphasis added). Meanwhile, a statement of policy is defined as "a governmental agency's statutory interpretation which a court may accept or reject depending upon how accurately the agency's interpretation reflects the meaning of the statute." *Central Dauphin Sch. Dist. v. Commonwealth, Dep't of Educ.*, 608 A.2d 576, 580-81 (Pa. Cmwlth. 1992). Thus "a statement of policy is 'one that tracks a statute and does not expand upon its plain meaning'." *Eastwood Nursing & Rehab. Ctr. V. Dep't of Pub. Welfare*, 910 A.2d 134, 142 (Pa. Cmwlth. 2006).

Here, the Model Policy simply sets forth PDE's interpretation of the plain meaning of the IDEA. Indeed, neither the Model Policy nor PDE claim any independent authority to compel that which the IDEA requires. Rather, PDE's communications regarding the IDEA-required Model Policy consist of general interpretive statements of PDE's understanding that LEAs must provide FAPE as dictated by IDEA. Such interpretations are not independently applied with the force of law and thus are not required to go through the regulatory process. Rather, IDEA itself applies with the force of federal law, and PDE's statements regarding the IDEA's requirements do not *independently* create a binding norm.

While Petitioners assert that PDE *will* "enforce" the Model Policy as a binding norm, they do not and cannot alleged the PDE *has* done so, or even that any such "enforcement" is imminent or even likely. Of course, to the extent that IDEA

compels such interpretation, the regulations at Chapter 14 of 22 Pa. Code have *already* been subject to such regulatory processes. *See*, 22 Pa. Code §14.102(a)(2)(x) (incorporating by reference 34 CFR §§ 300.101, 300.102).

Therefore, the challenged PDE communications regarding the Model Policy do not violate the Regulatory Review Act or Commonwealth Documents Law, and PDE's Application for Summary Relief should thus be granted.

VI. PDE'S APPLICATION FOR SUMMARY RELIEF SHOULD BE GRANTED BECAUSE PETITIONER HAS FAILED TO EXHAUST AVAILABLE REMEDIES.

The doctrine of exhaustion of administrative remedies requires a party to exhaust all adequate and available administrative remedies before the right of judicial review arises. *Empire Sanitary Landfill, Inc. v. Department of Environmental Resources,* 684 A.2d 1047 (Pa. 1996). The doctrine is a court-made rule intended to prevent premature judicial intervention into the administrative process. *National Solid Wastes Management Association v. Casey*, 580 A.2d 893 (Pa. 1990), aff'd, 619 A.2d 1063 (Pa. 1993). A court is "to defer judicial review where the question presented is one within an agency specialization and where the administrative remedy is likely to produce the desired result." *Id.*, 580 A.2d at 897. The doctrine of exhaustion of administrative remedies ensures that the body possessing expertise in the area will hear a challenge first, and it affords agencies the opportunity to correct errors and thereby to moot judicial controversies.

Pennsylvania Pharmacists Ass'n v. Department of Pub. Welfare, 733 A.2d 666, 671 (Pa. Cmwlth. 1999).

Any SEA, State agency, or LEA that receives financial assistance under IDEA must establish and maintain procedures to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to a free and appropriate public education. 20 U.S.C. § 1415(a). IDEA vests a court "with jurisdiction only when a plaintiff has first followed the procedures set forth in the Act and exhausted the administrative remedies under the Act." 20 U.S.C. §§ 1400-1484(a). The language of the statute makes clear that Congress intended plaintiffs to complete the administrative process before resorting to court. *Komninos v. Upper Saddle River Bd. of Educ.*, 13 F.3d 775, 778 (3d Cir. 1994). The administrative process includes participation in a due process hearing and, where appropriate, an appeal to the state educational agency. 20 U.S.C. § 1415(g)(1).

Here, Petitioners have failed to avail themselves of this administrative process. In particular, Petitioners do not allege that they have even sought to contest claims for special education services brought by students or parents. Rather, Petitioners appear to seek a "safe harbor" to deny such claims in the future without repercussion, by deferring to an interpretation of IDEA that they seek to impose upon PDE. Of course, IDEA vests PDE, rather than LEAs, with the obligation to instruct and guide LEAs with how best to adhere to IDEA.

Should Petitioners wish to advance their own interpretation of IDEA, they are free to do so via contesting students' claims for services, or, in the extreme event that Petitioners might be subject to an administrative action from the SEA or USDE, through an appeal of such action. Petitioners have thus far failed to do so, and such failure divests this Court of jurisdiction.

Indeed, Petitioners are not bound by the PDE's communications regarding the Model Policy nor by the Model Policy itself but are instead bound by provisions of IDEA. Petitioners do not demonstrate that any repercussions will be visited upon the Petitioners under the IDEA until the IDEA's various procedural mechanisms are employed and exhausted. Thus, Petitioners can and must utilize their administrative remedies and assert their position regarding the IDEA's requirements in the appropriate forums, rather than engaging in this "end around" challenge to PDE's communications regarding those requirements.

CONCLUSION

WHEREFORE, Dr. Khalid N. Mumin, Secretary of the Pennsylvania Department of Education, and the Pennsylvania Department of Education respectfully request that the Court grant PDE's Application for Summary Relief and dismiss the Petition for Review, with prejudice.

Respectfully submitted,

JENNIFER C. SELBER
GENERAL COUNSEL

By: /s/ *Thomas P. Howell*
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Date: December 29, 2023

CERTIFICATE OF COMPLIANCE Pa.R.A.P. 2135(d)

Undersigned counsel, pursuant to Pa.R.A.P. 2135(d), hereby certifies that the attached Brief in Support of Application for Summary Relief filed by Respondents', Dr. Khalid N. Mumin, Secretary of the Pennsylvania Department of Education, and the Pennsylvania Department of Education, contains 5294 words, in compliance with the word count limit imposed by Pa.R.A.P. 2135(a)(1). I am relying upon the word count provided by the word processing software used to prepare the attached filing.

By: /s/ *Thomas P. Howell*
THOMAS P. HOWELL
Deputy General Counsel
Attorney ID No. 79527

CERTIFICATION OF COMPLIANCE

I certify that this filing complies with the provisions of the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania that require filing confidential information and documents differently than non-confidential information and documents.

By: /s/ *Thomas P. Howell*
THOMAS P. HOWELL
Deputy General Counsel
Attorney ID No. 79527

APPLICATION FOR SUMMARY RELIEF FILED BY RESPONDENTS

DR. KHALID N. MUMIN,

SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF EDUCATON,

AND THE PENNSYLVANIA DEPARTMENT OF EDUCATION

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PENNSYLVANIA SCHOOL BOARDS ASSOCIATION, INC., et al.	:	ORIGINAL JURISDICTION
Petitioners,	:	
	:	No. 409 MD 2023
v.	:	
DR. KHALID N. MUMIN, SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF EDUCATION, et al.,	:	
Respondents.	:	

ORDER

AND NOW, this _____ day of _____, 2024 upon consideration of the Application for Summary Relief filed by Respondents Dr. Khalid N. Mumin, Secretary of Education, and the Pennsylvania Department of Education it is hereby ORDERED that the Application is GRANTED and the Petition for Review is DISMISSED, with prejudice.

_____

J.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PENNSYLVANIA SCHOOL BOARDS ASSOCIATION, INC., et al.	:	ORIGINAL JURISDICTION
Petitioners,	:	No. 409 MD 2023
v.	:	
DR. KHALID N. MUMIN, SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF EDUCATION, et al.,	:	
Respondents.	:	

APPLICATION FOR SUMMARY RELIEF FILED BY RESPONDENTS DR. KHALID N. MUMIN, SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF EDUCATION, AND THE PENNSYLVANIA DEPARTMENT OF EDUCATION

Respondents Dr. Khalid N. Mumin, Secretary of the Pennsylvania Department of Education, and the Pennsylvania Department of Education (collectively, "PDE"), pursuant to Pennsylvania Rules of Appellate Procedure 123 and 1532(b), file this Application for Summary Relief seeking dismissal of the Petition for Review filed by Petitioners, Pennsylvania School Board Association, Inc., the School District of Pittsburgh, the Central Bucks School District, and the Upper Darby School District (collectively, "Petitioners"), and in support thereof state the following:

BACKGROUND

1. Pennsylvania is obligated to develop and publish a Model Policy, titled Individuals with Disabilities Act, Part B, Policies and Procedures ("Model Policy"), under 34 CFR §§ 300.101-300.176. 34 CFR § 300.100.
2. Effective September 5, 2023, PDE amended its Model Policy setting forth PDE's interpretation of the Individuals with Disabilities Education Act's ("IDEA"), 20 U.S.C., Ch. 33, §§ 1400-1500, requirements related to the provision of a free and appropriate public education ("FAPE").
3. Simultaneously, and to provide adequate notice about the amended Model Policy, PDE informed Local Education Agencies ("LEAs") and other interested parties about the updated Model Policy and the impact the Model Policy could have upon LEAs via a Penn*Link, webinars, and other guidance documents referenced in the Petition for Review. *See*, Petition for Review, *passim*, including references to "Settlement," the "Directive," or the "New Age-Out Rule".
4. On September 11, 2023, Petitioners filed a Petition for Review ("Petition") in this Court's original jurisdiction seeking equitable declaratory and injunctive relief, asserting that PDE's guidance documents interpreting IDEA illegally "require" Pennsylvania LEAs to provide FAPE until a student's 22nd birthday (rather than through the end of the school term in

which the student reaches 21 years of age), and that PDE's actions violate state law and regulation.

5. Petitioners are the Pennsylvania School Boards Association, Inc. ("PSBA"), a non-profit Pennsylvania corporation whose membership includes multiple school entities; the School District of Pittsburgh ("Pittsburgh"); the Central Bucks School District ("Central Bucks"); and the Upper Darby School District ("Upper Darby").

6. The Petition fails to acknowledge or expressly challenge the updated Model Policy. Rather, Petitioners seek to enjoin PDE from "enforcing" or further disseminating its guidance regarding the Model Policy. *See, generally* Petition for Review.

7. IDEA directs states to provide FAPE to all eligible learners between the ages of 3 and 21, *inclusive* . . ." 20 U.S.C. § 1412(a)(1)(A).

8. Title 22, Chapter 14 of the Pennsylvania Code ("Chapter 14"), 22 Pa. Code §§ 14.101 – 14.163, specifically regulates the implementation of FAPE in Pennsylvania, and adopts numerous sections of 34 CFR Part 300 (relating to assistance to states for the education of children with disabilities), including the provision of FAPE through a student's 22nd birthday. *See*, 34 CFR §§ 300.101, 300.102; *see also*, 22 Pa. Code § 14.102(2)(x).

9. The Model Policy at issue, required by the regulations implementing IDEA, 34 CFR §§ 300.100 - 300.176, is consistent with Chapter 14, including that FAPE be provided to students through age 21, inclusive. *See,* 22 Pa. Code §14.102(a)(2)(x) (incorporating by reference 34 CFR §§ 300.101, 300.102).

ARGUMENT

10. Pennsylvania Rule of Appellate Procedure 1532(b) provides that "[a]t any time after the filing of a petition for review in an appellate or original jurisdiction matter[,] the court may on application enter judgment if the right of the applicant thereto is clear." Pa. R.A.P. 1532(b).

11. Summary relief will be granted where the party's right to judgment is clear and no issues of material fact are in dispute. *See, Pa. State Education Ass'n v. Dept. of Community and Economic Development*, 110 A.3d 1076, 1095 n. 3 (Pa. Cmwlth. 2015)(citing *Unified Sportsmen of Pa. v. Pa. Game Comm'n*, 18 A.3d 373, 382 (Pa. Cmwlth. 2011)). A fact is considered to be material if its resolution could affect the outcome of the case under the governing law. *Hospital & Healthsystem Ass'n v. Commonwealth*, 77 A.3d 587 (Pa. 2013).

12. In evaluating a request for summary relief, the Court applies the same standards that apply on summary judgment. *See, Myers v. Commonwealth,* 128 A.3d 845, 849 (Pa. Cmwlth. 2015).

13. The Department of Education has the power "[w]henever required, to give advice, explanations, construction, or information, to the district officers and to citizens relative to the school laws, the duties of school officers, the management of the schools and all other questions and matters calculated to promote the cause of education." 71 P.S. § 352(d).

14. Petitioners ask this Honorable Court to declare that PDE illegally communicated the IDEA-required Model Policy via Penn*Link and other guidance in violation of Pennsylvania state statute and regulation.

15. Pennsylvania is obligated to develop and publish a Model Policy under 34 CFR §§ 300.101-300.176. 34 CFR § 300.100.

16. LEAs may, but are not required to, implement the Model Policy.

17. PDE's Model Policy, which is both compelled by Federal Law and which sets forth PDE's understanding of IDEA requirements, is not an order, directive, requirement, or mandate requiring Petitioners to act in any specific manner and is expressly permitted by the Pennsylvania School Code and Chapter 14.

18. Because neither the Model Policy, nor the challenged communications regarding Model Policy, are *orders, directives, requirements, or mandates*, but are instead "advice...[and] not an order, directive, requirement, or mandate requiring the School District...to implement...mandates within their

schools" there exists no actual case or controversy regarding PDE's challenged actions. *R.M. v. Ortega*, 2022 WL 17347632, *12 (Pa. Cmwlth. 2022).

19. Thus, Petitioners fail, as a matter of law, to present the Court with an actual case or controversy, and the Petition should be dismissed.

20. Further, "[a]lthough the Declaratory Judgments Act is to be liberally construed, one limitation on a Court's ability to issue a declaratory judgment is that the issues involved must be ripe for judicial determination, meaning that there must be the presence of an actual case or controversy." *Brouillette v. Wolf*, 213 A.3d 341, 357 (Pa. Cmwlth. 2019).

21. A declaratory judgment must not be employed to determine rights in anticipation of events which may never occur . . . or as a medium for the rendition of an advisory opinion which may prove to be purely academic." *Gulnac by Gulnac v. S. Butler Cty. Sch. Dist.*, 526 Pa. 483, 488, 587 A.2d 699, 701 (1991).

22. Petitioners do not aver that they have had any negative consequence because of the challenged communications issue by PDE.

23. While Petitioners may choose to act in accordance with the challenged guidance, they are free to not do so.

24. If Petitioners choose not to act in accordance with the challenged guidance, any potential harm would result from potential non-compliance with federal IDEA requirements, rather than state law or PDE's actions.

25. Petitioners have not alleged that they have been, can be or will be subject to any imminent enforcement from PDE, or even that the challenged communications indicate that such enforcement is possible.

26. Consequently, Petitioners have not—and cannot yet—present a justiciable claim.

27. Petitioners' claims are therefore, as a matter of law, not ripe, and the Petition should be dismissed in its entirety.

28. To have standing to bring a claim, a plaintiff must "establish that he [or she] has a substantial, direct, and immediate interest in the outcome of the litigation." *Pittsburgh Palisades Park, LLC v. Com.*, 585 Pa. 196, 204, 888 A.2d 655, 660 (2005).

29. "[T]he core concept of standing is that a person who is not adversely affected in any way by the matter he seeks to challenge is not aggrieved thereby and has no standing to obtain a judicial resolution of his challenge. *Fumo v. City of Phila.*, 601 Pa. 322, 972 A.2d 487, 496 (Pa. 2009) (internal citations and quotation marks omitted).

30. "An individual can demonstrate that he has been aggrieved if he can establish that he has a substantial, direct and immediate interest in the outcome of the litigation." *Id., citing In re Hickson*, 573 Pa. 127, 821 A.2d 1238, 1243 (Pa. 2003).

31. Instantly, no Petitioner has a substantial, direct, and immediate interest in this case because no one represents that they have been aggrieved by PDE's communications regarding the Model Policy.

32. PDE's communications regarding the Model Policy place no legal burden or restriction on any Petitioner.

33. Even if the Model Policy is declared void, there would be no real effect on Petitioners because the IDEA, and the requirement that FAPE must be provided to eligible students through their 22nd birthday, does not change.

34. Thus, as a matter of law, no Petitioner has the standing to challenge the Model Policy, and the Petition should be dismissed in its entirety.

35. The doctrine of exhaustion of administrative remedies requires a party to exhaust all adequate and available administrative remedies before the right of judicial review arises. *Empire Sanitary Landfill, Inc. v. Department of Environmental Resources*, 546 Pa. 315, 684 A.2d 1047 (1996). The doctrine is a court-made rule intended to prevent premature judicial intervention into the administrative process. *National Solid Wastes Management Association v.*

Casey, 135 Pa. Cmwlth. 134, 580 A.2d 893 (1990), *affirmed*, 533 Pa. 97, 619 A.2d 1063 (1993).

36. A court is "to defer judicial review where the question presented is one within an agency specialization and where the administrative remedy is likely to produce the desired result." *Id.*, 580 A.2d at 897.

37. Petitioners are not bound by the PDE's communications regarding the IDEA Model Policy nor by the Model Policy itself, but are instead bound by the IDEA's provisions.

38. Petitioners do not demonstrate that any repercussions will be visited upon the Petitioners under the IDEA until the IDEA's various procedural mechanisms are employed and exhausted.

39. Petitioner can and must utilize their administrative remedies and assert their position regarding the IDEA's requirements in those forum, rather than engaging in this "end around" challenge to PDE's communications regarding those requirements.

40. As a matter of law, Petitioners have failed to exhaust available administrative remedies and the Petition should be dismissed.

41. Agency action must comply with the procedures of the Regulatory Review Act if it creates a binding norm or substantive rule, but not if it is making a general statement of policy.

42. In the instant matter, PDE's communications regarding the IDEA-required Model Policy consist of general interpretive statements of LEAs' legal requirements to provide FAPE as dictated by IDEA, but they are *not* applied by PDE as a "binding norm" and thus are *not* required to go through the regulatory process.

43. Rather, the IDEA itself applies with the force of federal law, and PDE's statements regarding the IDEA's requirements do not *independently* create a binding norm.

44. Therefore, as a matter of law, the challenged PDE communications regarding the Model Policy do not violate the Regulatory Review Act or Commonwealth Documents Law, and the Petition for Review should be dismissed.

45. While Petitioners assert that PDE *will* "enforce" the IDEA model policy as a binding norm, they do not and cannot alleged the PDE *has* done so, or even that any such "enforcement" is imminent or even likely.

46. The Model Policy at issue, required by 34 CFR §§ 300.100 - 300.176, is further consistent with Chapter 14 of the Department's properly promulgated regulations. *See*, 22 Pa. Code §14.102(a)(2)(x) (incorporating by reference 34 CFR §§ 300.101, 300.102).

47. None of the provisions cited to by Petitioners in support of the Petition, including 24 P.S. §13-1301 or 22 Pa. Code §11.12, conflict with PDE's interpretation of IDEA that FAPE is available to eligible students until their 22nd birthday (rather than through the end of the school term in which the student reaches 21 years of age) because these provisions: (1) do not speak to the education of eligible students under IDEA or Chapter 14; and (2) cannot supersede federal law.

48. No genuine issues of material fact exist as to the above averments.

49. Petitioner has failed to state any cognizable claim, as a matter of law.

50. For any or all of the foregoing reasons, summary relief in favor of PDE is appropriate.

WHEREFORE, Respondents, Dr. Khalid N. Mumin, Secretary of the Pennsylvania Department of Education, and the Department of Education respectfully requests that this Honorable Court grant this Application for Summary Relief and dismiss the Petition for Review.

Respectfully submitted,

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Date: November 28, 2023

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PENNSYLVANIA SCHOOL BOARDS ASSOCIATION, et al.	:	ORIGINAL JURISDICTION
Petitioners	:	No. 409 MD 2023
v.	:	
DR. KHALID N. MUMIN, SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF EDUCATION, et al.,	:	
Respondents	:	

CERTIFICATION PURSUANT TO Pa. R.A.P. 127

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

Date: November 28, 2023

Respectfully submitted,

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