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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

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONERS' APPLICATION FOR SUMMARY RELIEF

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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

Are Petitioners' exhibits, attached to and relied upon within their Application for Summary Relief, properly before the Court?

Suggested answer: No.

Is the Model Policy a binding norm subject to the requirements of the Commonwealth Documents Law or Regulatory Review Act?

Suggested answer: No.

Does the Pennsylvania Department of Education's interpretation of the Individuals with Disabilities Education Act that a Free and Appropriate Public Education is available to students until their 22nd birthday conflict with the Public School Code?

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 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, 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.

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(a)(2)(x).

Petitioners' Application for Summary Relief ("Application") incorporates and, in part, relies upon sixty-four proposed exhibits that contain disputed facts not properly before this Honorable Court. Although Petitioners claim that all sixty-four exhibits are "pleadings, admissions, affidavits, and expert reports" as allowed under Pennsylvania Rule of Civil Procedure 1035.1, Petitioners include several exhibits that do not fit the criteria established in the Rule. Petitioners have also attempted to submit documents that constitute hearsay and would not be admissible. Even more, Petitioners' claim for relief appears to rest largely upon facts that remain in dispute. To the extent that such facts may be material as to Petitioners' claims, their existence and inclusion here demonstrate that Petitioners are not entitled to Summary Relief.

Petitioners argue that PDE did not properly follow the procedures outlined in the Commonwealth Documents Law or the Regulatory Review Act. However, Petitioners mistake PDE's guidance as a "binding norm" or an independently enforceable rule. 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). While Petitioners contend that they fear 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. Further, as the Model Policy is consistent with IDEA, Chapter 14, which implements IDEA and incorporates it into Pennsylvania law, has *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).

Finally, none of the provisions of law cited to by Petitioners in support of the Application, 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 because these provisions: (1) do not speak to the education of eligible students under IDEA or Chapter 14; and (2) cannot supersede federal law.

ARGUMENT

I. PETITIONERS CREATE ISSUES OF FACT BY RELYING UPON AND INCORPORATING DISPUTED FACTS AND EXHIBITS THAT ARE NOT PROPERLY BEFORE THE COURT INTO THEIR APPLICATION FOR SUMMARY RELIEF.

Petitioners' Application incorporates and, in part, relies upon sixty-four proposed exhibits that contain disputed facts not properly before this Honorable Court. Petitioners claim that all sixty-four exhibits are "pleadings, admissions, affidavits, and expert reports" as allowed under Pennsylvania Rule of Civil Procedure 1035.1. Application ¶ 6. Pennsylvania Rule of Civil Procedure 1035(a) provides that a court may consider depositions, answers to interrogatories, admissions on file, and affidavits prior to ruling on a motion for summary judgment. Pa. R.C.P.1035(a). The vast majority of the documents that Petitioner submits as part of its Application are not "depositions, answers to interrogatories, admissions on file [or] affidavits." In order to be considered, such papers "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." *Irrera v. Southeastern Pennsylvania Transp. Authority*, 331 A.2d 705, 707 (Pa. Super. 1974).

In *Irrera*, the Pennsylvania Superior Court considered an appeal from a lower court that granted summary judgment in favor of the defendant. Id. at 706. In that case, plaintiffs filed an answer to the defendant's motion for summary judgment that

included a "memorandum of support" with exhibits consisting of a series of letters between the parties or between one of the parties and another entity or individual. Id. The Court held that those exhibits were not properly before the Court because the exhibits were merely characterized as a "memorandum" without being sworn to or without otherwise complying with Pa. R.C.P.1035. Id. at 707.

The Pennsylvania Superior Court revisited that issue in a subsequent case and clarified its holding under *Irrera*. *See Wheeler v. Johns-Manville Corp.*, 493 A.2d 120 (Pa. Super. 1985). In that case, the plaintiff initiated a claim that he had suffered medical injuries from asbestos exposure. Id. at 477. The trial court granted the defendants request for summary judgment in large part based on the exhibits that were attached to the motion. Id. The exhibits included a workers compensation claim form and the plaintiff's deposition testimony. Id. The Superior Court clarified that those documents are not part of the record and should not be considered in a motion for summary judgment because they are not sworn affidavits. Id. at 478.

Indeed, exhibits attached to a memorandum of law filed in opposition to summary judgment, like those proposed by Petitioners, are not "affidavits" made on personal knowledge (as opposed to information and belief) as required by Pa.R.C.P.1035(d) and Pa.R.C.P.1035(e). *See Zepp v. Nationwide Ins.*, 434 A.2d 112, 114 (Pa. Super. 1981). The critical distinction is that a verification based on

"information and belief," does not meet the requirement of an affidavit based on "personal knowledge." *See Phaff v. Gerner*, 303 A.2d 826 (Pa. 1973).

In this instant case, the exhibits attached to Petitioners' Application are not properly before this Honorable Court. In fact, the exhibits and portions of the Application that rely upon the exhibits appear to even be beyond the scope of any arguments pled as part of the Petition for Review in this matter. Petitioners cannot make these documents part of the record, and ostensibly expand upon their pleadings, simply by attaching such documents to the Application.

Specifically, many of the proposed exhibits are emails either between the respective parties or with one of the parties and another entity or individual. *See* Application ¶ 7. Emails like those are substantially similar to the letters that the Superior Court held were not proper under Pa. R.C.P. 1035 in *Irrera*. Id. Additionally, Petitioners attempt to include various school policies, which have not been subject to cross examination or otherwise sworn as affidavits nor subject to any other exception under Pa. R.C.P. 1035. Id.

Petitioners attempt to include several "declarations" that are not sworn affidavits also fails, as they are synonymous with the unsworn "verifications" that the Pennsylvania Supreme Court held are not valid under Pa. R.C.P. 1035. Id. Finally, several of the Petitioners exhibits are inadmissible hearsay that should not be made part of the record, particularly since PDE has not had an opportunity to

cross-examine the individuals making the declarations or challenge the individuals' designation as an expert. Id. A motion for summary judgment cannot be supported or defeated by statements that include inadmissible hearsay evidence. *See Isaacson v. Mobile Propane Corporation*, 461 A.2d 625 (Pa. Super. 1983).

Finally, even if every one of these documents were considered by the Court, Petitioners' Application must still fail. Indeed, the inclusion of such documents only raise additional facts and demonstrate that the facts upon which Petitioner seeks to proceed remain disputed. To the extent that such facts may be material as to Petitioners' claims, their existence and inclusion here demonstrate that Petitioners are not entitled to Summary Relief. For the foregoing reasons, PDE respectfully requests that this Honorable Court does not consider, nor make part of the record, the exhibits attached to Petitioners' Application.

II. THE MODEL POLICY IS NOT SUBJECT TO THE REQUIREMENTS OF THE REGULATORY REVIEW ACT OR THE COMMONWEALTH DOCUMENTS LAW.

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). Further, under 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.

Here, the advice contained in the Model Policy did not constitute an order, directive, requirement, or mandate and it thus not subject to the Regulatory Review Act.

Pennsylvania follows the "binding norm test" to assess whether an agency's pronouncement is a regulation or a statement of policy. *R.M. v. Pennsylvania Housing Finance Agency*, 740 A.2d 302, 307 (Pa. Cmwlth. 1999). In ascertaining whether an agency has established a binding norm, the reviewing court must consider (1) the plain language of the provision; (2) the manner in which an agency has implemented the provision; and (3) whether the agency's discretion is restricted by the provision. Id. Additionally, 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).

Agency action must comply with the procedures of the Regulatory Review Act only if it creates a binding norm or substantive rule - not if it is making a general statement of policy. *Home*, 828 A.2d 446, 449. A "statement of policy" is "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). In contrast, a "regulation" is "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).

Here, the challenged statements simply inform stakeholders of PDE's interpretation and understanding of IDEA's requirements, specifically, that such federal law requires schools to provide FAPE to students "ages 3 to 21, **inclusive**" (emphasis added), and provides information regarding 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).

This Court has noted that while the definition for a statement of policy is "so expansive that any pronouncement could fall within this definition;" " . . .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.

Here, the Model Policy simply sets forth PDE's interpretation of the plain meaning of IDEA. Indeed, 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. In fact, neither the Model Policy nor PDE claim any independent authority to compel that which IDEA requires – such authority rests within the IDEA itself. Instead, PDE's communications regarding the IDEA-required Model Policy are 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. In this regard, it is IDEA itself – and not PDE-issued documents – that create the requirement Petitioners now challenge.

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, Chapter 14 has *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, neither the Model Policy or the challenged PDE communications regarding the Model Policy violate the Regulatory Review Act or Commonwealth Documents Law, and PDE's Application for Summary Relief should thus be granted.

III. PDE'S MODEL POLICY DOES NOT CONFLICT WITH STATE LAW.

Any state accepting federal funding under IDEA must provide a FAPE "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) (emphasis added). PDE's interpretation of IDEA and amendments to its Model Policy 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, 157-58 (2d Cir. 2021); *K.L. v. Rhode Island Bd. of Educ.*, 907 F.3d 639, 641 (1st Cir. 2018); *E.R.K. ex rel. R.K. v. Hawaii Dep't of Educ.*, 728 F.3d 982, 986 (9th Cir. 2013).

Those circuit courts arrived at their holdings by analyzing what constitutes "public education" under IDEA. *K.L.*, 907 F.3d at 645. Their analyses 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 – including through an amendment to the Model Policy[1].

Further, Chapter 14 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). Thus, 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,

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[1] Again, LEAs may, but are not required to, adopt the Model Policy.

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).

Finally, none of the state law provisions – or Orders interpreting those provisions - cited to by Petitioners in support of their Application conflict with PDE's interpretation that FAPE is available to eligible students until their 22nd birthday. First, despite Petitioners' assertions that certain provisions of state law or Orders interpreting those provisions, including 24 P.S. § 13-1301, 22 Pa. Code § 11.12, and the PARC Consent Decree, prohibit PDE's interpretation of IDEA as set forth in the Model Policy, the School Code expressly permits school districts to provide educational services to children after their 21st birthday. Specifically, section 1925 of the School Code states: "[a]ny board of school directors may admit persons less than six years of age, or more than twenty-one years of age, to suitable special or career and technical schools or departments." 24 P.S. § 19-1925. Clearly, where federal law requires schools to provide such an education, the Pennsylvania School Code provides means for schools to do so.[2]

[2] On this point, Petitioners appear content to "throw the baby out with the bathwater" and jeopardize more than $177 million in federal special education funding annually, which the United States Department of Education may withhold if, as Petitioners contend, Pennsylvania's school code actually *prohibits* IDEA compliance.

Next, neither 24 P.S. § 13-1301 nor 22 Pa. Code § 11.12 speak specifically to the education of eligible students under IDEA or Chapter 14 and, therefore, do not conflict with the Model Policy. Even if this Court determines there is a conflict, the plain language of IDEA must control, as state law limitations must give way to valid federal requirements. *See*, U.S. Const. art. VI, Clause 2. ("This Constitution, and the laws of the United States which shall be made in pursuance thereof…shall be the supreme law of the land…"). *See, also*, *Rosado v. Wyman*, 397 U.S. 397, 422-23 (1970) ("the duty of this tribunal…[is] to resolve disputes as to whether federal funds allocated to the States are being expended in consonance with the conditions that Congress has attached to their use.").

The state law provisions cited to by Petitioners in support of their Application do not conflict with PDE's interpretation of IDEA that FAPE is available to eligible students until their 22nd birthday because these provisions: (1) do not speak to the education of eligible students under IDEA or Chapter 14; and (2) cannot supersede federal law[3]. For these reasons and all the reasons stated above, the Court should deny the Petitioners' Application for Summary Relief.

[3] As IDEA itself imposes certain conditions of recipients of its funds, LEAs that receive IDEA funds must execute agreements and acknowledge compliance with IDEA's 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 deny Petitioners' Application for Summary Relief and dismiss the Petition for Review, with prejudice.

Respectfully submitted,

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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 Opposition to Petitioners' Application for Summary Relief is 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*
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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*
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