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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PENNSYLVANIA SCHOOL BOARDS ASSOCIATION, INC., SCHOOL DISTRICT OF PITTSBURGH, CENTRAL BUCKS SCHOOL DISTRICT, and UPPER DARBY SCHOOL DISTRICT, Petitioners, v. DR. KHALID N. MUMIN, SECRETARY OF EDUCATION OF THE PENNSYLVANIA DEPARTMENT OF EDUCATION, and the PENNSYLVANIA DEPARTMENT OF EDUCATION, Respondents.	:	No.: 409 M.D. 2023

PETITIONERS' REPLY BRIEF OPPOSING RESPONDENTS' APPLICATION FOR SUMMARY RELIEF

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A. Does an actual case or controversy exist where School Districts have filed a Petition For Review contesting PDE's actions of adopting a mandatory rule with which school districts must comply to extend the right of education for disabled students until their 22nd birthday?

Suggested Answer: Yes.

B. Are the School Districts' claims ripe for adjudication where PDE has adopted a new rule that requires school districts to extend education to disabled students beyond the rules in Section 1301 of the School Code and applicable regulations?

Suggested Answer: Yes.

C. Do the School Districts have standing where they are affected by the actions of PDE in the concrete ways alleged and proven?

Suggested Answer: Yes.

D. Have the School Districts stated a cause of action?

Suggested Answer: Yes.

E. Are the claims by the Pennsylvania School Boards Association and the School Districts barred by an exhaustion requirement?

Suggested Answer: No.

II. COUNTER STATEMENT OF THE CASE

The Petitioners, the Pennsylvania School Boards Association, Inc. ("PSBA"), School District of Pittsburgh ("Pittsburgh"), Central Bucks School District ("Central Bucks"), and Upper Darby School District ("Upper Darby") (together referred to as "the School Districts"), counter the Statement of the Case presented by the

Respondents, the Secretary of Education, and the Department of Education (together referred to as "PDE"), not so much for what is included in PDE's Statement of the Case, but for what is omitted.

Upon reading PDE's Statement of the Case, one gets the impression that the only things that PDE did in this case was to issue a "Model Policy" and some guidance documents. (*See* PDE's Brief, p.p. 4-5). Conspicuously omitted from PDE's Statement of the Facts are: (a) the settlement agreement compelling PDE to enforce the New Age-Out Rule; (b) PDE's change to the State Plan and the legal effect of the State Plan; and (c) PDE's training wherein school districts were told that they are mandated to comply with the New Age-Out Rule. Indeed, PDE fails to mention anywhere in its brief the settlement agreement, the terms of the settlement agreement, the State Plan, or the training mandating that school districts allow students who have aged out continue in school until their 22nd birthday. When one takes into consideration the settlement agreement, the State Plan, and the directives provided by PDE, PDE's arguments have no merit.

III. SUMMARY OF THE ARGUMENT

The Pennsylvania Department of Education, in a desperate effort to settle a federal lawsuit, agreed to a fundamental change in how special education services are provided in Pennsylvania and changed the age at which students with disabilities cease to be eligible to receive services from the natural period of transition at the end

of the school year in which the student turns 21 to an arbitrary date of the student's 22nd birthday, which can occur at any time during the school year and has no connection to programming. This change violates the School Code, a court order, the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq*. ("IDEA"), itself, and PDE's own regulations. For these reasons alone, the directive by PDE changing the age-out rule should be found unlawful.

Remarkably, PDE has taken the view that the change in the age-out rule is not a directive at all but rather a suggestion. However, PDE's own guidance on this issue and the fact that it entered into a binding settlement agreement to enforce this change belie any such claim.

Finally, the process used by PDE to make this fundamental change to the age-out rule failed to involve any discussion with the various stakeholders impacted by this change, including school districts, which must implement this change, and the very people the change purports to be designed to help, young adults with disabilities and their parents. The approach used by PDE by violating both the Commonwealth Documents Law, 45 P.S. §§ 1102 *et seq*. ("the CDL"), and the Regulatory Review Act, 71 P.S. §§ 745.1 *et seq*. ("the RRA"), and the process for such changes provided for under the IDEA shut out of the discussion the very stakeholders who should have been heard from before any such fundamental change in special education practice was undertaken in the Commonwealth. This has led to confusion, fails to ensure

special education services are provided in a consistent and well-planned manner, and instead provides them in an arbitrary manner.

As a result, the change in the age-out rule should be found to be an unlawful directive by PDE and flawed both in its substance and the process by which it was created.

IV. STANDARD FOR SUMMARY JUDGMENT

A motion for summary judgment may be granted only where there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Flood v. Silfies*, 933 A.2d 1072, 1074 (Pa. Commw. Ct. 2007). A fact is material if it directly affects the disposition or the outcome of a case. *Department of Environmental Protection v. Delta Chemicals, Inc.*, 721 A.2d 411, 416 (Pa. Commw. Ct. 1998). The right to judgment must be clear and free from doubt.

V. ARGUMENT

A. AN ACTUAL CASE OR CONTROVERSY EXISTS WHERE SCHOOL DISTRICTS HAVE FILED A PETITION FOR REVIEW CONTESTING PDE'S ACTIONS OF ADOPTING A MANDATORY RULE WITH WHICH SCHOOL DISTRICTS MUST COMPLY TO EXTEND THE RIGHT OF EDUCATION FOR DISABLED STUDENTS UNTIL THEIR 22ND BIRTHDAY.

PDE argues that there is no case or controversy because "neither the Model Policy, or the challenged communications regarding the Model Policy, are orders, directives, requirements, or mandates, but are instead, 'advice . . . [and] not an order, directive, requirement, or mandate . . .." PDE's Brief, pp. 10-11. PDE's argument

lacks merit as it ignores the settlement agreement, the change to the State Plan, and the training whereby PDE officials directed school districts to comply with the New Age-Out Rule. It also ignores the evidence filed in this case, including affidavits by experts that hearing officers and PDE staff will enforce the New Age-Out Rule. Finally, PDE ignores the legal effects of changing the State Plan.

PDE ignores the fact that it entered into a "Mutual Settlement Agreement and Release" agreement ("the Settlement Agreement") on August 30, 2023, establishing the New Age-Out Rule.[1] *See* Exhibit P-3. Intending to be "legally bound" (Exhibit P-3, p. 2), PDE agreed that it "will rescind and cease implementing and enforcing the Current Age-Out Policy as it exists in Section 300.101 of its IDEA Policies and Procedures." Exhibit P-3, ¶ I.1.

Just as PDE ignored the Settlement Agreement in its brief, PDE also ignored the State Plan and its change to the State Plan. PDE's Policies and Procedures are the "State Plan." Exhibit P-56. PDE agreed to amend "***its*** IDEA Policies and Procedures" to reflect the New Age-Out Rule. Exhibit P-3, ¶ 1.2 (emphasis added). In paragraph I.3 of the Settlement Agreement, PDE agreed to "implement" and to

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[1] Your Honorable Court has recognized, "an agency cannot create new regulation through negotiations that are binding on the agencies without formally adopting the regulation through the procedures set forth in the Commonwealth Documents Law; nor can an agency enter into settlement agreements that are *de facto* regulations." *Home Builders Ass'n of Chester & Del. Counties v. Commonwealth*, 828 A.2d 446, 455 (Pa. Commw. Ct. 2003).

"enforce" the New Age-Out Rule. The clear and unmistakable language of the Settlement Agreement establishes that PDE has bound itself to enforce the New Age-Out Rule.

The State Plan has the force of law and is enforceable through the IDEA. *See CJN v. Minneapolis Pub. Sch.*, 323 F.3d 630, 639 (8th Cir. 2003); *Blackmon ex rel. Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648 (8th Cir. 1999). The School Districts have filed affidavits of two experts in the field of special education asserting that the changes to the State Plan and the agreements in the Settlement Agreement will be enforced by special education due process hearing examiners and through the PDE officials who have the enforcement powers over school districts. *See* Exhibits P-61, Affidavit of Mr. Andrew Faust, and P-33, Affidavit of Mr. Andrew Klein. Mr. Klein declared, "It is my opinion that the Settlement Agreement and related documents would be determined to be binding upon the hearing officers" and that PDE employs individuals whose jobs are to ensure compliance with the special education laws. It is my opinion that said employees will treat the Settlement Agreement and related documents as legally binding." Exhibit P-33, Klein Affidavit ¶¶ 20-21. Mr. Faust declared, "[i]t is my opinion that hearing officers will give legal effect and decide cases on the bases of what is stated in the Settlement and related documents. Indeed, the settlement agreement expressly states that students and parents can sue school districts to enforce the settlement agreement." Exhibit P-61,

Faust Affidavit, ¶ 83(f). Mr. Faust also stated, "PDE compliance staff will require school districts to comply with the new rule contained in the settlement and related documents." Exhibit P-61, Faust Affidavit, ¶ 83.c.

When one considers the terms and conditions of the Settlement Agreement, the change to the State Plan, the legal effect of the State Plan, and how special education hearing officers and PDE staff will enforce the Settlement Agreement and the State Plan provisions, PDE's assertions that it merely issued "advice" are without merit and disingenuous.

B. THE SCHOOL DISTRICTS' CLAIMS ARE RIPE FOR ADJUDICATION WHERE PDE HAS ADOPTED A NEW RULE THAT REQUIRES SCHOOL DISTRICTS TO EXTEND EDUCATION TO DISABLED STUDENTS BEYOND THE RULES IN SECTION 1301 OF THE SCHOOL CODE AND APPLICABLE REGULATIONS.

Beginning on page 11 of its brief, PDE argues that the School Districts' claims are not ripe. The crux of PDE's ripeness argument is its assertion that: "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." PDE Brief, p. 12. This assertion has no merit in light of what the School Districts alleged in their Petition for Review and in their Motion for Summary Relief, the evidence presented in this case, the actions taken by PDE and the consequences of those actions.

Directly undermining PDE's assertion that "[t]he Petition [for Review] does not allege that Petitioners' suffer any particular hardship" are paragraphs 11 (Pittsburgh's estimates of the number of students returning), 17 (Central Bucks's estimates of the number of students returning), 21 (Upper Darby's estimates that many students would be entitled to return), and 6 (alleging that PDE's actions will impose significant cost and expenses, potentially millions of dollars on school districts). It must be noted that PDE has not filed an Answer to the Petition for Review. "Averments in a pleading to which a responsive pleading is required are admitted when not denied specifically or by necessary implication." Pa. R.C.P. No. 1029.

In addition, at the summary judgment stage, parties are not permitted to rely on averments in the pleadings. It is hornbook law that a party "may not satisfy the summary judgment requirement by relying on the averments contained in a [pleading]. Mere pleadings are not sufficient. A [party] must present actual evidence." *Pilchesky v. Gatelli*, 12 A.3d 430, 444 (Pa. Super. Ct. 2011). In this case, the School Districts filed evidence supporting the proposition that the School Districts have experienced injury deserving of relief. Furthermore, the parties have entered into Stipulations. Exhibit P-63. The parties have stipulated that five students were readmitted into Pittsburgh at an estimated cost of $225,000 for this school year (Exhibit P-63, ¶¶ 13-14); that fourteen students were readmitted by Central Bucks at

an estimated cost of $590,000 for this school year (Exhibit P-63, ¶¶ 20-21); and that three students were readmitted by Upper Darby at an estimated cost of $70,000 (Exhibit P-63, ¶¶ 24, 27). With these stipulated facts, it is difficult to understand how PDE can argue that the case is not ripe and that the School Districts have not alleged "any particular hardship . . .." PDE's Brief, p. 11.

In addition to these stipulated facts, the School Districts presented affidavits about the effects of the New Age-Out Rule and that they are providing these services because PDE instructed them that the New Age-Out Rule is mandatory. Patti Camper ("Camper"), Assistant Superintendent for Special Education in Pittsburgh, stated that she attended PDE training on August 31, 2023, where Carole Clancy stated that the new rule was mandatory. Exhibit P[2]-62, ¶ 5. Camper described the effects that the new rule will have on Pittsburgh. Exhibit P-62, ¶¶ 7-15. Edward Marshaleck ("Marshaleck"), Assistant Superintendent of Student Services at Upper Darby, stated that he received notice from PDE that it was "directing all school districts" to provide education to disabled students until their 22nd birthday. Exhibit P-64, ¶ 3. Marshaleck described the consequence of the New Age-Out Rule adopted by PDE. Exhibit P-64, ¶¶ 4-6. Alyssa Marton ("Marton"), Director of Pupil Services for Central Bucks, also attended the PDE training where "the Director of PDE's

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[2] The exhibit number was inaccurately designated with a "D" instead of a "P."

Bureau of Special Education, Carol Clancy, Ed.D., unequivocally stated that the policy change was mandatory." Exhibit P-60, ¶ 5. In addition, Marton described the impact on Central Bucks in terms of services to students and costs. Exhibit P-60, ¶¶ 7-8.

In addition to the pleadings and evidence as to how the New Age-Out Rule adopted by PDE is affecting school districts, PDE is ignoring major components of its actions. PDE has changed both the State Plan and the Model Policy without going through the required regulatory processes of either state law as reflected in the RRA and the CDL or the public processes of federal law. As argued above, the State Plan has the force of law, and the contents of school district policies must confirm to the contents of the State Plan. 34 C.F.R. § 300.201. Consequently, PDE's arguments about the non-binding effects of the Model Policy have no merit in law.

The undisputed evidence regarding the impact of PDE's actions on the School Districts and PDE's disregard of its unlawful changes to both the State Plan and the Model Policy undermine its contention that this case is not ripe.

C. THE SCHOOL DISTRICTS HAVE STANDING WHERE THEY ARE AFFECTED BY THE ACTIONS OF PDE IN THE CONCRETE WAYS ALLEGED AND PROVEN.

PDE makes three arguments for the proposition that the School Districts do not have standing. First, PDE argues that the School Districts have no substantial, direct, and immediate interest in the litigation. Second, PDE argues that the School

Districts cannot be harmed by requiring them to follow the law. Third, PDE argues that School Districts cannot challenge the interpretations of state education agencies. For the reasons that follow, PDE's arguments lack merit.

On page 14 of its brief, PDE cites *Lawrence Township Board of Education v. New Jersey*, 417 F.3d 368 (3d Cir. 2005), for the proposition that the School Districts do not have standing.[3] In *Lawrence Township,* the school district sued the state for money in federal court under the IDEA. The question in that case was whether Congress intended to provide a private cause of action to school districts under the IDEA. The Court concluded that the IDEA did not permit a private cause of action by a school district under the IDEA against the state, and, therefore, school districts had no standing to sue a state under the IDEA for money damages. In contrast, the School Districts at bar have not filed any claims under the IDEA. The Petition for Review was filed under Pennsylvania's Declaratory Judgment Act and equity jurisdiction alleging PDE's violations of the RRA and the CDL. The IDEA is relevant to this matter, not because of the School Districts' claims, but because PDE is basing its interpretation of the IDEA as a defense to the claims.

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[3] PDE makes what can only be described as a curious statement on page 14 of its brief. PDE argued, "Indeed, the very section of the IDEA that Petitioners cite in favor of standing has been interpreted to the contrary." PDE's Brief, p. 14. This is curious because the School Districts have not cited any law in any filings in this matter citing anything in the IDEA in favor of standing.

The other cases cited by PDE are similarly distinguishable. In *Andrews v. Ledbetter*, 880 F.2d 1287 (11th Cir. 1989), school districts sued the state in federal court under the IDEA to seek an order declaring that the state is obligated to provide disabled children with a free appropriate public education. In *Board of Education of Oak Park v. Kelly E.,* 207 F.3d 931 (7th Cir. 2000), a claim for contribution was made by school districts under the IDEA for the costs of a residential placement. The Court framed the question to be decided in that case as "does the Act prescribe a particular allocation of expenses between local and state bodies?" *Id.* at 95. The Court did not hold that there was a lack of standing but that the school districts were not entitled to contribution.

The final case cited by PDE was *County of Westchester v. New York*, 286 F.3d 150 (2d Cir. 2002). That case was filed in federal court under the IDEA whereby the state was sued under the IDEA to enforce the IDEA's substantive provisions. The Court said:

> The sole issue raised on appeal is whether Congress intended to create a private cause of action for intermediaries, such as the Counties in this case, to remedy a State's alleged failure to satisfy the conditions imposed by the IDEA on States that volunteer to participate in the federal program. We find that no such cause of action was created by Congress for substantially the same reasons as expressed by the district court.

County of Westchester, 286 F.3d at 151-152.

As is clear, the claims by the School Districts against PDE were not filed under the IDEA. They were not made in federal court. Instead, PDE unlawfully created a New Age-Out Rule for Pennsylvania's school districts and in violation of the RRA and the CDL. The cases cited by PDE have nothing to do with the claims under review by your Honorable Court.

Beginning on page 15 of its brief, PDE argues that the School Districts have no "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." However, this is an erroneous assertion as explained in section V.A. (argument regarding the existence of a case and controversy) of this Brief. Allegations were made in the Petition for Review and evidence in the form of affidavits was submitted as discussed in section V.A. of this Brief.

D. THE SCHOOL DISTRICTS HAVE STATED A CAUSE OF ACTION.

Beginning on page 16 of its brief, PDE argues that the School Districts have not presented a cause of action, not because PDE complied with the CDL or the RRA, but because "the Model Policy simply sets forth PDE's interpretation of the plain meaning of the IDEA." PDE Brief, p. 18. For the following reasons, PDE's argument has no merit.

PDE's argument is built upon an unstable foundation, leaving out important components of the foundation. PDE ignores the Settlement Agreement (Exhibit P-3) and the commitments it made to enforce the New Age-Out Rule. The Settlement Agreement provides that "[i]mmediately upon execution of the Agreement, PDE will implement, publish, ***and enforce the Amended Age-Out Policy***." (Exhibit P-3, §I.3) (emphasis added). PDE ignores its agreement to change, not just the Model Policy, but also the State Plan. (Exhibit P-3, §I.1) PDE ignores the legal effect of a State Plan and the changes it made to the State Plan.[4] PDE ignores the affidavits filed in this case about the training provided by PDE where school districts were told that

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[4] The state standards that are set forth in the State Plan are enforceable through the IDEA. *See CJN*, 323 F.3d at 639; *Blackmon ex rel. Blackmon*, 198 F.3d at 658. In *Michael C. ex rel. Stephen C. v. Radnor Twp. Sch. Dist.*, 202 F.3d 642 (3d Cir. 2000), the Court said:

> Entitlement to a [free appropriate public education, or] FAPE, by its terms, encompasses an appropriate educational program that is individually-designed for each student in accordance with the requirements of Part B [of IDEA] and the educational standards of the State in which the student's parents reside. In addition, under 34 C.F.R. § 300.600, each State must exercise a general supervision over all programs in the State that provide educational services to disabled students, and must ensure that all such programs meet State education standards and Part B requirements.

Id. at 648.

the new rule was mandatory. (Exhibits P-62, ¶ 5; P-60, ¶ 5) PDE ignores the facts set forth in the affidavits of Mr. Faust and Mr. Klein that PDE's enforcement officers will enforce the New Age-Out Rule and that special education hearing officers will apply the New Age-Out Rule. (Exhibits P-61, ¶ 83, and P-33, ¶¶ 20-21) When one properly considers all of the facts alleged in the Petition for Review and presented in the affidavits and other exhibits in this case, it is clear that the New Age-Out Rule prepared by the PDE has the force of law.

PDE's argument that the New Age-Out Rule "simply sets forth PDE's interpretation of the plain meaning of the IDEA" (PDE Brief, p. 18) is similarly without basis. PDE ignores the fact that its "interpretation" is directly at odds with the age out rule set forth in Section 1301 of the School Code, 24 P.S. § 13-1301, and 22 Pa. Code § 11.12.

You Honorable Court has held that interpretations by a state agency that are inconsistent with state law cannot stand, even if not a regulation, saying:

> Even if section 28b.1 was considered to be an interpretive rule, we would reach a similar conclusion. An agency's interpretive rule is invalid if it is "unwise or violative of legislative intent." *Northwestern Youth Services* 66 A.3d at 312 (*quoting Uniontown Area School District v. Pennsylvania Human Relations Commission*, 455 Pa. 52, 313 A.2d 156, 169 (Pa. 1973)).

Keith v. Commonwealth ex rel. Pa. Dep't of Agric., 151 A.3d 687, 696 (Pa. Commw. Ct. 2016).

Ignoring clear and unmistakable state law, agreeing in the Settlement Agreement to enforce a rule violating state law, and changing the State Plan in a way that violates state law, PDE is not "merely interpreting" federal law. Indeed, nowhere in its Brief does PDE explain that its interpretation is correct.

PDE's position seems to be that it can agree to enforce a new rule, can change a State Plan, can tell school districts that they cannot rely on state law, and can establish a new paradigm for special education hearing officers, but school districts cannot file a lawsuit alleging violations of the CDL and the RRA, even though PDE's agreements and actions will cost school districts and their taxpayers millions of dollars a year. Such is not the law.

E. THE CLAIMS BY THE PENNSYLVANIA SCHOOL BOARDS ASSOCIATION AND THE SCHOOL DISTRICTS ARE NOT BARRED BY AN EXHAUSTION REQUIREMENT.

Beginning on page 19 of its brief, PDE argues that this case must be dismissed due to the School Districts failure to exhaust administrative remedies. PDE argues on pages 20-21 that the School Districts must first prohibit a student from enrolling under the New Age-Out Rule, have the parents file a special education due process complaint against the school district under the IDEA, and then raise the issue of whether PDE's actions of adopting the New Age-Out Rule was in violation of the

RRA or the CDL. This argument is without merit, and a similar argument was rejected by the Pennsylvania Supreme Court in *Arsenal Coal Co. v. Commonwealth*, 505 Pa. 198, 477 A.2d 1333 (1984).[5]

Initially, it must be noted that neither the CDL nor the RRA contain any administrative processes to challenge regulations adopted in the violations of the law.

The illogicality of PDE's argument is easily illustrated. Among the actions that PDE has taken in its adoption of a regulation is to change the State Plan and to insert the New Age-Out Rule in the State Plan. Special Education hearing officers have no power or authority to declare a State Plan to be invalid or unenforceable and PDE cites no legal authority that any such power exists. Further, the special

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[5] Rejecting the approach of violating a regulation and testing the validity of the regulation in individual cases, the Supreme Court said:

> Appellants may refuse to comply and test the regulations by appealing, for example, a denial of permit to operate, or a denial of bond release, or by defending actions imposing sanctions for non-compliance. 52 P.S. § 1396.4(b). This proposed avenue of review is beset with penalties and impediments to the operation of the anthracite industry rendering it inadequate as a satisfactory alternative to the equitable action initiated under the original jurisdiction of Commonwealth Court.

Arsenal Coal Co., 505 Pa. at 210. The same observations can be made with forcing school districts to engage in due process proceedings against parents and face the costs of their own attorneys fees and prevailing attorneys fees for parents.

education hearing processes have no authority to direct PDE officials not to enforce the New Age-Out Rule against school districts. PDE failed to cite a single case where it was held that special education due process proceedings are available for school districts to raise violations of either the RRA or the CDL by the state.

The Pennsylvania Supreme Court has made it clear that the general rule of exhaustion is not absolute or inflexible, stating:

> However, "[w]here the administrative process has nothing to contribute to the decision of the issue and there are no special reasons for postponing its immediate decision, exhaustion should not be required." *Borough of Green Tree v. Board of Property Assessments*, 459 Pa. 268, 279, 328 A.2d 819, 824 (1974), *quoting L. Jaffe, Judicial Control of Administrative Action* 440 (1965). Furthermore, exhaustion will not be required when the administrative process is not capable of providing the relief sought. *See Feingold v. Bell of PA.*, 477 Pa. 1, 383 A.2d 791 (1977); *Borough of Green Tree, supra.*

Ohio Casualty Group of Ins. Cos. v. Argonaut Ins. Co., 514 Pa. 430, 436, 525 A.2d 1195 (1987).

Your Honorable Court noted:

> [E]xhaustion is not a necessary prerequisite for obtaining judicial review if "[the challenged administrative] regulation itself causes actual, present harm" prior to its enforcement. *Concerned Citizens*, 632 A.2d at 3.

Pocono Manor Investors, LP v. Dep't of Envtl. Prot. of Pa., 212 A.3d 112, 116 (Pa. Commw. Ct. 2019).

As established in the affidavits filed in this case and explained earlier in this Brief, the School Districts have actual harm from complying with the New Age-Out Rule.

The one case cited by PDE under the IDEA is on page 20 of its brief and involves actions by parents seeking FAPE or monetary relief for the provision of FAPE. *See Komninos v. Upper Saddle River Bd. of Educ.*, 13 F.3d 775 (3d Cir. 1994). There is nothing in that case that remotely suggests that claims for the violation of the RRA or the CDL must begin in a special education due process hearing.

The other cases cited on pages 19-20 of PDE's brief seem to be cited for purposes of setting forth general propositions rather than having any applicability to the facts in this case.

PDE first cites *Empire Sanitary Landfill v. Dep't of Envtl. Res.*, 546 Pa. 315, 684 A.2d 1047 (1996). In that case, the plaintiffs filed a petition for injunctive relief seeking to enjoin the Department of Environmental Resources from enforcing The Municipal Waste Planning, Recycling and Waste Reduction Act due to alleged constitutional violations. Finding that certain claims were barred by the plaintiffs' failure to exhaust administrative remedies, the Court said:

> The Commonwealth Court did not err when it held that the EHB has jurisdiction over challenges to the County Plan approved by DER and that Empire and Danella failed to exhaust their administrative remedies. The EHB has the jurisdiction to hear appeals of actions of the DER, 35 P.S. § 7514(2), which includes challenges to county plans approved by DER. *Greene County Citizens United v. Greene County Solid Waste Authority*, 161 Pa. Commw. 372, 636 A.2d 1299 (1994). While DER approved the County Plan in 1992, neither Empire nor Danella filed an appeal of DER's action with the EHB. Thus, they failed to exhaust their available administrative remedies with respect to the County Plan.

Empire Sanitary Landfill, 546 Pa. at 329-330.

PDE next cites *Pennsylvania Pharmacists Ass'n v. Department of Pub. Welfare*, 733 A.2d 666 (Pa. Commw. Ct. 1999). In that case, the petitioners filed a Petition for Review contesting outpatient pharmacy rates established by the respondents. The Court concluded that the Petitioners had an administrative remedy to petition the Secretary of the Department of Public Welfare. The Court ruled that "a party challenging administrative decision-making must first exhaust administrative remedies before seeking judicial review; where such remedies exist, courts lack jurisdiction." *Id.* at 672. The Court decided that such a remedy existed under 1 Pa. Code § 35.19 (relating to petitions for declaratory orders). Unlike *Pennsylvania Pharmacies,* the instant case does not involve a discrete decision that is subject to review under 1 Pa. Code § 35.19. On the contrary, PDE's actions were to create a new regulation in violation of the CDL and the RRA. Neither of those laws contain any required administrative processes to be exhausted.

In addition to the fact that neither the CDL nor the RRA contain any administrative processes to contest a regulation, your Honorable Court has held that if an administrative regulation causing harm is being challenged, exhaustion is not required. More specifically, your Honorable Court has stated:

> [E]xhaustion is not a necessary prerequisite for obtaining judicial review if "[the challenged administrative] regulation itself causes actual, present harm" prior to its enforcement. *Concerned Citizens [of Chestnuthill Twp. v. Dep't of Env't Res.]*, 158 Pa. Commw. 248, 632 A.2d [1,] 3 [(Pa. Cmwlth. 1993)].
>
> *Pocono Manor Invs., LP v. Dep't of Env't Prot.*, 212 A.3d 112, 116 (Pa. Cmwlth. 2019).

McNew v. E. Marlborough Twp., 295 A.3d 1, 11 (Pa. Commw. Ct. 2023).

VI. CONCLUSION

For the foregoing reasons, the School Districts respectfully request that the Court deny PDE's Application for Summary Relief and grant Summary Judgement in favor of the Petitioners and against the Respondents.

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Date: Friday, January 5, 2024

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 2135, I certify the following:

This brief complies with the type-volume limitation of Rule 2135, as it contains 6,316 words, excluding the parts of the brief exempted by the Rule.

Dated: Friday, January 5, 2024

/s/ Michael I. Levin, Esquire
Michael I. Levin, co-counsel for Petitioners

CERTIFICATE OF SERVICE

I, the undersigned counsel, hereby certify that I served the foregoing Brief Opposing Respondents' Application for Summary Relief on the following counsel and on the date indicated below in the manner indicated, which service satisfies the requirements of Pa. R.A.P. 121:

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