

# RULES AND REGULATIONS

## Title 22—EDUCATION

### STATE BOARD OF EDUCATION

[22 PA. CODE CH. 14]

#### Special Education Services and Programs; Extended School Year Services

The State Board of Education (Board) amends Chapter 14 (relating to special education services and programs) under authority of sections 1372, 2603-B and 2604-B of the Public School Code of 1949 (24 P. S. §§ 13-1372, 26-2603-B and 26-2604-B).

Notice of proposed rulemaking was published at 27 Pa.B. 2428 (May 17, 1997) with an invitation to submit written comments within 30 days.

#### *Purpose*

Chapter 14 governs the Commonwealth's operation of special education services and programs for eligible students. The amendments to §§ 14.1 and 14.34 (relating to definitions; and ESY services) define extended school year (ESY) services for eligible students and clarify requirements for the identification of students in need of ESY and the program itself.

ESY services address the needs of eligible students who lose behavioral patterns or skills (regression) during an interruption in educational programming and who do not recover those behavior patterns or skills (recoupment), making it unlikely that the student will attain or maintain the goals reflected in the Individualized Education Program (IEP) or make reasonable progress from year to year.

#### *Public Comments and Responses*

The Board received comments from two education organizations, three school districts and one law firm. The Board considered the public comments received during the public comment period, as well as additional public comments received after the close of the comment period. Comments were received from the House Education Committee on July 3, 1997; the Senate Education Committee on July 2, 1997; and the Independent Regulatory Review Commission (IRRC) on July 16, 1997.

IRRC recommended defining the terms "regression" and "recoupment" in § 14.1. The Board concurs and the definitions are added on final-form.

In its comments to the Department of Education (Department) regarding a proposed amendment to Chapter 342 (relating to special education services and programs), IRRC recommended adding a cross reference to ESY services in existing § 342.32 (relating to ISP), which outlines IEP development. The Board concurs with this recommendation, and the Department placed a cross reference in § 14.32(f)(3)(iii).

IRRC recommended moving the proposed revisions of § 14.34(d) to subsection (a) and incorporating the subheading "Scope" to the new subsection (a). Also, IRRC recommended adding a citation to the specific Federal laws and regulations referenced in this subsection. The Board made these changes on final-form.

IRRC and one public commentator suggested that the phrase "other factors" in proposed § 14.34(a) was vague.

In response, the Board added three examples of other factors in § 14.34(c). These factors were drawn directly from Remedial Order # 2 under *Armstrong v. Kline*, 476 F. Supp. 583 (E. D. Pa. 1979). To accommodate the addition of subsection (c), the Board moved the last sentence from proposed subsection (a) to a separate subsection, § 14.34(d).

IRRC recommended rewording of the last sentence in proposed § 14.34(b) for clarity. This was done on final-form.

IRRC, the House and Senate Education Committees, and some public commentators expressed concerns about the accuracy of the analysis of the fiscal impact of the proposed amendments. The cost estimates provided with the proposed amendments were developed using predictions from survey responses from all 29 intermediate units and 22 urban school districts, as well as analysis of data submitted annually by intermediate units to the Department regarding the number of children receiving ESY services. Given the difficulty in predicting the outcome of case-by-case decisionmaking by IEP teams in 501 school districts, the Board is satisfied with the original cost estimates and does not agree that additional fiscal analysis would produce more reliable predictive conclusions. As stated with the proposed amendments, the costs of ESY services are expected to be offset by Federal funds within the Individuals with Disabilities Education Act (IDEA) Part B subgrants of the intermediate units. Finally, concerns about the fiscal impact of the amendments need to be weighed against the costs of litigation promised by the *Armstrong* plaintiff's counsel if the amendment were not promulgated.

#### *Affected Parties*

These amendments will benefit Commonwealth students who are eligible for special education services and programs and who need ESY services to enable them to receive a free appropriate public education. The amendments also affect the parents and guardians of these students, as well as all school districts and intermediate units by providing clear policy for ESY services.

#### *Cost and Paperwork Estimates*

Costs imposed on State government will be for providing training and technical assistance to school districts and intermediate units in interpreting and implementing the amendments and accompanying revised standards under Chapter 342. These efforts are ongoing for various sections of the regulations, so the changes in amendments will not materially affect the State's costs.

The number of students entitled to ESY services should not increase significantly as a result of these amendments, since each district must consider all eligible students for ESY services if regression and limited recoupment capacity warrant this consideration. Costs may increase slightly because of the demand expectations created by bringing attention to the issue. ESY services are already being provided to approximately 3,000 students in this Commonwealth. The Board is not aware of students in this Commonwealth who are entitled to ESY services but are not receiving them. As a result of the Department's analysis of fiscal impact, the maximum increase in the number of students served would be less than 10%. Given an average cost of services of \$1,968, a 10% increase would result in a total added cost across

this Commonwealth of approximately \$590,000. These costs are expected to be offset by Federal IDEA Part B funds within the budgets of intermediate units. The fiscal impact on school districts should be minimal.

Amendments to §§ 14.1, 14.32 and 14.34 will not substantially alter paperwork, accounting or reporting requirements already in place.

*Effective Date*

These amendments will become effective upon final publication in the *Pennsylvania Bulletin*.

*Sunset Date*

The effectiveness of Chapter 14 (including §§ 14.1 and 14.34) will be reviewed by the Board every 4 years, in accordance with the Board's policy and practice respecting regulations and standards promulgated by the Department and Board. Thus, no sunset date is necessary.

*Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on May 7, 1997, the Board submitted a copy of the notice of proposed rulemaking published at 27 Pa.B. 2428 to IRRC and to the Chairpersons of the House and Senate Committees on Education for review and comment. In compliance with section 5(b.1) of the Regulatory Review Act, the Board also provided IRRC and the Committees with copies of the comments received as well as other documentation.

In preparing these final-form regulations, the Board has considered the comments received from IRRC, the Committees and the public.

These final-form regulations were deemed approved by the Committees on December 31, 1997, and were approved by IRRC on January 13, 1998, in accordance with section 5(c) of the Regulatory Review Act.

*Contact Person*

The official responsible for information on the Board's process of promulgating these final-form regulations is Dr. Peter H. Garland, Executive Director, State Board of Education, 333 Market Street, Harrisburg, PA 17126-0333, (717) 787-3787. The official responsible for implementation of these final-form regulations is William Penn, Director, Bureau of Special Education, 333 Market Street, Harrisburg, PA 17126-0333, (717) 783-6913.

*Findings*

The Board finds that:

(1) Public notice of the intention to adopt these amendments was given under sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202) and the regulations promulgated thereunder in 1 Pa. Code §§ 7.1 and 7.2.

(2) A public comment period was provided as required by law and all comments were considered.

(3) The amendments are necessary and appropriate for the administration of the Public School Code of 1949 (24 P. S. §§ 1-101—27-2702).

*Order*

The Board, acting under the authorizing statute, orders that:

(a) The regulations of the Board, 22 Pa. Code Chapter 14, are amended by amending §§ 14.1, 14.32 and 14.34 to read as set forth at Annex A, with ellipses referring to the existing text of the regulations.

(b) The Executive Director will submit this order and Annex A to the Office of General Counsel and the Office of Attorney General for review and approval as to legality and form as required by law.

(c) The Executive Director of the Board shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(d) This order is effective upon final publication in the *Pennsylvania Bulletin*.

PETER H. GARLAND,  
*Executive Director*

*(Editor's Note: The amendment of § 14.32 was not included in the proposal at 27 Pa.B. 2428.)*

*(Editor's Note: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 28 Pa.B. 588 (January 31, 1998).)*

**Fiscal Note:** Fiscal Note 6-260 remains valid for the final adoption of the subject regulations.

**Annex A**

**TITLE 22. EDUCATION**

**PART I. STATE BOARD OF EDUCATION**

**CHAPTER 14. SPECIAL EDUCATION SERVICES AND PROGRAMS**

**§ 14.1. Definitions.**

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

\* \* \* \* \*

*ESY—Extended school year services*—Special education or related services provided outside of a standard schedule of school days within a school term, for the purpose of ensuring the provision of a free appropriate public education to an eligible student.

\* \* \* \* \*

*Recoupment*—Recovery of skills or behavioral patterns, or both, specified on the IEP to a level demonstrated prior to the interruption of educational programming.

*Regression*—Reversion to a lower level of functioning evidenced by a measurable decrease in the level of skills or behaviors which occurs as the result of an interruption in educational programming.

\* \* \* \* \*

**§ 14.32. IEP.**

\* \* \* \* \*

(f) The IEP of each exceptional student shall contain the following:

\* \* \* \* \*

(3) A statement of the specific special education services and programs and related services to be provided to the student, including if appropriate the following:

\* \* \* \* \*

(iii) ESY services as provided for in §§ 14.34 and 342.34 (relating to ESY services).

\* \* \* \* \*

**§ 14.34. ESY services.**

(a) This section may not be construed or applied to require more than is required by Federal law and regula-

tions, particularly the requirements of the Individuals with Disabilities Education Act (20 U.S.C.A. §§ 1400—1485) and its implementing regulations.

(b) An eligible student is entitled to ESY services if regression caused by interruption in educational programming and limited recoupment capacity, or other factors, makes it unlikely that the student will attain or maintain skills and behavior relevant to established IEP goals and objectives.

(c) Examples of other factors in addition to regression and recoupment include:

(1) The extent to which the student has mastered and consolidated an important skill or behavior at the point when educational programming would be interrupted.

(2) The extent to which a skill or behavior is particularly crucial to reaching the goals of self-sufficiency and independence from caretakers.

(3) The extent to which successive interruptions in educational programming reduce a student's motivation and trust and may lead to an irreversible withdrawal from the learning process.

(d) School districts are responsible for considering the need for ESY services for each eligible student, including each student placed by the district in an approved private school or other placement site not operated by the school district.

(e) Consideration of the need for ESY services shall occur at the IEP team meeting to be convened at least annually, or more frequently if conditions warrant consistent with § 14.32(i)(3) (relating to IEP). Consideration means that ESY services are raised and discussed at the IEP team meeting. In making a determination that a student is eligible for ESY services, the IEP team shall rely on criteria in Chapter 342 (relating to special education services and programs) and applicable judicial decisions.

(f) The need for ESY services will not be based on any of the following:

(1) The desire or need for day care or respite care service.

(2) The desire or need for a summer recreation program.

(3) The desire or need for other programs or services which, while they may provide educational benefit, are not required to ensure the provision of a free appropriate public education.

[Pa.B. Doc. No. 98-294. Filed for public inspection February 20, 1998, 9:00 a.m.]

## DEPARTMENT OF EDUCATION

### [22 PA. CODE CH. 342]

#### Special Education Services and Programs; Extended School Year Services

The Department of Education (Department) amends § 342.34 (relating to ESY services) to read as set forth in Annex A, under the authority of section 1372 of the Public School Code of 1949 (24 P.S. § 13-1372) and § 14.3 (relating to standards).

Notice of proposed rulemaking was published at 27 Pa.B. 2423 (May 17, 1997).

#### Purpose

Chapter 342 governs the Commonwealth's operation of special education services and programs for eligible students. Amendments to § 342.34 establish definitions, criteria and procedures for considering and documenting the need for extended school year (ESY) services for eligible students under Chapter 14 (relating to special education services and programs).

ESY services address the needs of eligible students who lose behavioral patterns or skills (regression) during an interruption in educational programming and who do not recover those behavior patterns or skills (recoupment), making it unlikely that the student will attain or maintain the goals as reflected in the Individualized Education Program (IEP) or make reasonable progress from year to year.

#### Public Comments and Responses

The Secretary of Education (Secretary) reviewed comments submitted to the State Board of Education (Board) by two education organizations, three school districts and one law firm. The Secretary considered the public comments received during the public comment period, as well as additional public comments received after the close of the comment period. Comments were received from the House Education Committee on July 3, 1997; from the Senate Education Committee on July 2, 1997; and the Independent Regulatory Review Commission (IRRC) on July 16, 1997.

IRRC recommended that the acronym, "ESY," be defined in § 342.34(a). The definition was added on final form.

IRRC and at least one public commentator expressed concerns about the clarity of the factors to be considered by IEP teams. To increase clarity, the Secretary added a reference to § 14.34 in subsection (b), because both § 14.34 and § 342.24 (relating to ESY services; and instructional support) mention factors to be considered.

IRRC and at least one public commentator pointed out that the phrase, "disabilities thought of as severe," in subsection (c) is not defined and is therefore open to a host of different interpretations. IRRC recommended that the requirement to pay particular attention to students with disabilities thought of as severe be eliminated. The Secretary did not eliminate this requirement because it is drawn directly from Remedial Order # 2 under *Armstrong v. Kline*, 476 F. Supp. 583 (E. D. Pa. 1979). However, the Secretary concurs that the phrase, "disabilities thought of as severe," may be interpreted differently. Therefore, specific examples of disabilities thought of as severe were added to subsection (c). These examples were drawn directly from Remedial Order # 2 under *Armstrong v. Kline*. The Secretary believes that this revision satisfies the expressed concerns while maintaining the court's requirement to pay particular attention to students who are more likely to need ESY services.

IRRC pointed out that subsection (c) lacked clarity because the first sentence prescribed duties for IEP teams and the second sentence prescribed duties for school districts. The Secretary concurs and changed the second sentence on final form. IRRC also suggested that the second sentence be split into its own subsection. The Secretary believes that, for clarity, the two sentences need to be read as a unit, and therefore need to be in one subsection.

During review of the proposed standards in light of public comment, Department staff became aware that a literal reading of subsection (e)(1) was that goals make progress, when, in fact, students make progress on goals. The Secretary modified the subsection for clarity on final form.

IRRC recommended that the phrase, "other appropriate measures," in subsection (e)(6), be made more specific to narrow the range of interpretations. The Secretary concurs with this recommendation and substituted the word "equivalent" for "appropriate" on final form.

IRRC pointed out a typographical error in subsection (e)(6). "Ecological like skills" should have read "ecological life skills." The correction was made on final-form.

IRRC recommended that a cross-reference to subsection (f), regarding documentation of ESY on IEPs, be added to § 342.32, regarding IEPs. The Secretary concurs that a cross-reference is helpful. However, the Secretary believes that the logical place for a cross-reference is in Chapter 14, which specifically requires IEPs to contain statements about ESY if appropriate. Therefore, a cross-reference to both §§ 14.34 and 342.34 was added by the Board to § 14.32(f)(3)(iii).

IRRC, the House and Senate Education Committees, and some public commentators expressed concerns about the accuracy of the analysis of the fiscal impact of the proposed amendment. The cost estimates provided with the proposed amendment were developed using predictions from survey responses from all 29 intermediate units and 22 urban school districts, as well as analysis of data submitted annually by intermediate units to the Department regarding the number of children receiving ESY services. Given the difficulty in predicting the outcome of case-by-case decisionmaking by IEP teams in 501 school districts, the Secretary is satisfied with the original cost estimates and does not agree that additional fiscal analysis would produce more reliable predictive conclusions. As stated with the proposed amendment, the costs of ESY services are expected to be offset by Federal funds within the Individuals with Disabilities Education Act (IDEA) Part B subgrants of the intermediate units. Finally, concerns about the fiscal impact of the regulation need to be weighed against the costs of litigation promised by the *Armstrong* plaintiff's counsel if the amendment was not adopted.

#### *Affected Parties*

The amendments will benefit Commonwealth students who are eligible for special education services and programs and who need ESY services to enable them to receive a free appropriate public education. The amendments also affect the parents and guardians of these students, as well as all school districts and intermediate units by providing clear policy for implementation and dispute resolution.

#### *Cost and Paperwork Estimates*

Costs imposed on State government will be for providing training and technical assistance to school districts and intermediate units in interpreting and implementing the new amendment. These efforts are ongoing for various sections of the amendment, so the amendment will not materially affect the State's costs.

The number of students entitled to ESY services should not increase significantly as a result of this amendment, since each district must consider all eligible students for

ESY services if regression and limited recoupment capacity warrant this consideration. Costs may increase slightly because of the demand expectations created by bringing attention to the issue. ESY services are already being provided to approximately 3,000 students in this Commonwealth. The Department is not aware of students in this Commonwealth who are entitled to ESY services but are not receiving them. As a result of the Department's analysis of fiscal impact, the maximum increase in the number of students served would be less than 10%. Given an average cost of services of \$1,968, a 10% increase would result in a total added cost across the Commonwealth of approximately \$590,000. These costs are expected to be offset by Federal IDEA Part B funds within the budgets of intermediate units. The fiscal impact on school districts should be minimal.

The amendment to § 342.34 will not substantially alter paperwork, accounting or reporting requirements already in place.

#### *Effective Date*

This amendment will become effective upon final publication in the *Pennsylvania Bulletin*.

#### *Sunset Date*

The effectiveness of Chapter 342 (including § 342.34) will be reviewed by the Department and Board every 4 years, in accordance with the Board's policy and practice respecting all regulations and standards promulgated by the Department and Board. Thus, no sunset date is necessary.

#### *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on May 7, 1997, the Department submitted a copy of the notice of proposed rulemaking published at 27 Pa.B. 2423 to IRRC and to the Chairpersons of the House and Senate Committees on Education for review and comment. In compliance with section 5(b.1) of the Regulatory Review Act, the Board also provided IRRC and the Committees with copies of the comments received as well as other documentation.

In preparing this final-form regulation, the Department has considered the comments received from IRRC, the Committees and the public.

This final-form regulation was deemed approved by the Committees on December 31, 1997, and was approved by IRRC on January 13, 1998, in accordance with section 5(c) of the Regulatory Review Act.

#### *Contact Person*

The official responsible for information on the process of promulgating this final-form regulation and for their implementation is William Penn, Director, Bureau of Special Education, 333 Market Street, Harrisburg, PA 17126-0333, (717) 783-6913.

#### *Findings*

The Department finds that:

(1) Public notice of the intention to adopt this amendment was given under sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202) and the regulations promulgated thereunder in 1 Pa. Code, §§ 7.1 and 7.2.

(2) A public comment period was provided as required by law and all comments were considered.

(3) The amendment is necessary and appropriate for the administration of the Public School Code of 1949 (24 P. S. §§ 1-101—27-2702).

*Order*

The Department of Education, acting under authorizing statute orders that:

(a) The regulations of the Department, 22 Pa. Code Chapter 342, are amended by amending § 342.34 to read as set forth in Annex A.

(b) The Secretary will submit this order and Annex A to the Office of General Counsel and the Office of Attorney General for review and approval as to legality and form as required by law.

(c) The Secretary will certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(d) This order is effective upon final publication in the *Pennsylvania Bulletin*.

EUGENE W. HICKOK,  
*Secretary*

*(Editor's Note: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 28 Pa.B. 588 (January 31, 1998).)*

**Fiscal Note:** Fiscal Note 6-259 remains valid for the final adoption of the subject regulation.

**Annex A**

**TITLE 22. EDUCATION  
PART XVI. STANDARDS  
CHAPTER 342. SPECIAL EDUCATION  
SERVICES AND PROGRAMS**

**IEP**

**§ 342.34. ESY services.**

(a) The following words and terms, when used in this section, have the following meanings, unless the context clearly indicates otherwise:

*ESY services*—Extended school year services.

*IEP*—Individual Education Program.

*Recoupment*—Recovery of skills or behavioral patterns, or both, specified on the IEP to a level demonstrated prior to the interruption of educational programming.

*Regression*—Reversion to a lower level of functioning evidenced by a measurable decrease in the level of skills or behaviors which occurs as the result of an interruption in educational programming.

(b) Factors such as those listed in this section and § 14.34 (relating to ESY services) shall be considered by IEP teams whenever relevant, but no single factor is determinative of need for ESY services.

(c) When considering the need for ESY services, the IEP team shall pay particular attention to students with disabilities that are thought of as severe (that is, students with autism/pervasive developmental disorder, serious emotional disturbance, severe levels of mental retardation, degenerative impairments with mental involvement and severe multiple disabilities) and to IEP goals that are associated with self-sufficiency and independence from

caretakers. IEP teams may not limit their consideration of need for ESY services to students with particular types or degrees of disability, particular student goals, particular methods of programming provided during the regular school term, or the availability of retrospective data on regression and recoupment.

(d) ESY services shall be designed to attain or maintain skills and behaviors relevant to established IEP goals and objectives.

(e) Reliable sources of information regarding a student's educational needs, propensity to progress, recoupment potential, and year-to-year progress may include the following:

(1) Progress on goals in consecutive IEPs.

(2) Progress reports maintained by educators, therapists and others having direct contact with the student before and after interruptions in the education program.

(3) Reports by parents of negative changes in adaptive behaviors or in other skill areas.

(4) Medical or other agency reports indicating degenerative-type difficulties which become exacerbated during breaks in educational services.

(5) Observations and opinions by educators, parents and others.

(6) Results of tests including criterion-referenced tests, curriculum-based assessments, ecological life skills assessments and other equivalent measures.

(f) Documentation that ESY services have been considered shall be made on each eligible student's IEP. When determined to be necessary by the IEP team, ESY services shall be reflected on a student's IEP.

[Pa.B. Doc. No. 98-295. Filed for public inspection February 20, 1998, 9:00 a.m.]

## Title 58—RECREATION

### FISH AND BOAT COMMISSION

#### [58 PA. CODE CH. 93]

#### Corrective Amendment to 58 Pa. Code § 93.13

The Fish and Boat Commission has discovered a discrepancy between the agency text of 58 Pa. Code § 93.13(d) and (e) (relating to issuing agents), as deposited with the Legislative Reference Bureau, and the official text as published at 28 Pa.B. 40 (January 3, 1998) and which will appear in the *Pennsylvania Code Reporter* (Master Transmittal Sheet No. 280), in March 1998. The amendment to § 93.13(d) and (e) was represented inaccurately.

Therefore, under 45 Pa.C.S. § 901: The Fish and Boat Commission has deposited with the Legislative Reference Bureau a corrective amendment to 58 Pa. Code § 93.13. The corrective amendment to 58 Pa. Code § 93.13 is effective as of January 3, 1998, the date the defective official text was printed in the *Pennsylvania Bulletin*.

The correct version of 58 Pa. Code § 93.13 appears in Annex A.

**Annex A**  
**TITLE 58. RECREATION**  
**PART II. FISH AND BOAT COMMISSION**  
**Subpart C. BOATING**  
**CHAPTER 93. BOAT REGISTRATION AND**  
**NUMBERING**

**§ 93.13. Issuing agents.**

(a) The designation of issuing agents for temporary boat registrations shall be limited to the Commission and Commission offices, county treasurers and businesses dealing in boats, boating equipment or sporting goods.

(b) To maintain an agency, the agent shall issue at least 25 temporary boat registrations during the calendar year.

(c) If the Executive Director determines that a sufficient number of agents are not available in an area

reasonably to address the needs of the boating public, the Executive Director may appoint additional agents from other interested individuals or reduce the number of temporary boat registrations that existing agents are required to issue during the year.

(d) The Commission will collect and deposit in the Boat Fund the \$2 issuing agent fee for all temporary boat registrations issued by Commission offices.

(e) Issuing agents shall have access to nonpublic information concerning holders of boat registrations and titles, including their home addresses. Issuing agents who are provided nonpublic information about boat registration holders or boat owners in the course of their duties may not release or disclose the nonpublic information except for official purposes.

[Pa.B. Doc. No. 98-296. Filed for public inspection February 20, 1998, 9:00 a.m.]

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