

# RULES AND REGULATIONS

## Title 22—EDUCATION

### STATE BOARD OF EDUCATION

#### [22 PA. CODE CHS. 14, 16 AND 342]

#### Gifted Education; Special Education Services and Programs

The State Board of Education (Board) deletes the gifted education provisions of Chapters 14 and 342 (relating to special education services and programs) and adds a new Chapter 16 (relating to gifted education) to read as set forth in Annex A, under the authority of sections 1371, 2601-B and 2602-B of the Public School Code of 1949 (School Code) (24 P. S. §§ 13-1371, 26-2601-B and 26-2602-B).

Notice of proposed rulemaking was published at 28 Pa.B. 4939 (October 3, 1998) with an invitation to submit written comments within 30 days.

#### *Purpose*

The Board acknowledges that students who are gifted and therefore need specially designed instruction are considered to be children with exceptionalities under section 1371(1) of the School Code. The creation of Chapter 16 and the separation of gifted education from Chapters 14 and 342 are not intended to circumvent the statutory protections afforded to gifted students by the School Code, nor is it the Board's intent to create a need to relitigate case law already established in this Commonwealth pertaining to gifted students. It is the Board's intent to draw a clear distinction between gifted education as required in this Commonwealth and special education as required by Federal law. To accomplish this, the Board has removed or changed references to terms and concepts which are clearly linked to special education as prescribed under the Individuals with Disabilities Education Act (20 U.S.C.A. §§ 1400—1485). This chapter is intended to strike a proper balance between necessary regulatory protections and maximum local control.

#### *Response to Comments*

*Oversight of gifted education by the Department.* Public commentators, the Senate Education Committee and the Independent Regulatory Review Commission (IRRC) recommended that oversight and monitoring responsibilities of the Department be specified as found in Chapters 14 and 342. Language in Chapters 14 and 342 is required by Federal statute for students with disabilities. Repeating that language in this chapter would not serve the goal of separating Federally-driven provisions for students with disabilities from those determined by the Commonwealth for students who are gifted.

As a result, no additional language was added to the final-form regulation in § 16.6 (relating to general supervision) because the responsibility of the Secretary and the Department to oversee gifted education is found in the School Code. Section 1371(1) of the School Code includes students who are gifted in the term children with exceptionalities. In section 1372 of the School Code, the responsibility of the Secretary to ensure that special education for students with exceptionalities is delineated. Specifically the Secretary is required to "superintend the organization of special classes and other arrangements for special education and shall enforce the provisions of this act relating thereto (24 P. S. § 13-1372(3))." To meet this

responsibility, the Secretary will continue to include students who are gifted in Departmental tracking systems, monitor the actions of school districts for compliance with the requirements of this regulation, and hear and investigate complaints.

*Limitation on class size.* Public commentators, the Senate Education Committee and IRRC recommended that in addition to establishing a case load maximum, a maximum class size should be established in § 16.41(c) (relating to general). Under Chapter 342, class size is limited to 15. A statewide gifted education organization suggested that a class size maximum of 20 be included in the regulation. The final form regulation has been revised under § 16.41(c)(4) to include this maximum class size.

*Participation of regular education teachers in the gifted individualized education program (GIEPs).* Public commentators recommended that both gifted and regular education teachers participate in the GIEP meeting. Section 16.41 of the proposed rulemaking stated that "one or more of the student's current teachers" participate in the GIEP. The teacher or teachers involved in the GIEP could be a teacher of gifted students or a regular education teacher. There is currently no unique certification for teachers of gifted students. No change was made on final-form to provide local districts with the flexibility to include and involve teachers as necessary to develop an appropriate program.

*Prehearing conference.* Public commentators and IRRC recommended the addition of the prehearing conference provision available to parents of gifted students in current Chapters 14 and 342. In the past, persons have found the prehearing procedure obviates the need for the time and expense consumed by the formal hearing process. However, a relatively high percentage of prehearing conferences are unable to resolve differences with the parties electing to proceed to a due process proceeding anyway. The Board heard from many that it would be more efficient to move directly to a due process hearing to resolve differences.

*Title change.* Public commentators, the House and Senate Education Committees and IRRC commented that the title of the chapter be revised to better reflect statutes requiring special education for students who are gifted. The title is changed on final-form.

*Graduation plans.* Public commentators, the House Education Committee and IRRC recommended that proposed rulemaking be revised to add a requirement for a graduation plan. IRRC stated that a GIEP would not be complete without graduation planning for those in high school. In considering the addition of a graduation plan, the Board felt that planning courses and experiences needed to meet graduation requirements needs to be determined is implicit in the development of GIEP's for high school students. To make this clear, the Department will advise local school districts of this responsibility.

*Dual exceptionality.* Public commentators, the Senate Education Committee and IRRC recommended that the language in § 16.7(b) (relating to special education) be clarified to ensure that for students determined to be eligible for special education and needing gifted education, the processes followed under Chapters 14 and 342 fully address the students' needs related to disability as well as that for gifted status. The final-form regulations have been revised to clarify the intent to provide fully for students with dual exceptionality.

*Deletion of nonregulatory language.* IRRC identified several places where nonregulatory language was contained within the regulation and recommended its deletion or movement to the Preamble (such as, § 16.2(b) (relating to purpose) which explains the Board's intent in developing separate gifted education regulations). In addition, IRRC identified several places where regulatory language was embedded within definitions under §§ 16.1 and 16.64(b) (relating to definitions; and mediation), and recommended that they be moved to the body of the regulation (such as, regulatory language found in the definition of "mentally gifted" was moved to § 16.21(d) or deleted (such as, the mediator's responsibility under the definition of joint session). The changes have been made in the final-form rulemaking.

*Deadline for implementation of the individualized education program (IEP).* The House and Senate Education Committees and IRRC commented that there was no time frame in which a completed GIEP must be implemented. The final-form was revised to require the implementation of the completed GIEP within 10 school days or at the start of the following school year if the GIEP is completed less than 30 days before the last day of scheduled classes.

*Subpoena powers.* Public commentators and IRRC questioned the statutory authority under which the Board could empower parties in a due process hearing to compel the attendance of witnesses, found in the proposed rulemaking under § 16.63(k) (relating to impartial due process hearing). No statutory provision can be found for the compelling of witnesses in a due process hearing. The Board has deleted this provision in the final-form rulemaking.

*Evaluation by certified school psychologist.* Public commentators, the Senate Education Committee and IRRC recommended that the broad language of § 16.22(h)(3)(iv) (relating to gifted multidisciplinary evaluation) enabling certified professional employees to administer tests and similar evaluation materials used to determine giftedness be eliminated to clarify that only certified school psychologists are able to administer tests and evaluation materials. The final-form rulemaking has been revised accordingly.

*Definition of criteria for gifted education.* IRRC commented that the criteria for determination of gifted status currently found in Department guidelines are regulatory in nature and should be added to the regulation. Criteria has been added to § 16.21(e) (relating to general).

#### *Application of Education Empowerment Act*

On May 10, 2000, the Governor approved the Education Empowerment Act (EEA) (24 P. S. Art. XVII-B). Effective July 1, 2000, section 1714-B of the EEA (24 P. S. § 17-1714-B) established a mandate waiver program under which the Department of Education is empowered to waive certain statutory and regulatory mandates on application of any school district. However, the EEA expressly exempts from the Department's waiver authority certain specified statutes and regulations. Among those regulations exempted from the waiver program is Chapter 14. See 24 P. S. § 17-1714-B(h).

On May 4, 2000, the Board submitted its final-form regulations to IRRC and the Senate and House Education Committees for review under the Regulatory Review Act. However, at the Board's meeting held May 11, 2000, concerns were raised as to whether a new Chapter 16 would be exempt from the EEA's mandate waiver program scheduled to take effect July 1, 2000. To study this new legal issue, the Board on May 11 voted to recall its final-form regulations from regulatory review.

At the request of the Board, the Secretary asked the Department's Office of Chief Counsel to render an opinion on the issue. The Department's Office of Chief Counsel advised the Secretary that because the General Assembly clearly intended to exempt from the mandate waiver program all of Chapter 14, including the provisions governing gifted education, a new Chapter 16 governing gifted education would also be exempt from the mandate waiver program under section 1714-B(h) of the EEA. The change in numbering of the regulations by the Board would not alter the clear legislative intent to exempt from the program all Board regulations contained in Chapter 14 at the time the law went into effect.

Satisfied that a new Chapter 16 would be exempt from the mandate waiver program of the EEA exactly as Chapter 14 is exempt, the Board on July 12, 2000, voted to resubmit its final-form regulations.

#### *Changes Directed by Attorney General*

Based on its review under the Commonwealth Attorneys Act (71 P. S. §§ 732-101—732-506), on September 19, 2000, the Office of the Attorney General requested that clarification be made in the language in two sections. First, in § 16.21(a) the Office of the Attorney General found that the language used in this section might limit the efforts of school districts to identify students suspected of being gifted to those enrolled in the school district. A duty is created under 24 P. S. § 13-1371 for superintendents of school districts to identify and report every exceptional child within the district. To ensure that students suspected of being gifted in the district are identified regardless of whether they are enrolled in the public schools or not, changes were made to § 16.21(a) and (b).

Second, the Office of the Attorney General required that § 16.63(h) be changed prior to publication to make it clear that under State law, licensed attorneys only may represent parents in due process proceedings. Changes to § 16.63(h) were made to clarify the role of legal counsel and other parties with special knowledge or training with respect to students who are gifted.

These changes to the regulations were ratified by the Board on November 16, 2000.

#### *Affected Parties*

Chapter 16 will benefit Commonwealth students who are, or thought to be, gifted; their parents; and school districts and other education agencies which must comply with the regulations.

#### *Cost and Paperwork Estimates*

The final-form regulations impose no additional cost or revenue loss to the Commonwealth. They will not require any additional reports or paperwork requirements. None of the regulatory requirements in the chapter are new for school districts, and, in fact, a number of regulatory requirements have been removed or reduced. For example, routine reevaluations of the approximately 85,000 identified gifted students currently required every 2 years, cost an average of \$250 per student. Eliminating the requirements for reevaluation every 2 years, assuming that reevaluations are requested for 20% of gifted students, can reduce costs to school districts by approximately \$16.8 million over 3 years. Moreover, considerable staff time can be redirected to teaching and other services for students.

#### *Effective Date*

Chapter 16 will become effective upon final publication in the *Pennsylvania Bulletin*.

*Sunset Date*

The effectiveness of Chapter 16 will be reviewed by the Board every 4 years in accordance with the Board's policy and practice respecting all regulations promulgated by the 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 September 23, 1998, the Board submitted a copy of the proposed rulemaking published at 28 Pa.B. 4939 to IRRC and to the Chairpersons of the House and Senate Committees on Education for review and comment.

In compliance with section 5(c) 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.

Under section 5.1(d) of the Regulatory Review Act (71 P. S. § 745.5a(d)), the final-form regulations were deemed approved by the Senate and House Committees. IRRC met on August 10, 2000, and approved the final-form regulations in accordance with section 5.1(e) of the Regulatory Review Act.

*Contact Person*

The official responsible for information on these final-form regulations is Peter H. Garland, Executive Director of the State Board of Education, 333 Market Street, Harrisburg, PA 17126-0333, (717) 787-3787 or TDD (717) 787-7367.

*Findings*

The Board finds that:

(1) Public notice of the intention to adopt these regulations 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 regulations are necessary and appropriate for the administration of the School Code.

*Order*

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

(a) The regulations of the Board, 22 Pa. Code Chapters 14, 16 and 342, are amended by amending §§ 14.1, 14.2, 14.24, 14.25, 14.38, 14.67, 342.1, 342.25, 342.38 and 342.42 and by adding §§ 16.1—16.7, 16.21—16.23, 16.31—16.33, 16.41, 16.42 and 16.61—16.65 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 the 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:* For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 30 Pa.B. 4480 (August 26, 2000).)

**Fiscal Note:** Fiscal Note 6-266 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:

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*Exceptional student*—For purposes of this chapter, an eligible student.

\* \* \* \* \*

**§ 14.2. Purpose.**

(a) This chapter specifies how the Commonwealth will meet its obligations to suspected and identified exceptional students and to young children who require early intervention services to reach their potential. It is the intent of the Board that exceptional students and eligible young children be provided with quality special education services and programs. Achieving this purpose will require mutual efforts by the Commonwealth, school districts and other agencies.

(b) The Commonwealth, through the Department, will provide general supervision of services and programs provided under this chapter and Chapter 342 (relating to special education services and programs) and will meet other obligations of State and Federal law and this chapter.

(c) The Department will disseminate information about and promote the use of promising practices and innovative programs to meet the needs of exceptional students and eligible young children.

(d) To provide services and programs efficiently, the Commonwealth will delegate operational responsibility to its school districts. Each school district shall, by direct service or through arrangement with other agencies, provide the following:

(1) Services and programs planned, developed and operated for the early identification and evaluation of each exceptional student, including early intervention for eligible young children.

(2) A continuum of services and programs to provide instructional support to a student recommended for screening under §§ 14.21—14.25 (relating to screening and evaluation process) and found by the screening to be in need of assistance to achieve in school according to the documented needs and abilities of the student.

(3) A continuum of services to provide instructional support to assist eligible students to benefit from regular education programs, to the maximum extent appropriate.

(4) A free appropriate public program of education for each exceptional student which is based on the unique needs of the student, not solely on the classification of the student.

(5) Opportunities for each eligible student, including students in public or private day or residential facilities,

to interact with noneligible students and adults in community and school based activities, when appropriate.

(6) An education for each eligible student which approximates as nearly as possible the approved curriculum of the school district.

(7) An education for each eligible student which is designed to enable the student to participate fully and independently in the community, including preparation for employment or higher education.

(8) An appropriate program of early intervention services and programs for eligible young children as specified in this chapter and Chapter 342.

**SCREENING AND EVALUATION PROCESS**

**§ 14.24. Instructional support.**

(a) This section does not apply to students beyond the sixth grade who are thought to be eligible, to students attending nonpublic schools who are thought to be exceptional or to young children not yet of kindergarten age or not enrolled in a public school program.

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**§ 14.25. Multidisciplinary evaluation.**

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(c) A multidisciplinary evaluation shall be initiated if one of the following applies:

\* \* \* \* \*

(5) The student is beyond the sixth grade and thought to be eligible, the student attends a nonpublic school and is thought to be exceptional or the young child thought to be eligible is not yet of kindergarten age or not enrolled in a public school program.

**IEP**

**§ 14.38. Planned courses.**

Planned courses for exceptional students shall be conducted under Chapter 4 (relating to academic standards and assessment), this chapter and Chapter 342 (relating to special education services and programs). Planned courses shall include provisions for:

(1) An orderly sequence of instruction to permit the development of learning skills and assessment of student progress.

(2) Adaptations or modifications in existing curricula or instructional approaches which will allow an exceptional student to progress through the regular curriculum of the district to earn credits toward graduation.

(3) Adaptions or modifications in existing curricula or instructional approaches which allow the student to develop skills necessary to make a transition from the school environment to community life and employment.

(4) Development of curricula which lead to instruction and supervision of instruction designed to teach skills which are functional and usable in participating in family, community, leisure and work activities in school and in the community.

**PROCEDURAL SAFEGUARDS**

**§ 14.67. Independent educational evaluation.**

(a) The parents of an eligible student or eligible young child or student or young child thought to be eligible have the right to obtain an independent educational evaluation of the student or young child, subject to subsections (b)—(f).

(b) Each school district shall provide to parents, on request, information about where an independent educational evaluation may be obtained.

(c) If parents obtain an independent educational evaluation at private expense, the results of the evaluation shall be considered by the district in decisions made with respect to the provisions of a free appropriate public education to the student and may be presented as evidence at a due process hearing regarding that student.

(d) If a hearing officer requests an independent educational evaluation as part of a due process hearing, the cost of the evaluation shall be at public expense.

(e) Whenever an independent evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the evaluators, shall be the same as the criteria which the district uses when it initiates an evaluation.

(f) Parents have the right to an independent evaluation at public expense if the parents disagree with an evaluation obtained by the school entity. The school entity may initiate a hearing under § 14.64 (relating to impartial due process hearing) to show that its evaluation is appropriate. If the final decision is that the school entity's evaluation was appropriate, the parents may present a privately-commissioned independent educational evaluation not at public expense.

**CHAPTER 16. SPECIAL EDUCATION FOR GIFTED STUDENTS**

**GENERAL PROVISIONS**

- Sec. 16.1. Definitions.
- 16.2. Purpose.
- 16.3. Experimental programs.
- 16.4. Strategic plans.
- 16.5. Personnel.
- 16.6. General supervision.
- 16.7. Special education.

**SCREENING AND EVALUATION**

- 16.21. General.
- 16.22. Gifted multidisciplinary evaluation.
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**GIEP**

- 16.31. General.
- 16.32. GIEP.
- 16.33. Support services.

**EDUCATIONAL PLACEMENT**

- 16.41. General.
- 16.42. Parental placement in private schools.

**PROCEDURAL SAFEGUARDS**

- 16.61. Notice.
- 16.62. Consent.
- 16.63. Impartial due process hearing.
- 16.64. Mediation.
- 16.65. Confidentiality.

**GENERAL PROVISIONS**

**§ 16.1. Definitions.**

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

*Agency*—An intermediate unit, school district, area vocational technical school, State-operated program or facility, or other public or private organization providing educational services to gifted students or students thought to be gifted.

*Chapter 4*—The State Board of Education regulations as adopted under statutory authority in the School Code.

*Educational placement*—The overall educational environment in which gifted education is provided to a gifted student.

*GIEP*—Gifted Individualized Education Program.

*GMDT*—Gifted Multidisciplinary Team.

*Gifted education*—Specially designed instruction to meet the needs of a gifted student that is:

- (i) Conducted in an instructional setting.
- (ii) Provided in an instructional or skill area.
- (iii) Provided at no cost to the parents.
- (iv) Provided under the authority of a school district, directly, by referral or by contract.
- (v) Provided by an agency.
- (vi) Individualized to meet the educational needs of the student.
- (vii) Reasonably calculated to yield meaningful educational benefit and student progress.
- (viii) Provided in conformity with a GIEP.

*Gifted Multidisciplinary Evaluation*—A systematic process of testing, assessment, and other evaluative processes used by a team to develop a recommendation about whether or not a student is gifted or needs gifted education.

*Gifted student*—A student who is exceptional under section 1371 of the School Code (24 P. S. § 13-1371) because the student meets the definition of “mentally gifted” in this section, and needs specially designed instruction beyond that required in Chapter 4 (relating to academic standards and assessment). This term applies only to students who are of “school age” as defined under § 11.12 (relating to school age).

*Instructional setting*—A classroom or other setting in which gifted students are receiving gifted education.

*Mentally gifted*—Outstanding intellectual and creative ability the development of which requires specially designed programs or support services, or both, not ordinarily provided in the regular education program.

*Parents*—A natural or adoptive parent or parents, a guardian or guardians, one or more persons acting as the parent or parents of a student.

*Party*—Parent or school district.

*Regular classroom*—A specific instructional grouping within the regular education environment.

*Regular education environment*—The regular classroom and other instructional settings in which students without a need for gifted education receive instructional programs and the full range of supportive services normally provided to these children.

*School Code*—The Public School Code of 1949 (24 P. S. §§ 1-101—27-2702).

*School day*—A day in which school is in session.

*Screening and evaluation process*—The systematic determination of whether or not a student is gifted or needs gifted education.

*Specially designed instruction*—Adaptations or modifications to the general curriculum, instruction, instructional environments, methods, materials, or a specialized curriculum for students who are gifted.

*Support services*—Services as required under § 16.33 (relating to support services) to assist a gifted student to benefit from gifted education. Examples of the term include:

- (i) Psychological services.
- (ii) Parent counseling and education.
- (iii) Counseling services.
- (iv) Transportation to and from gifted programs to classrooms in buildings operated by the school district.

### § 16.2. Purpose.

(a) This chapter specifies how the Commonwealth will meet its obligations to suspected and identified gifted students who require gifted education to reach their potential. It is the intent of the Board that gifted students be provided with quality gifted education services and programs.

(b) The Commonwealth, through the Department, will provide general supervision of services and programs provided under this chapter.

(c) The Department will disseminate information about and promote the use of promising practices and innovative programs to meet the needs of gifted students.

(d) To provide services and programs efficiently, the Commonwealth will delegate operational responsibility to its school districts. Each school district shall, by direct service or through arrangement with other agencies, provide the following:

- (1) Services and programs planned, developed and operated for the identification and evaluation of each gifted student.
- (2) Gifted education for each gifted student which is based on the unique needs of the student, not solely on the student's classification.
- (3) Gifted education for gifted students which enables them to participate in acceleration or enrichment programs, or both, as appropriate, and to receive services according to their intellectual and academic abilities and needs.

### § 16.3. Experimental programs.

(a) The Secretary may approve exceptions to this chapter for the operation of experimental programs that are anticipated to improve student achievement and that meet certain unique programmatic needs of gifted students. School districts shall submit an annual application for approval of those programs. The application shall:

- (1) Include provision for the involvement of parents, administrators and professionals in the design and ongoing review of performance.
- (2) Include provisions for annually evaluating the program as to whether it benefits student achievement.
- (3) Demonstrate that it has met the following criteria:
  - (i) A definition of the need that exists which necessitates an experimental program.
  - (ii) Data to support the existence of the need.
  - (iii) A description of the program, including the nature of the program, specific goals and objectives to be reached, role and function of personnel involved, and timelines for development, implementation and evaluation.

(b) When an experimental program has been approved for 3-consecutive years and has resulted in improved

student achievement under subsection (a), annual application is not needed for the program to continue to operate.

(c) The Secretary may terminate an experimental program for failing to meet the objectives established in the application or for noncompliance with State law or regulations not specifically waived in the Secretary's approval of the experimental program under subsection (a) upon 60 days notice.

(d) The Secretary will report annually to the Board regarding applications for experimental programs under this section and the disposition of the applications.

**§ 16.4. Strategic plans.**

(a) Each school district's strategic plan developed under Chapter 4 (relating to academic standards and assessments) shall include procedures for the education of all gifted students enrolled in the district. The strategic plan shall be developed to ensure the support of the implementation of plans developed under subsection (b).

(b) Each school district shall provide, as the Department may require, reports of students, personnel and program elements, including the costs of the elements, which are relevant to the delivery of gifted education.

**§ 16.5. Personnel.**

(a) Professional personnel shall consist of certified individuals responsible for identifying gifted students and providing gifted education in accordance with Article XI of the School Code (24 P. S. §§ 11-1101—11-1192) and this title.

(b) Paraprofessional personnel consist of individuals who work under the direction of professional personnel as defined in this chapter. The duties and training of the paraprofessional staff shall be determined by the employing agency.

(c) A school district and intermediate unit shall provide, under section 1205.1 of the School Code (24 P. S. § 12-1205.1), in-service training for gifted and regular teachers, principals, administrators and support staff persons responsible for gifted education.

**§ 16.6. General supervision.**

(a) Educational programs for gifted students administered within this Commonwealth are considered to be under the general supervision of the Department and shall meet the provisions of this chapter.

(b) The Department will ensure that appropriate and responsible fiscal oversight and control is maintained over the development and provision of gifted education in accordance with this chapter providing for fiscal accountability and prudent management.

(c) The Board will review this chapter at least every 4 years to ensure consistent interpretation and application of this chapter.

**§ 16.7. Special education.**

(a) Nothing in this chapter is intended to reduce the protections afforded to students who are eligible for special education as provided for under Chapters 14 and 342 (relating to special education services and programs) and the Individuals with Disabilities Education Act (20 U.S.C.A. §§ 1400—1485).

(b) If a student is determined to be both gifted and eligible for special education, the procedures in Chapter 14 and 342 shall take precedence. For these students identified with dual exceptionalities, the needs estab-

lished under gifted status in this chapter shall be fully addressed in the procedures required in Chapters 14 and 342.

(c) For students who are gifted and eligible for special education, it is not necessary for school districts to conduct separate screening and evaluations, develop separate IEPs, or use separate procedural safeguards processes to provide for a student's needs as both a gifted and an eligible student.

**SCREENING AND EVALUATION PROCESS**

**§ 16.21. General.**

(a) Each school district shall adopt and use a system to locate and identify all students within that district who are thought to be gifted and in need of specially designed instruction.

(b) Each school district shall conduct awareness activities to inform the public of gifted education services and programs and the manner by which to request these services and programs. These awareness activities shall be designed to reach parents of students enrolled in the public schools and the parents of school age children not enrolled in the public schools.

(c) Each school district shall determine the student's needs through a screening and evaluation process which meets the requirements of this chapter.

(d) Each school district shall establish procedures to determine whether a student is mentally gifted. This term includes a person who has an IQ of 130 or higher and when multiple criteria as set forth in Department Guidelines indicate gifted ability. Determination of gifted ability will not be based on IQ score alone. A person with an IQ score lower than 130 may be admitted to gifted programs when other educational criteria in the profile of the person strongly indicate gifted ability. Determination of mentally gifted shall include an assessment by a certified school psychologist.

(e) Multiple criteria indicating gifted ability include:

(1) A year or more above grade achievement level for the normal age group in one or more subjects as measured by Nationally normed and validated achievement tests able to accurately reflect gifted performance. Subject results shall yield academic instruction levels in all academic subject areas.

(2) An observed or measured rate of acquisition/retention of new academic content or skills that reflect gifted ability.

(3) Demonstrated achievement, performance or expertise in one or more academic areas as evidenced by excellence of products, portfolio or research, as well as criterion-referenced team judgement.

(4) Early and measured use of high level thinking skills, academic creativity, leadership skills, intense academic interest areas, communications skills, foreign language aptitude or technology expertise.

(5) Documented, observed, validated or assessed evidence that intervening factors such as English as a second language, learning disability, physical impairment, emotional disability, gender or race bias, or socio/cultural deprivation are masking gifted abilities.

**§ 16.22. Gifted multidisciplinary evaluation.**

(a) Prior to conducting an initial gifted multidisciplinary evaluation, the school district shall comply with the notice and consent requirements under §§ 16.61 and § 16.62 (relating to notice; and consent).

(b) Referral for gifted multidisciplinary evaluation shall be made when the student is suspected by teachers or parents of being gifted and not receiving an appropriate education under Chapter 4 (relating to academic standards and assessment) and one or more of the following apply:

(1) A request for evaluation has been made by the student's parents under subsection (c).

(2) The student is thought to be gifted because the school district's screening of the student indicates high potential consistent with the definition of mentally gifted or a performance level which exceeds that of other students in the regular classroom.

(3) A hearing officer or judicial decision orders a gifted multidisciplinary evaluation.

(c) Parents who suspect that their child is gifted may request a gifted multidisciplinary evaluation of their child at any time, with a limit of one request per school term. The request shall be in writing. If a parental request is made orally to school personnel, the personnel shall inform the parents that the request shall be made in writing and shall provide the parents with a form for that purpose.

(d) Multidisciplinary evaluations shall be conducted by GMDTs. The GMDT shall be formed on the basis of the student's needs and shall be comprised of the student's parents, a certified school psychologist, persons familiar with the student's educational experience and performance, one or more of the student's current teachers, persons trained in the appropriate evaluation techniques and, when possible, persons familiar with the student's cultural background. A single member of the GMDT may meet two or more of the qualifications specified in this subsection.

(e) Gifted multidisciplinary evaluations shall be sufficient in scope and depth to investigate information relevant to the student's suspected giftedness, including academic functioning, learning strengths and educational needs.

(f) The multidisciplinary evaluation process shall include information from the parents or others who interact with the student on a regular basis, and may include information from the student if appropriate.

(g) The following protection-in-evaluation measures shall be considered when performing an evaluation of students suspected of being gifted:

(1) No one test or type of test may be used as the sole criterion for determining that a student is or is not gifted.

(2) Intelligence tests yielding an IQ score may not be used as the only measure of aptitude for students of limited English proficiency, or for students of racial-, linguistic- or ethnic-minority background.

(3) Tests and similar evaluation materials used in the determination of giftedness shall be:

(i) Selected and administered in a manner that is free from racial and cultural bias and bias based on disability.

(ii) Selected and administered so that the test results accurately reflect the student's aptitude, achievement level or whatever other factor the test purports to measure.

(iii) Professionally validated for the specific purpose for which they are used.

(iv) Administered by certified school psychologists under instructions provided by the producer of the tests and sound professional practice.

(v) Selected and administered to assess specific areas of educational need and ability and not merely a single general IQ.

(h) The GMDT shall prepare a written report which brings together the information and findings from the evaluation or reevaluation concerning the student's educational needs and strengths. The report shall make recommendations as to whether the student is gifted and in need of specially designed instruction, shall indicate the bases for those recommendations, and shall indicate the names and positions of the members of the GMDT.

(i) To recommend that a student who has been evaluated is a gifted student, the GMDT shall conclude that the student needs specially designed education and meets the criteria for eligibility as defined in §§ 16.1 and 16.21 (relating to definitions; and general).

(j) The following timeline applies to the completion of gifted multidisciplinary evaluations:

(1) Each district shall establish and implement procedures to complete a gifted multidisciplinary evaluation for a student referred for evaluation within 45 school days after receiving parental permission for an initial evaluation, after notifying the parents of a reevaluation or after receiving an order of a court or hearing officer to conduct a multidisciplinary evaluation.

(2) An evaluation report shall be completed within 10 school days after completion of the gifted multidisciplinary evaluation.

(3) Within 5 school days after its completion, a copy of the evaluation report shall be delivered to the parents of the student.

#### **§ 16.23. Gifted multidisciplinary reevaluation.**

(a) Gifted students shall be reevaluated before a change in educational placement is recommended for the student and when the conditions under § 16.22(b)(1) or (3) (relating to gifted multidisciplinary evaluations) are met. In addition, gifted students may be reevaluated at any time under recommendation by the GIEP team.

(b) Reevaluations shall be developed in accordance with all the requirements concerning evaluation in this chapter.

(c) Reevaluations shall include a review of the student's GIEP, a determination of which instructional activities have been successful, and recommendations for the revision of the GIEP.

#### **GIEP**

#### **§ 16.31. General.**

(a) A GIEP is a written plan describing the education to be provided to a gifted student. The initial GIEP shall be based on and be responsive to the results of the evaluation and shall be developed and implemented in accordance with this chapter.

(b) If a gifted student moves from one school district in this Commonwealth to another, the new district shall implement the existing GIEP to the extent possible or shall provide the services and programs specified in an interim GIEP agreed to by the parents until a new GIEP is developed and implemented in accordance with this section and §§ 16.32 and 16.33 (relating to GIEP; and

support services) or until the completion of due process proceedings under §§ 16.61—16.65 (relating to procedural safeguards).

(c) Every student receiving gifted education provided for in an IEP developed prior to December 9, 2000, shall continue to receive the gifted education under that IEP until the student's GIEP is developed. For a student also eligible under Chapters 14 and 342 (relating to special education services and programs), the student will continue to receive gifted education under that IEP until revised.

(d) Every student receiving gifted education prior to December 9, 2000, shall continue to receive gifted education until the student one of the following conditions exists:

- (1) The student graduates from high school.
- (2) The student is no longer of school age.
- (3) A GIEP team determines that the student no longer needs gifted education.

**§ 16.32. GIEP.**

(a) Each school district shall establish and implement procedures to appoint a GIEP team to review the recommendations of the GMDT and, if the GIEP team determines a student is gifted, to develop a GIEP for the student. The GIEP shall be developed at a GIEP meeting and based on data and information presented at that meeting.

(b) The GIEP team, in accordance with the requirements of this chapter shall, based upon the evaluation report, develop an initial GIEP for a student it determines to be a gifted student, and arrive at a determination of educational placement. Revisions to GIEPs, changes in educational placement, or continuation of educational placement for a student determined to be a gifted student shall be made by the GIEP team based upon a review of the student's GIEP and instructional activities, as well as on information in the most recent evaluation.

(c) Each GIEP team shall include persons who meet the following qualifications:

- (1) One or both of the student's parents.
- (2) The student if the parents choose to have the student participate.
- (3) A representative of the district, who will serve as the chairperson of the GIEP team, who is knowledgeable about the availability of resources of the district, and who is authorized by the district to commit those resources.
- (4) One or more of the student's current teachers.
- (5) Other individuals at the discretion of either the parents or the district.

(d) The school district shall establish and implement procedures designed to ensure that the parents of the gifted student are offered the opportunity to be present at each GIEP team meeting. These procedures shall include any one or a combination of the following: documented phone calls, letters and certified letters with return receipts. Agencies shall maintain documentation of their efforts to encourage parents to attend. By including them in the invitation, the following shall be considered reasonable efforts to ensure parent participation in the GIEP meeting:

- (1) The purpose, time and location of the meeting.
- (2) The names of the persons expected to attend.

(3) The procedural rights available to protect the student and parent, in language which is clear and fully explains all rights.

(4) That a determination will be made at the meeting as to whether or not the student is gifted.

(5) That if the student is determined to be gifted, a GIEP will be developed.

(6) Notifying the parent and other persons who will be attending at least 10 calendar days in advance to ensure that the parent will have an opportunity to attend.

(e) The GIEP of each gifted student shall be based on the GMDT's recommendations and shall contain the following:

- (1) A statement of the student's present levels of educational performance.
- (2) A statement of annual goals and short-term learning outcomes which are responsive to the learning needs identified in the evaluation report.
- (3) A statement of the specially designed instruction and support services to be provided to the student.
- (4) Projected dates for initiation and anticipated duration of gifted education.
- (5) Appropriate objective criteria, assessment procedures and timelines for determining, on at least an annual basis, whether the goals and learning outcomes are being achieved.
- (6) The names and positions of GIEP team participants and the date of the meeting.
- (f) A copy of the GIEP shall be provided to the parents, along with a notice of parental rights under §§ 16.61—16.65 (relating to procedural safeguards).

(g) The following timeline governs the preparation and implementation of GIEPs:

- (1) A GIEP shall be developed within 30 calendar days after issuance of a GMDT's written report.
- (2) The GIEP of each student shall be implemented no more than 10 school days after it is signed or at the start of the following school year if completed less than 30 days before the last day of scheduled classes in accordance with § 16.62(5) (relating to consent).
- (3) GIEP team meetings shall be convened at least annually, or more frequently if conditions warrant, as well as following an evaluation or reevaluation. A GIEP team meeting shall also be convened at the request of a GIEP team member, the parent, the student or the school district.

**§ 16.33. Support services.**

(a) The GIEP team, during the development, review or revision of a GIEP, shall determine whether the gifted student needs one or more support services.

(b) The GIEP team shall conclude that transportation to and from school psychological services, parent counseling and education, or another service is a support service if the GIEP team determines that one of the following criteria has been met:

- (1) The service is an integral part of an educational objective of the student's GIEP, without which the GIEP cannot be implemented.
- (2) The service is needed to ensure the student benefits from or gains access to a gifted education program.



**EDUCATIONAL PLACEMENT****§ 16.41. General.**

(a) The GIEP team shall base educational placement decisions on the gifted student's needs.

(b) Districts may use administrative and instructional strategies and techniques in the provision of gifted education for gifted students which do not require, but which may include, categorical grouping of students. The placement shall:

(1) Enable the provision of appropriate specially designed instruction based on the student's need and ability.

(2) Ensure that the student is able to benefit meaningfully from the rate, level and manner of instruction.

(3) Provide opportunities to participate in acceleration or enrichment, or both, as appropriate for the student's needs. These opportunities shall go beyond the program that the student would receive as part of a general education.

(c) Districts shall adopt board policies relating to caseloads and class sizes for gifted students which:

(1) Ensure the ability of assigned staff to provide the services required in each gifted student's GIEP.

(2) Address all the educational placements for gifted students used by the district.

(3) Limit the total number of gifted students which can be on an individual gifted teacher's caseload to a maximum of 75 students.

(4) Limit the total number of gifted students which can be on an individual gifted teacher's class roster to a maximum of 20 students.

(d) Caseload and class size maximums may be waived by the Secretary upon written request by the district for extenuating circumstances.

(e) Gifted educational placement may not be based on one or more of the following:

(1) Lack of availability of placement alternatives.

(2) Lack of availability or efforts to make educational or support services available.

(3) Lack of staff qualified to provide the services set forth in the GIEP.

(4) Lack of availability of space or of a specific facility.

(5) Administrative convenience.

**§ 16.42. Parental placement in private schools.**

(a) This chapter does not limit the right of parents to have their gifted children educated at private schools completely at private expense.

(b) The home education program of a gifted child shall be governed by sections 1327 and 1327.1 of the School Code (24 P. S. §§ 13-1327 and 13-1327.1).

**PROCEDURAL SAFEGUARDS****§ 16.61. Notice.**

(a) A school district shall document the provision of written notice to the parents of a gifted student at least 10 school days prior to one or more of the following events:

(1) The school district proposes to conduct a gifted multidisciplinary evaluation or reevaluation of the student.

(2) The school district proposes or refuses to initiate or change the identification, evaluation or educational placement of the student, or proposes or refuses to make any significant changes in the GIEP.

(b) A change in the identification, evaluation, educational placement or GIEP of a gifted student may not be made during the pendency of an administrative or judicial proceeding unless agreed to by the parties to the proceeding.

(c) The content of notices to the parents shall be written in language understandable to the general public. If necessary, the content of notices shall be communicated orally in the native language or directly so that the parents understand the content of the notices.

(d) The notice shall include:

(1) A description of the action proposed or refused by the district, an explanation of why the district proposes or refuses to take the action and a description of options the district considered and the reasons why those options were rejected.

(2) A description of each evaluation procedure, type of test, record or report used as a basis for the action.

(3) A description of other factors relevant to the district's action.

(4) A full explanation of the procedural safeguards, including the right to an impartial hearing available to the student or the parents under this chapter.

(e) The notice shall inform the parents of the following:

(1) The addresses and telephone numbers of various organizations which are available to assist in connection with the hearing.

(2) The timelines involved in conducting an evaluation, developing a GIEP, and initiating a hearing.

(3) An outside evaluation submitted by the parents shall be considered.

(4) The information in § 16.63 (relating to impartial due process hearing).

**§ 16.62. Consent.**

The district shall document that written parental consent is obtained prior to:

(1) Conducting an initial multidisciplinary evaluation.

(2) Initially placing a gifted student in a gifted program.

(3) Disclosing to unauthorized persons information identifiable to a gifted student.

(4) When completed, the GIEP provided for in § 16.32 (relating to GIEP) shall be presented to the parents, along with a notice of recommended assignment signed by the school district superintendent provided for in § 16.61 (relating to notice) and a notice of parental right to an impartial due process hearing under § 16.63 (relating to impartial due process hearing). The notice shall be presented to the parents in person at the conclusion of the GIEP conference or by certified mail within 5-calendar days after the completion of the GIEP conference.

(5) The parents shall have 10-calendar days to respond to a notice of recommended assignment sent by mail or 5 calendar days to respond to a notice presented in person at the conclusion of a GIEP conference. If the parents receive the notice in person and approve the recommended assignment within 5-calendar days, the school district may not implement the GIEP for at least

5-calendar days, to give the parents an opportunity to notify the district within the 5-day period of a decision to revoke the previous approval of the recommended assignment.

**§ 16.63. Impartial due process hearing.**

(a) Parents may request in writing an impartial due process hearing concerning the identification, evaluation or educational placement of, or the provision of a gifted education to, a student who is gifted or who is thought to be gifted if the parents disagree with the school district's identification, evaluation or placement of, or the provision of a gifted education to the student.

(b) A school district may request in writing a hearing to proceed with an initial evaluation or an initial educational placement when the district has not been able to obtain consent from the parents or in regard to a matter under subsection (a).

(c) The hearing shall be conducted by and held in the local school district at a place reasonably convenient to the parents. At the request of the parents, the hearing may be held in the evening. These options shall be set forth in the form provided for requesting a hearing.

(d) The hearing shall be an oral, personal hearing and shall be open to the public unless the parents request a closed hearing 5 days in advance of the hearing. If the hearing is open, the decision issued in the case, and only the decision, shall be available to the public. If the hearing is closed, the decision shall be treated as a record of the student and may not be available to the public.

(e) The decision of the hearing officer shall include findings of fact, a discussion and conclusions of law. Although technical rules of evidence will not be followed, the decision shall be based solely upon the substantial evidence presented during the course of the hearing.

(f) The hearing officer shall have the authority to order that additional evidence be presented.

(g) A written transcript of the hearing shall, upon request, be made and provided to parents at no cost.

(h) Parents may be represented by legal counsel and accompanied and advised by individuals with special knowledge or training with respect to students who are gifted.

(i) A parent or a parent's representative shall be given access to educational records, including any tests or reports upon which the proposed action is based.

(j) A party may prohibit the introduction of evidence at the hearing that has not been disclosed to that party at least 5-calendar days before the hearing.

(k) A party has the right to present evidence and testimony, including expert medical, psychological or educational testimony.

(l) The decision of the impartial hearing officer may be appealed to a panel of three appellate hearing officers. The panel's decision may be appealed further to a court of competent jurisdiction. In notifying the parties of its decision, the panel shall indicate the courts to which an appeal may be taken.

(m) The following applies to coordination services for hearings and to hearing officers:

(1) The Secretary may contract for coordination services in support of hearings conducted by local school districts. The coordination services shall be provided on behalf of school districts and may include arrangements for stenographic services, arrangements for hearing officer services, scheduling of hearings and other functions in support of procedural consistency and the rights of the parties to hearings.

(2) If a school district chooses not to utilize the coordination services under paragraph (1), it may conduct hearings independent of the services if its procedures similarly provide for procedural consistency and ensure the rights of the parties. In the absence of its own procedures, a school district which receives a request for an impartial due process hearing shall forward the request to the agency providing coordination services under paragraph (1) without delay.

(3) A hearing officer may not be an employe or agent of a school district in which the parents or student resides, or of an agency which is responsible for the education or care of the student. A hearing officer shall promptly inform the parties of a personal or professional relationship the officer has or has had with any of the parties.

(n) The following timeline applies to due process hearings:

(1) A hearing shall be held within 30-calendar days after a parent's or school district's initial request for a hearing.

(2) The hearing officer's decision shall be issued within 45-calendar days after the parent's or school district's request for a hearing.

(o) Each school district shall keep a list of the persons who serve as hearing officers. The list shall include the qualifications of each hearing officer. School districts shall provide parents with information as to the availability of the list and shall make copies of it available upon request.

**§ 16.64. Mediation.**

(a) Mediation is a process in which parents and agencies involved in a special education for gifted students dispute may obtain the assistance of an impartial mediator in attempting to reach a mutually agreeable settlement.

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

*Joint session*—A stage of the mediation conference when the mediator meets with the parties and participants together and each party is given a reasonable uninterrupted opportunity to present the issues and concerns.

*Mediation agreement*—A written record of agreement reached by the parties.

*Mediation conference*—A structured, but informal meeting of the parties and participants with a mediator. The purpose of the conference is to develop a mutually acceptable, written agreement that is binding on the parties.

*Mediator*—An impartial, neutral person who helps parties involved in a conflict to develop their own solutions to the dispute. The term does not include a person who makes decisions about the conflict for the parties.

*Participants*—Other persons appearing at the mediation conference on behalf of either party, such as other family members and specialists.

*Parties*—The parents and designated agency personnel involved in the conflict.

*Private session (caucus)*—A private meeting between the mediator and only one of the parties to further clarify that party's position and to explore possible solutions to the conflict. The mediator may not share information from the private session without consent of the party.

(c) If a dispute is resolved through mediation, a written agreement shall be prepared and placed in the child's education record. The agreement shall also be incorporated into the GIEP.

(d) During a mediation conference, the mediator shall meet with the parties together in a joint session and individually in private sessions.

(e) Discussions occurring during the mediation session shall be confidential, and no part of the mediation conference shall be recorded.

(f) The mediator may not be called as a witness in future proceedings.

(g) The designated agency involved in the dispute shall send a representative who has the authority to commit resources to the resolution agreed upon by the parties.

(h) The written mediation agreement is not a confidential document and shall be incorporated into the student's GIEP and is binding on the parties.

(i) The mediation agreement shall be enforceable by the Department.

(j) A GIEP team shall be convened, within 10 school days following the mediation agreement, to incorporate the mediation agreement into the GIEP.

(k) When the mediation conference results in a resolution of the dispute, each party shall receive an executed copy of the agreement at the conclusion of the mediation conference.

(l) Mediation may not be used to deny or delay a party's right to a due process hearing.

#### **§ 16.65. Confidentiality.**

Each agency shall protect the confidentiality of personally identifiable information regarding a gifted student or a student thought to be gifted in accordance with section 13(a) of the Family Educational Rights and Privacy Act of 1974 (20 U.S.C.A. § 1232g), 34 CFR Part 99 (relating to family educational rights and privacy), Chapter 12 (relating to students) and other applicable law.

### **PART XVI. STANDARDS**

#### **CHAPTER 342. SPECIAL EDUCATION SERVICES AND PROGRAMS**

##### **§ 342.1. Definitions.**

(a) *Applicability of § 14.1.* Unless otherwise noted, definitions stated in § 14.1 (relating to definitions) apply to terms used in this chapter.

(b) *Additional definitions.* The following words and terms, when used in this chapter, have the following meanings unless the context clearly indicates otherwise:

*Autism/pervasive developmental disorder*—A developmental disability characterized by qualitative distortions in the development of cognitive, language, social or motor skills. Determination of autism/pervasive developmental

disorder shall include full assessment and comprehensive report of diagnosis by a physician qualified to render a diagnosis and by a public school psychologist specifying the nature and degree of the disorder. Eligibility for special education services and programs for a student may not be limited solely because of the failure of a neurological examination by a physician to identify the child as having autism. Symptoms are typically manifested before 3 years of age, are not usual for any stage of child development and shall include two or more of the following:

(i) Impairment in reciprocal social interaction.

(ii) Impairment in communication and imaginative activity including verbal and nonverbal skills.

(iii) Markedly restricted repertoire of activities and interests, often involving resistance to change and motor or verbal stereotypes.

(iv) Abnormal or inconsistent responses to sensory stimuli in one or more of the following areas: sight, hearing, touch, pain, balance, smell, taste, posture and motor behavior.

*Blindness or visual impairment*—A visual impairment which adversely affects the educational performance of the person. Determination of visual impairment shall include a full assessment and comprehensive report by an eye specialist specifying the nature and degree of the impairment.

*Deafness or hearing impairment*—A hearing loss which interferes with the development of the communication process and results in failure to achieve educational potential. Determination of the hearing impairment shall include a report by an audiologist or otologist, or both, specifying the nature and degree of the impairment.

*Department*—The Department of Education of the Commonwealth.

*Developmental delay*—

(i) This term is limited to early intervention services and programs under §§ 342.51—342.56 (relating to early intervention).

(ii) A child is considered to have a developmental delay when one of the following exists:

(A) The child's score, on a developmental assessment device, on an assessment instrument which yields a score in months, indicates that the child is delayed by 25% of the child's chronological age in one or more developmental areas: cognitive, language/speech, physical, social/emotional and self-help, and by reason thereof needs early intervention services as defined in this chapter, Chapter 14 (relating to special education) and the Early Intervention Services System Act (11 P. S. §§ 875-101—875-503).

(B) The child is delayed in one or more of the following developmental areas: cognitive, language/speech, physical, social/emotional and self-help, as documented by test performance of 1.5 standard deviations below the mean on standardized tests, and by reason thereof needs early intervention services as defined in this chapter, Chapter 14 and the Early Intervention Services System Act.

(iii) Determination of developmental shall specify the nature and degree of the delay and shall include a full assessment and comprehensive report by one or more of the following: a certified public school psychologist, speech correctionist, a pediatrician or a psychiatrist, and shall specify the nature and degree of the delay.

*Mental retardation*—Impaired mental development which adversely affects the educational performance of a person. The term includes a person who exhibits significantly impaired adaptive behavior in learning, maturation or social adjustment as a result of subaverage intellectual functioning. The term does not include persons with IQ scores of 80 or higher. Determination of mental retardation shall include a full assessment and comprehensive report by a public school psychologist certified by the Department specifying the nature of the impairment and the level of functioning.

\* \* \* \* \*

(c) *Eligible young child.* The classification of eligible young child includes all of the classifications listed in this section.

\* \* \* \* \*

**SCREENING AND EVALUATION PROCESS**

**§ 342.25. Multidisciplinary evaluation.**

(a) Referral for multidisciplinary evaluation shall be made when special education referral criteria have been met and are in accordance with § 14.25 (relating to multidisciplinary evaluation). Referral for multidisciplinary evaluation is indicated when the student is suspected of being exceptional and one or more of the following exist:

(1) The instructional assessment of the student experiencing academic difficulty indicates a performance level which is not sufficient to demonstrate success in the regular class without the addition of supplementary aids or services, or both.

(2) The life skills screening of the student who has not been able to benefit from an academic program indicates a performance level which is not sufficient to demonstrate success in the regular class without the addition of supplementary aids or services, or both, beyond those available in the regular class.

\* \* \* \* \*

**IEP**

**§ 342.38. Planned courses.**

(a) Curricula for exceptional students shall be designed to:

(1) Meet the needs of exceptional students and shall be adapted, if possible, from regular curricula in Chapter 5 (Reserved).

(2) Coincide with regular education curricula and allow for and lead to the maximum amount of interaction of exceptional students with students who are not exceptional.

(3) Stress general life skills to maximize independence for exceptional students who differ to such an extent that their needs dictate curricular offerings different from those in regular education.

(4) Provide for the acquisition of specific competencies in all areas of development, including: cognitive, language, social, motor, self-help and vocational, in accordance with the IEP of the student.

(b) Curricula for exceptional students is subject to a review at least every 2 years and to revision as required.

(c) Exceptional students who require special instructional materials, supplies and equipment, including assistive technology, shall be provided with these items in accordance with the IEP. The instructional materials, equipment and supplies provided for exceptional students shall be equivalent to those provided for students in regular education and of comparable age, grade and interest levels, with the modifications necessary to meet the individual needs of the exceptional student, and may be subject to review and approval by the Department.

(d) Furniture shall be suited to the age, size, physical status and individual needs of exceptional students and may be subject to review and approval by the Department.

**EDUCATIONAL PLACEMENT**

**§ 342.42. Educational placement.**

\* \* \* \* \*

(h) School districts may establish classes for exceptional students in the following categories:

(1) *Learning support class.* A class for exceptional students whose primary identified need is academic learning.

\* \* \* \* \*

(j) Class sizes and class loads for assignments for special education services and programs shall conform to the following table:

**Caseload and Class Size for Special Education**

This chart presents the caseload allowed on a single teacher's rolls; the number in parenthesis is the maximum number of exceptional students in the room with the teacher at any one time.

Type of Service	Itinerant	Resource	Part-time	Full-time
<i>Academic Support Class:</i>				
Learning Support	15-50(6)	15-20(8)*	10-15(8)*E 15-18(9)*S	6-12(12)*E 8-15(15)*S
Life Skills Support	10-20(4)*	10-20(6)*	10-15(8)*E 15-18(9)*S	8-12(12)*E 8-15(15)*S
Emotional Support	15-50(4)	15-20(6)*	10-15(10)*	6-12(12)*
<i>Sensory and Communication Support Class:</i>				
Deaf or Hearing Impaired Support	15-50(4)	6-15(6)*	6-10(6)*	5-8(8)*
Blind or Visually Impaired Support	15-50(4)	6-15(6)*	8-15(8)*	5-12(12)*

<i>Type of Service</i>	<i>Itinerant</i>	<i>Resource</i>	<i>Part-time</i>	<i>Full-time</i>
Speech and Language Support	20-90(4)**			5-8(8)*
Physical Support	15-50(4)*	6-15(6)*	6-12(6)*	6-12(12)*
Autistic Support	8-12(4)*	6-8(6)*	4-8(6)*	4-8(8)*
Multihandicapped Support	8-12(4)*	6-8(6)*	4-8(6)*	4-8(8)*

\*Paraprofessional assistance available.

\*\*With no more than 90 sessions per week.

[Pa.B. Doc. No. 00-2124. Filed for public inspection December 8, 2000, 9:00 a.m.]

## Title 49—PROFESSIONAL AND VOCATIONAL AFFAIRS

### STATE ARCHITECTS LICENSURE BOARD

#### [49 PA. CODE CH. 9]

#### Fees

The State Architects Licensure Board (Board) amends § 9.3 (relating to fees) by revising certain application fees as set forth in Annex A.

The final-form rulemaking amends application and certification fees and creates verification and registration/modification of firms practice fees to reflect the Board's actual cost of providing the services.

Notice of proposed rulemaking was published at 29 Pa.B. 4170 (August 7, 1999). Publication was followed by a 30-day public comment period during which the Board received no public comments. Following the close of the public comment period, the Board received comments from the House Professional Licensure Committee (HPLC) and the Independent Regulatory Review Commission (IRRC). The Senate Consumer Protection and Professional Licensure Committee (SCP/PLC) did not comment.

The following is a response to the comments.

#### *Certification and Verification Fee*

The HPLC questioned under what circumstances the Board certifies an examination score. The HPLC and IRRC also requested an explanation of the difference between a verification and certification and an explanation of what accounts for the differential in fees.

The certification of a score is made at the request of a licensee when the licensee is seeking to obtain licensure in another state based upon licensure in this Commonwealth which was issued on the basis of a uniform National or regional examination which was taken in this Commonwealth. Generally the state of original licensure is the only source of the score of the licensee as testing agencies do not maintain this information. The licensure laws of many states include provisions that licensure by reciprocity or endorsement based on licensure in another state will be granted only if the board or agency determines that the qualifications are the same or substantially similar. Many state agencies have interpreted this provision to require that licensees have attained a score equal to or exceeding the passing rate in that jurisdiction at the time of original licensure. For this reason, these states require that the Pennsylvania Board and other boards certify the examination score the applicant achieved on the licensure examination.

As noted in proposed rulemaking the difference between the verification and certification fees is the amount

of time required to produce the document requested by the licensee. States request different information when making a determination as to whether to grant licensure based on reciprocity or endorsement from another state. The Bureau of Professional and Occupational Affairs (Bureau) has been able to create two documents from its records that will meet all of the needs of the requesting state. The licensee, when the licensee applies to the other state, receives information as to what documentation and form is acceptable in the requesting state. The Bureau then advises the licensee of the type of document the Bureau can provide and the fee. In the case of a verification the staff produces the requested documentation by a letter, usually computer generated, which contains the license number, date of original issuance and current expiration date and status of the license. The letters are printed from the Bureau's central computer records and sent to the Board staff responsible for handling the licensee's application. The letters are sealed, folded and mailed in accordance with the directions of the requestor. The Bureau estimates the average time to prepare this document to be 5 minutes. The Bureau uses the term "certification fee" to describe the fee for a request for a document, again generally to support reciprocity or endorsement applications to other states, territories or countries, or for employment of training in another state. A certification document contains information specific to the individual requestor. It may include dates or location where examinations were taken, or scores achieved or hours and location of training. . . The information is entered onto a document which is usually supplied by the requestor. The average time to prepare a certification is 45 minutes. This is because a number of resources, such as files, microfilm and rosters must be retrieved and consulted to provide the information requested. The Board staff then seals and issues this document.

#### *Administrative Overhead*

IRRC requested that the Bureau and the boards: (1) itemize the overhead cost to be recouped by the fees; and (2) reexamine the method that is used to determine the administrative overhead factor for each fee.

IRRC commented that although the Bureau's method was reasonable, there was no assurance that the fees would recover the actual overhead cost because the charge was not related to the service, and because the charge was based on the actual rather than the projected expenditures. IRRC also commented that there was no certainty that the projected revenues would meet or exceed projected expenditures, as required under the boards, enabling statutes.

In computing overhead charges, the boards and the Bureau include expenses resulting from service of support staff operations, equipment, technology initiatives or upgrades, leased office space and other sources not directly

attributable to a specific board. Once determined, the Bureau's total administrative charge is apportioned to each board based upon that board's share of the total active licensee population. In turn, the board's administrative charge is divided by the number of active licensees to calculate a "per application" charge which is added to direct personnel cost to establish the cost of processing. The administrative charge is consistently applied to every application regardless of how much time the staff spends processing the application.

This method of calculating administrative overhead to be apportioned to fees for services was first included in the biennial reconciliation of fees and expenses conducted in 1988-89. In accordance with the regulatory review, the method was approved by the Senate and House Standing Committees and IRRC as reasonable and consistent with the legislative intent of statutory provisions which require the Board to establish fees which meet or exceed expenses.

IRRC suggested that within each board, the administrative charge should be determined by the amount of time required to process each application. For example, an application requiring 1/2 hour of processing time would pay one-half as much overhead charge as an application requiring 1 hour of processing time. The Bureau concurs with IRRC that by adopting this methodology the Bureau and the boards would more nearly and accurately accomplish their objective of setting fees that cover the cost of the service. Therefore, in accordance with IRRC's suggestions, the Bureau conducted a test to compare the resulting overhead of charge obtained by applying IRRC suggested time factor versus the current method. This review of a board's operation showed that approximately 25% of staff time was devoted to providing services described in the regulations. The current method recouped 22% to 28% of the administrative overhead charges versus the 25% recouped using a ratio-based time factor. However, when the time factor is combined with the licensing population for each board, the resulting fees vary widely even though different licensees may receive the same services. For example, using the time-factor method to issue a verification of licensure would cost \$34.58 for a landscape architect as compared with a cost of \$10.18 for a cosmetologist. Conversely, under the Bureau method the administrative overhead charge of \$9.76 represents the cost of processing a verification application for all licensees in the Bureau. Also, the Bureau found that employing a time factor in the computation of administrative overhead would result in a different amount of overhead charge being made for each fee proposed.

With regard to IRRC's suggestions concerning projected versus actual expenses, the boards note that the computation of projected expenditures based on amounts actually expended has been the basis for biennial reconciliations for the past 10 years. During these 5 biennial cycles, the experience of both the boards and the Bureau has been that established and verifiable data which can be substantiated by collective bargaining agreements, pay scales and cost benefit factors. This method has provided a reliable basis for fees. Also, the fees are kept at a minimum for licensees, but appear adequate to sustain the operations of the boards over an extended period. Similarly accounting, recordkeeping and swift processing of applications, renewals and other fees were the primary basis for "rounding up" the actual costs to establish a fee. This rounding up process has in effect resulted in the necessary but minimal cushion or surplus to accommodate unexpected needs and expenditures.

For these reasons, the boards have not made changes in the method by which they allocate administrative expenditures and the resulting fees will remain as proposed.

#### *Compliance with Executive Order 1996-1, Regulatory Review and Promulgation*

The Board reviewed this rulemaking and considered its purpose and likely impact upon the public and the regulated population under the directives of Executive Order 1996-1, Regulatory Review and Promulgation. The final-form regulation addresses a compelling public interest as described in this Preamble and otherwise complies with Executive Order 1996-1.

#### *Fiscal Impact and Paperwork Requirements*

The amendment will have no adverse fiscal impact on the Commonwealth or its political subdivisions. The fees will have a modest fiscal impact on those members of the private sector who apply for services from the Board. The amendment will impose no additional paperwork requirements upon the Commonwealth, political subdivisions or the private sector.

#### *Statutory Authority*

The amendment is authorized under section 11 of the Architects Licensure Law (63 P. S. § 34.11).

#### *Sunset Date*

The Board continually monitors the effectiveness of its regulations through communications with the regulated population; accordingly, no sunset date has been set.

#### *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), the Board submitted a copy of the notice of proposed rulemaking, published at 29 Pa.B. 4170, to IRRC and the Chairpersons of the HPLC and the SCP/PLC for review and comment.

In compliance with section 5(c), the Board also provided IRRC and the Committees with copies of all comments received, as well as other documentation. In preparing this final-form regulation, the Board has considered the comments received from the Committees, IRRC and the public.

Under section 5.1(d) of the Regulatory Review Act, this final-form regulation was approved by the HPLC on October 3, 2000 and deemed approved by the SCP/PLC on October 10, 2000. IRRC met on October 19, 2000, and approved the regulation in accordance with section 5.1(e) of the Regulatory Review Act.

#### *Contact Person*

Further information may be obtained by contacting Dorna Thorpe, Administrative Assistant, State Architects Licensure Board, at P. O. Box 2649, Harrisburg, PA 17105-2649, (717) 783-3397.

#### *Findings*

The Board finds that:

(1) Public notice of proposed rulemaking 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, 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) This amendment does not enlarge the purpose of the proposed rulemaking published at 29 Pa.B. 4170.

(4) This amendment is necessary and appropriate for administration and enforcement of the Board's authorizing statute.

Order

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

(1) The regulations of the Board, 49 Pa. Code Chapter 9, are amended by amending § 9.3 to read as set forth in Annex A.

(2) The Board shall submit this order and Annex A to the Office of General Counsel and to the Office of the Attorney General as required by law.

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

(4) This order shall take effect upon publication in the *Pennsylvania Bulletin*.

FRANK M. ADAMS,
Chairperson

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 30 Pa.B. 5807 (November 4, 2000).)

Fiscal Note: Fiscal Note 16A-414 remains valid for the final adoption of the subject regulation.

Annex A

TITLE 49. PROFESSIONAL AND VOCATIONAL STANDARDS

PART I. DEPARTMENT OF STATE

Subpart A. PROFESSIONAL AND OCCUPATIONAL AFFAIRS

CHAPTER 9. STATE ARCHITECTS LICENSURE BOARD

FEES

§ 9.3. Fees.

(a) The cost of the ARE is \$980. The fee for each portion is:

Table with 2 columns: Fee description and Amount. Includes items like Predesign (\$92), Site Planning (\$129), Building Planning (\$155), etc.

Table with 2 columns: Fee description and Amount. Includes items like (f) Reactivation of lapsed or expired license (\$30), (g) Firm practice registration or modification (\$50), (h) License or registration verification (\$15).

[Pa.B. Doc. No. 00-2125. Filed for public inspection December 8, 2000, 9:00 a.m.]

STATE BOARD OF ACCOUNTANCY
[49 PA. CODE CH. 11]
Fees

The State Board of Accountancy (Board), by this order amends §§ 11.4, 11.5 and 11.17 (relating to fees; temporary practice in this Commonwealth; and submission of application and examination fees) to read as set forth in Annex A.

The amendments raise Board fees for certification and initial licensure of certified public accountant, temporary practice permit, certification of examination scores, and verification of certification, registration or licensure status; add a new fee for reinstatement of expired or inactive license; relocate all existing fees to a single section; and make editorial changes to the description of certain fees.

Summary of Comments and Responses to Proposed Rulemaking

The Board published a notice of proposed rulemaking at 30 Pa.B. 2376 (May 13, 2000), following which the Board entertained public comments for 30 days. The Board did not receive any public comments.

The Board received comments from the Independent Regulatory Review Commission (IRRC) on July 13, 2000, as part of its review of the amendments in proposed form under the Regulatory Review Act. The Board did not receive comments from the Senate Committee on Consumer Protection and Professional Licensure (Senate Committee) and the House Professional Licensure Committee (House Committee), which also reviewed the amendments in proposed form under the Regulatory Review Act.

IRRC's comments involved the relocation of the temporary practice fee from § 11.5 and the examination fees from § 11.17 to § 11.4, where all other Board fees are listed. The proposed version of the amendments would have added the temporary permit fee and examination fees to § 11.4 but would not have deleted them from §§ 11.5 and 11.17. As stated in the notice of proposed rulemaking, the Board intended to revise §§ 11.5 and 11.17 as part of a separate rulemaking initiative relating to general revisions (#16A-559).

IRRC recommended that the fees be deleted from §§ 11.5 and 11.17 in this rulemaking. IRRC noted that retaining the examination fees in § 11.17 would create an unnecessary, if temporary, redundancy, while retaining the existing \$20 temporary permit fee in § 11.5 would create a conflict with the revised § 11.4, which sets forth the increased \$25 temporary permit fee. The Board agrees with IRRC that amending §§ 11.5 and 11.17 at this time would eliminate duplication as well as the potential for confusion. Accordingly, the Board has revised the amendments to delete the fees from §§ 11.5 and 11.17.

*Statutory Authority*

Section 3(6) of the CPA Law (63 P. S. § 9.3(6)), gives the Board general authority to collect fees for its operations. Section 9.2(d)(2) of the CPA Law (63 P. S. § 9.9b(d)(2)), specifically references the Board's authority to collect a fee for reinstatement of an inactive or expired license. Section 6 of the CPA Law (63 P. S. § 9.6), requires the Board to establish fees by regulation and to

ensure that revenues derived from fees are adequate to cover the Board's expenditures over a biennial period.

*Fiscal Impact*

The Board projects that the amendments will generate additional fee revenues totaling approximately \$36,875 during each fiscal biennium. The additional biennial revenues are broken down as follows:

<i>Service</i>	<i>Estimated Fee-Payers</i>		<i>Fee Increase</i>		<i>Additional Revenues</i>
Certification and Initial Licensure of Certified Public Accountant	1,000	×	\$20	=	\$20,000
Temporary Practice Permit	75	×	\$5	=	\$ 375
Reinstatement of Inactive or Expired License	200	×	\$35	=	\$ 7,000
Certification of Examination Scores	900	×	\$10	=	\$ 9,000
Verification of Certification, Registration or Licensure Status	100	×	\$5	=	\$ 500
				Total	\$36,875

*Paperwork Requirements*

The amendments will require the Board to change certain forms to reflect the revised schedule of fees. The amendments will not create additional paperwork requirements for the regulated community.

*Compliance with Executive Order 1996-1*

In accordance with Executive Order 1996-1 (relating to regulatory review and promulgation), the Board, in drafting and promulgating the amendments, considered the least restricted alternative to regulatory costs for services requested by individual licensees and applicants.

*Regulatory Review*

On May 3, 2000, as required by section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), the Board submitted copies of the notice of proposed rulemaking, published at 30 Pa.B. 2376 to IRRC and the House and Senate Committees for review and comment.

In adopting final-form regulations, the Board considered comments from IRRC. The Board did not receive comments from either the House and Senate Committees or the general public.

On October 2, 2000, the Board submitted final-form amendments to IRRC and the House and Senate Committees. Under authority of section 5.1(d) of the Regulatory Review Act (71 P. S. § 745.5a(d)), the amendments were approved by the House Committee on October 11, 2000, and deemed approved by the Senate Committee on October 23, 2000. Under section 5.1(e) of the Regulatory Review Act, IRRC met on November 2, 2000 and approved the final-form regulations.

*Additional Information*

Individuals who desire additional information about the amendments are invited to submit inquiries to Dorna Thorpe, Administrator, State Board of Accountancy, P. O. Box 2649, Harrisburg, PA 17105-2649, (717) 783-1404.

*Findings*

The Board finds that:

(1) Public notice of the Board's intention to amend 49 Pa. Code Chapter 11, by this order has been 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 thereunder, 1 Pa. Code §§ 7.1 and 7.2.

(2) The amendments adopted by this order are necessary and appropriate for the administration of the CPA Law.

*Order*

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

(1) The regulations of the Board, 49 Pa. Code Chapter 11, are amended by amending §§ 11.4, 11.5 and 11.17 to read as set forth in Annex A.

(2) The Board shall submit this order and Annex A to the Office of the Attorney General and the Office of General Counsel for approval as required by law.

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

(4) The amendments shall take effect upon publication in the *Pennsylvania Bulletin*.

THOMAS J. BAUMGARTNER, CPA,  
*Chairperson*

*(Editor's Note: The amendment of §§ 11.5 and 11.17 was not included in the proposal at 30 Pa.B. 2378 (May 13, 2000). For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 30 Pa.B. 6020 (November 18, 2000).)*

**Fiscal Note:** Fiscal Note 16A-558 remains valid for the final adoption of the subject regulations.



## Annex A

TITLE 49. PROFESSIONAL AND  
VOCATIONAL STANDARDS

## PART I. DEPARTMENT OF STATE

Subpart A. PROFESSIONAL AND  
OCCUPATIONAL AFFAIRS

## CHAPTER 11. STATE BOARD OF ACCOUNTANCY

## GENERAL PROVISIONS

## § 11.4. Fees.

Following is the schedule of fees charged by the Board:

Complete CPA examination (Four parts).....	\$135
Three parts .....	\$112.50
Two parts .....	\$90
One part .....	\$67.50
AICPA examination administration to candi- dates of other state boards .....	\$100
Certification and initial licensure of certified public accountant .....	\$65
Initial licensure of public accounting firm .....	\$45
Temporary practice permit .....	\$25
Biennial renewal of license of certified public accountant, public accountant or public account- ing firm .....	\$45
Reinstatement of inactive or expired license ....	\$35
Certification of scores.....	\$25
Verification of certification, registration or licensure .....	\$15

## § 11.5. Temporary practice in this Commonwealth.

(a) *Requirements for temporary practice.* A certified public accountant, or partnership or corporation composed of certified public accountants, of another state or other jurisdiction of the United States may temporarily practice public accountancy in this Commonwealth, if the certified public accountant, or partnership or corporation:

(1) Holds a valid license or registration to practice public accountancy in the other state or jurisdiction.

(2) Concurrently practices public accountancy in the other state or jurisdiction.

(3) Does not maintain an office in this Commonwealth.

(4) Obtains from the Board a temporary practice permit prior to performing the temporary work.

(b) *Temporary practice permit.* The temporary practice permit:

(1) Allows a certified public accountant, or partnership or corporation, who meets the requirements of subsection (a) to work for not more than 500 hours in this Commonwealth during a 12-month period, except that this 500 hour limitation does not apply if the holder of a temporary practice permit is working only on a single, nonrecurring engagement.

(2) Is valid for not more than 12 months.

(3) Is renewable if the permit was not granted for a single, nonrecurring engagement in excess of 500 hours.

(c) *Failure to meet requirements for temporary practice.* A person, partnership or corporation, of another state or other jurisdiction who wishes to practice public accountancy in this Commonwealth but does not meet the

requirements of subsection (a) is subject to the full licensing requirements of section 8.2 of the act (63 P. S. § 9.8b).

(d) *Exemption from requirement of temporary practice permit.* The requirement of a temporary practice permit does not apply to a person, partnership or corporation, who renders bookkeeping and similar technical services, prepares income tax returns, or prepares financial statements, but does not issue a report that expresses an opinion or assurance on the statements.

## EXAMINATIONS

## § 11.17. Submission of application and examination fees.

An applicant for admission to the Uniform Certified Public Accountant Examination shall submit to the designee of the Board the application for examination required by § 11.11 (relating to application for examination), together with a fee to cover the costs associated with the preparation and administration of the examination.

[Pa.B. Doc. No. 00-2126. Filed for public inspection December 8, 2000, 9:00 a.m.]

## Title 52—PUBLIC UTILITIES

## PENNSYLVANIA PUBLIC UTILITY COMMISSION

## [52 PA. CODE CH. 62]

[L-00000147]

Reporting Requirements for Quality of Service  
Benchmarks and Standards

The Pennsylvania Public Utility Commission (Commission) on June 8, 2000, adopted a final rulemaking order establishing uniform measures and standard data reporting requirements for natural gas distribution companies (NGDCs). The contract persons are M.J. (Holly) Frymoyer, Bureau of Consumer Services (technical) (717) 783-1628, and Rhonda Daviston, Law Bureau (legal) (717) 787-6166.

*Executive Summary*

On June 22, 1999, Governor Tom Ridge signed into law 66 Pa.C.S. Chapter 22 (relating to Natural Gas Choice and Competition Act) (act). Section 2206(a) of the act (relating to consumer protections and customer service) requires that customer services shall, at a minimum, be maintained at the same level of quality under retail competition as in existence on June 22, 1999. The purpose of this rulemaking is to establish uniform measures and reporting requirements to allow the Commission to monitor the level of the NGDCs' customer service performance. Using the statistics collected under this rulemaking, the Commission will annually prepare a summary report on the customer service performance of the covered NGDCs. The reports will be public information.

*Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on February 3, 2000, the Department submitted a copy of the notice of proposed rulemaking, published at 30 Pa.B. 893 (February 19, 2000), to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House and Senate Committees for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC and the Committees were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing these final-form regulations, the Department has considered all comments from IRRC, the Committees and the public.

Under section 5.1(d) of the Regulatory Review Act (71 P. S. § 745.5a(d)), on October 23, 2000, these final-form regulations were deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on November 2, 2000, and approved the final-form regulations.

Public Meeting held  
June 8, 2000

*Commissioners Present:* John M. Quain, Chairperson; Robert K. Bloom, Vice-Chairperson; Nora Mead Brownell; Aaron Wilson, Jr.; Terrance J. Fitzpatrick

### **Final Rulemaking Order**

*By the Commission:*

At public meeting of January 12, 2000, the Commission issued an order adopting and directing publication of proposed regulations to establish a means by which the Commission can develop uniform measurement and reporting requirements to assure that the customer services of the NGDCs are maintained, at a minimum, at the same level of quality under retail competition.

#### *Background*

On June 22, 1999, Governor Tom Ridge signed into law the act. The act revised the Public Utility Code, 66 Pa.C.S. § 101 et seq. by inter alia, adding Chapter 22 (relating to restructuring of the natural gas utility industry). Section 2206(a) of the act (relating to consumer protections and customer service) is clear that customer service for retail gas customers is, at a minimum, to be maintained at the same level of quality under retail competition as in existence on June 22, 1999.

Based on its experience with collecting quality of service data from the electric distribution companies in accordance with §§ 54.151—54.156 (relating to reporting requirements for quality of service benchmarks and standards), the Commission instituted a rulemaking proceeding to establish a means by which the Commission can ensure that the quality of each NGDC's customer service performance is being maintained. The proposed regulations set forth uniform measures and standard data reporting requirements for various components of an NGDC's customer service performance and established effective dates for the reporting requirements.

The proposed regulations were published at 30 Pa.B. 893 (February 19, 2000) and a 30-day comment period set. The 30-day comment period for public comments ended March 20, 2000. The proposed rulemaking was served on all jurisdictional gas companies, the Office of Consumer Advocate (OCA), the Office of Small Business Advocate and all parties to this proceeding. The Commission order was also posted on the Commission's Internet website.

We received comments from The Pennsylvania Gas Association (PGA) on behalf of its member companies; the OCA; Columbia Gas of Pennsylvania of Pennsylvania, Inc. (Columbia); Statoil Energy Services, Inc. and TXU Energy Services (Statoil and TXU); and IRRC. We have considered all these comments. We appreciate and thank the commentators for their suggestions on developing final-form regulations.

This order presents a summary of comments and our response. Comments not directed toward any specific section are included after the section-by-section summary. The final-form regulations, as revised pursuant to the discussion in this order, appear in Annex A.

#### *§ 62.31. Purpose.*

IRRC suggested that to improve clarity, we should specify that this regulation applies to two classes of NGDCs which are required to file restructuring plans under the Act: large NGDCs serving more than 100,000 residential customers and small NGDCs serving less than 100,000 residential customers.

We also received comments that generally apply to this section from Statoil and TXU. These companies point out that the regulations fail to address NGDC services to third party suppliers. Statoil and TXU recommend that the Commission expand its analysis of NGDC performance to include service to sales and transportation customers. They suggest that the NGDCs be held accountable for customer service to these entities through similar benchmarks and reporting requirements. Statoil and TXU also suggest that the Commission may want to measure an NGDC's performance in opening up its system to competition by looking at migration and enrollment trends. They recommended that the Commission may want to require data regarding data error, average time from order to ordinary installation and conformance of payment transmission to contractual standards.

*Response:* We do not agree with the recommendation of Statoil and TXU to expand the coverage of the regulation to include NGDC services to third-party suppliers. Although we acknowledge the importance of a cooperative relationship between an NGDC and a supplier, the purpose of this rulemaking is to gather data on existing measures of customer service to existing end use customers. Further, we believe that the transaction survey will help the Commission monitor and uncover poor performance, if any, on the part of NGDCs that might be associated with competition and their lack of cooperation with natural gas suppliers. Thus, we decline to make the requested change at this time.

In regard to IRRC's comments, we agree and have revised the language of this section accordingly. The revised section reads:

This subchapter establishes a means by which the Commission can develop uniform measurement and reporting to assure that the customer services of the natural gas distribution companies (NGDCs) that are required to file restructuring plans under the Natural Gas Choice and Competition Act are maintained, at a minimum, at the same level of quality under retail competition. This subchapter sets forth uniform measurements and reporting requirements for monitoring the level of the customer service performance of two separate classes of these NGDCs: NGDCs serving more than 100,000 residential customers and those serving less than 100,000 residential customers. This subchapter also establishes the effective dates of the reporting requirements.

#### *§ 62.32. Definitions.*

*Call abandonment rate.* Columbia reiterates a suggestion it made to the proposed rulemaking regarding Reporting Requirements for Quality of Service Benchmarks and Standards for electric distribution companies (EDCs). Columbia suggests that an abandoned call should be calculated as abandoned only if the call is abandoned after 45 seconds of waiting.

IRRC recommended that we delete the phrase "...at the NGDC's telephone call center or business office" that appeared at the end of the definition of Call abandonment rate.

*Response:* We did not agree with Columbia's suggestion and did not revise the definition of call abandonment rate to accommodate this recommendation. We believe that 45 seconds is a long period of time and that frustrated customers may disconnect their calls long before 45 seconds is up. We plan to establish a working group that will consist of representatives of the subject NGDCs and the Commission's Bureau of Consumer Services (BCS). One purpose of this working group will be to discuss the calculations and measurement of call abandonment rate and the other access measures. The object of this group's discussion will be to make certain that all the NGDCs will report this and the other statistics uniformly.

We agree with IRRC's recommendation and have deleted that phrase from the definition of Call Abandonment Rate.

*Justified payment arrangement request and justified informal consumer complaint.* IRRC pointed out that the definitions of justified payment arrangement request and justified informal consumer complaint contain references to the Commission's "negotiation procedures or regulations." IRRC believed that this phrase is vague and recommends that we specify the procedures and regulations.

*Response:* The BCS has met with representatives of the six largest NGDCs on numerous occasions both individually and collaboratively to explain its rules for determining whether or not a consumer complaint or payment arrangement request is justified in coming to the BCS. In addition, the BCS has shared written explanations of its rules and annually updates and distributes its payment arrangement guidelines that are based on the Federal poverty guidelines. The NGDCs are all aware of these rules, guidelines and the regulations that apply to them in their dealings with residential gas customers. The BCS sends quarterly reports containing this information to the individual NGDCs. Further, the Commission has annually published justified rates in its annual report, Utilities Activities Report and Evaluation (UCARE). The report is available to the public in hard copy and more recently is available on the Commission Internet website.

For these reasons, we conclude that the affected parties are well aware of how the BCS determines whether or not it considers a case justified in coming to us. However, because the "justified" rules are fluid and may change based on many factors, including changes in Commission policy, we prefer not to include language in the regulation that would limit the procedures and policies to those in effect at this point in time. We want to point out that if BCS makes changes, it announces them to the companies well before they take effect. If requested, the BCS will meet with companies again to go over its rules for determining "justified" cases.

*Infraction rate, justified informal consumer complaint rate and justified payment arrangement request rate.* IRRC suggested that to improve clarity, we should add the phrase "as determined by BCS" to the definitions of infraction rate, justified informal consumer complaint rate and justified payment arrangement request rate.

*Response:* We accept this suggestion and have added the clarifying language to each definition:

*Transaction survey.* IRRC recommended that subparagraph (ii) in the definition of "transaction survey" be deleted.

The PGA pointed out that the list of interactions to be captured in transaction surveys that appears in the definitions is inconsistent with the list that appears in proposed § 62.34(3) under interaction categories.

*Response:* We agree with IRRC's recommendation and have deleted this list from the definition of transaction survey. The change also addresses PGA's concern.

*Promptness and Timeliness:* In its comments to §§ 62.34(1) and 62.35(3)(iv), IRRC recommends that we add two terms to the definitions that appear in these sections: "promptness" and "timeliness."

*Response:* Based on this recommendation, we added these terms and their definitions to § 62.32. The added definitions read:

*Promptness*—The state or condition of acting or responding with speed or readiness to a customer's question, complaint, dispute or request. An example of promptness might be the NGDC responding to a customer's request for a premise visit with an appointment in five days rather than in five weeks.

*Timeliness*—The state or condition of acting at the appropriate or correct time as previously determined or promised when responding to a customer's question, complaint, dispute or request. An example of timeliness might be an NGDC representative arriving at the customer's residence on the date and at the time previously agreed upon by the NGDC and the customer.

#### § 62.33. Reporting Requirements.

##### *Subsection (b) Recordkeeping.*

IRRC commented that this section contained unnecessary language and that the phrase "take measures necessary and keep sufficient records to" is not necessary.

The OCA recommended that in addition to the measures included in the proposed rulemaking, the Commission should also require the NGDCs to track and report its dispute ratio by key categories.

Both IRRC and the OCA ask the Commission to consider adding an additional measure to the data an NGDC must report. They propose that we add the amount of time it takes for an NGDC to respond to emergency calls. The OCA suggested that the Commission require NGDCs to track and report the number of minutes between the logging of a customer's request for a premise visit due to gas safety concerns and the arrival of a company representative at the affected premise.

*Response:* With respect to IRRC's comment regarding the unnecessary language in this section, we concur with this comment and have deleted the phrase from the section as suggested by IRRC.

With respect to OCA's suggestion regarding the addition of dispute ratios by key categories, we agree that this information would be of value. However, our experience with the electric distribution companies in this Commonwealth indicated that this information was not available. The companies were not logging in calls in this manner. We are assuming that the NGDCs would likewise not have this information available. To require that the NGDCs report this would require new data collection processes on the part of most of the NGDCs and would

likely add to their expenses. Therefore, we decline to add this additional measure to the list of data that NGDCs are required to report.

However, we would like to point out that the Commission will be able to rely on two sources for this type of data. First, the BCS annually produces statistics from its own call center that captures this information to some degree. The Commission's annual report UCARE includes a table that shows a breakdown of each major NGDC's complaints to the BCS into more than a dozen different categories. We have found that these categories reflect the types and percentages of complaints consumers have made directly to an NGDC since in most cases, the BCS requires that a consumer attempt to solve a complaint with the company prior to appealing to the Commission. Second, the Commission will be able to rely on transaction survey results since the findings are to be reported by category of interaction, such as credit and collection, billing, reliability and safety, etc. as specified in § 62.34(2) of Annex A.

With respect to IRRC's and OCA's suggestion, we agree that NGDC response to safety calls is extremely important and needs to be monitored by the Commission. As a result of these suggestions, we initiated several rounds of discussion within the Commission to explore revising the proposed regulations to include this response statistic in a way that would be of value to the Commission. The Commission's Bureau of Transportation and Safety is already collecting and reviewing this information from all the NGDCs. The companies report gas safety response times monthly. However, at the present time the reporting is not required by Commission regulation.

The major consideration of our discussions on this matter centered around the fact that the instant rulemaking pertains only to the NGDCs that are required to file restructuring plans. (See revised § 62.31 Purpose.) It is vital that the Commission receive emergency response data from all NGDCs, not just those covered by the Act. In fact, the need for emergency response data from smaller gas utilities is just as critical, if not more so in some instances. However, natural gas utilities that are not covered by the Act were not placed on notice in the proposed rulemaking about potential reporting requirements they would need to fulfill. Therefore, it is the position of the Commission's Law Bureau that an expansion of the proposed rulemaking to include these gas utilities would appear to violate both the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201—1205), known as the Commonwealth Documents Law and general principles of due process.

We acknowledge that we could incorporate this requirement into the instant rulemaking and receive data from only the covered NGDCs. However, we concluded that this would not be in the best interest of the Commission since we would then need to institute another rulemaking to collect the information from the smaller NGDCs. Therefore, we have decided to defer this reporting to a separate, future rulemaking proceeding that will apply to all NGDCs. The Commission expects to institute a rulemaking requiring NGDCs to report response to gas safety calls before the end of 2000. Thus, we will not include gas safety reporting with the requirements in the instant rulemaking.

*§ 62.33. Reporting Requirements, Subsection (3) Meter reading.*

The comments of both IRRC and Columbia asked us to consider the variations in number of inside meters among

NGDCs as would relate to this section. Columbia argued that it has a high percentage of inside meters and is often unable to gain access to these meters to obtain a reading.

*Response:* For the most part, we formulated the quality of service reporting requirements on established regulation—primarily Chapter 56 (relating to standards and billing practices for residential utility standards). We acknowledge that there are differences among the NGDCs concerning the percentage of inside residential gas meters. However, we argue that the companies have been under the Chapter 56 for more than 20 years and thus have had a more than adequate amount of time to adjust to the Chapter 56 meter reading provisions. Some utilities have taken steps to reduce the number of inside meters over the years to increase their ability to obtain readings. We also believe that the Chapter 56 provide the utilities with an extended period of time in which to obtain an actual or customer supplied reading (6 months) and an actual reading (12 months). Further, Chapter 56 addresses the issue of a utility's inability to gain access to read a meter by providing utilities with procedures such as the threat of termination and actual termination of service for failure to provide access. We believe that the NGDCs should have resolved this problem by now and should be able to obtain readings as required by the meter reading sections of Chapter 56.

During its 20 plus years of investigating consumer complaints, the BCS has learned that the failure of companies to read meters regularly produces numerous complaints to both companies and to the BCS. Regular meter reading is important to produce accurate bills for customers who expect to receive bills based on the amount of energy they have used. We are concerned that regular meter reading may be one of the customer service areas where, under competition, the NGDCs may reduce service resulting in more bills being estimated. We appreciate that from time to time companies may need to estimate customer meter readings, but we also have seen the effects of too many estimates. We believe that even if a customer has a meter located inside the premises, the NGDCs should strive to meet the minimum meter reading requirements as outlined in Chapter 56.

*§ 62.34. Customer Surveys*

*Paragraph (1) Purpose.*

IRRC recommended that for clarity, the Commission should define "promptness" and "timeliness," two qualities to be used to assess the customer's perception of the most recent transaction with the NGDC, in the definitions. As discussed under the definition section, we agree with IRRC's recommendation and added these two attributes to the list of definitions.

Columbia cautioned that the Commission should recognize that the expanded availability of customer choice increases the likelihood of customer contacts with third-party suppliers. As a result, Columbia pointed out, customer survey results may well reflect experiences the customers have had with those parties, rather than with the NGDC.

*Response:* We believe that a well-developed questionnaire will allow the majority of consumers to discern that the survey questions pertain to a specific NGDC and not a third-party entity. We recommend that the introduction to the survey specifically name the NGDC as the company about which the survey is being conducted. We also believe that Columbia's concern will be at least partially addressed by the requirement of a uniform survey instrument. If consumer confusion about NGDC/third-party

entity does prove to be a problem, we would expect that it would affect all NGDCs equally, especially if all NGDC surveys ask the same questions of the customer.

In the proposed rulemaking order, we proposed the formation of a transaction survey working group to work out the details of the survey. We specifically designed the survey timetable to allow enough time for the group to complete its tasks. We hope to use the EDC working group as a model. That group already "invented the wheel"; it laid the groundwork for a uniform customer survey. The Commission, represented by the BCS and the NGDCs, will collaborate to work out the details of the survey for the major gas companies.

We believe that the issue raised by Columbia is an appropriate item of discussion for the working group. We are confident that the group can find a solution to this issue that will work for the benefit of all the NGDCs.

*Paragraph (2) Questions.*

The PGA raised a concern that the requirements would require NGDCs to survey recipients of dunning calls. The PGA notes that it sees no value to adding these calls to the transaction survey.

*Response:* We agree with the PGA, however, we believe that this issue is best left to the discussions of the transaction survey working group. The EDC working group decided to survey only those customers whose contact with the company was customer-initiated. The Commission approved this decision. The NGDC working group may come to a similar agreement.

*Paragraph (3) Uniform data.*

Columbia commented that the Commission should not mandate the use of a uniform survey for all NGDCs. Columbia argued that many NGDCs already conduct customer satisfaction surveys.

Similarly, the PGA in its commented notes that many NGDCs already conduct customer satisfaction surveys as a matter of sound business practice and argues that allowing them to continue these current surveys would be considerably less costly than forcing them to develop new ones.

IRRC recommended that we should clarify what "instruments and procedures" are to be used by the NGDCs in providing the Commission with uniform survey data.

*Response:* An overall primary objective of the Commission for this rulemaking is to have the NGDCs gather and report uniform quality of service data that can be compared among the Pennsylvania NGDCs. We believe that it is of paramount importance that the survey questionnaire, sampling procedures, method of conducting the survey, analysis of results and reporting format be sufficiently uniform to support the Commission's overall primary objective. As stated earlier, the establishment of benchmarks will necessitate a separate proceeding, however, we do not want to automatically preclude the establishment of standards that could be set for all NGDCs. Without the prescribed uniformity, the Commission will not have a valid way of comparing the customer service performance of the NGDCs in many important areas. The uniformity factor will aid the Commission by allowing it to compare "apples with apples" rather than producing findings that may be biased by a variety of factors. For example, survey language and response choices can strongly influence survey results. A question to measure employee courtesy may elicit one response from a customer if worded one way and a different response from the same customer if worded another way.

This is why we are so adamant that all companies use the same survey questionnaire.

Our experience with the EDCs proves that the customer survey can be conducted without great expense to a company. Most of the EDCs, through collaboration with the Pennsylvania Electric Association, jointly hired a single research firm to administer the survey for all the companies at a very economical price. We have chosen to give the NGDCs the option of who should conduct their surveys but we believe that it will not be as costly as the NGDCs fear.

As we stated when we prepared the final rulemaking for the EDC reporting requirements for quality of service benchmarks and standards, our original intention in collecting customer service data from companies was to request records from the companies on number of appointments kept, response time to installation of service and repair requests, and speed of posting customer payments. Experts in quality of service measurement commonly accept all these measures as measures of customer service performance. However, EDC representatives convinced us that to require this information would be unduly burdensome on the EDCs. As a result, we decided to use the customer transaction survey to monitor performance. We believe that the NGDCs would also argue that to require this information would be burdensome and costly to measure and report to the Commission. Thus, we have decided to use the transaction customer survey for the NGDCs in order to allow the Commission the ability to track customer service performance in these areas.

As indicated earlier, the NGDCs and the BCS will form a working group to work out the details of carrying out the transaction survey. Together the group will develop a survey questionnaire, a sampling methodology, a method of conducting the survey, as well as a method of reporting survey results to the Commission. The charge of the working group will be to develop the details of the transaction survey process that the working group, including the BCS, agrees will result in standard, comparable information being reported to the Commission.

We accepted IRRC's recommendation to clarify this section and revised the language of this section:

The NGDCs shall carry out the transaction survey process using survey questionnaires, sample selection procedures, methods of conducting the surveys and any other procedures associated with the survey, including provision of survey results, that they and the Commission agree will provide the Commission with uniform data that can be used to directly compare customer service performance among Pennsylvania NGDCs.

*Paragraph (6) Commission approval.*

IRRC posed several questions about this provision. First, they ask when the review and approval will occur. Second, IRRC asks if the approval is done through a formal proceeding and, if not, what type of proceeding will be used.

*Response:* We plan for Commission final review and approval no later than December 1, 2001. Our goal, however, is to have preliminary agreement on various aspects of the survey plan prior to that date. This will enable the NGDCs to begin implementation of their processes so they can start conducting the surveys in January 2002.

The Commission plans to use a collaborative working group process involving representatives from the NGDCs

and the Commission's BCS. The objective of the working group will be to obtain consensus on the questionnaire and procedures that the working group members think would result in uniform data being collected and reported to the Commission to accurately reflect NGDC customer service performance. If the working group model is successful in obtaining the stated objective, the BCS will grant, in writing, Commission approval of the document containing the written procedures. If the working group is not successful in obtaining its stated objectives and consensus is not reached, a more formal process will be used by the Commission to determine the questionnaire content and procedures.

We have revised this paragraph as follows:

(6) *Commission Approval.* On or before December 1, 2001, the Commission will approve the survey questionnaire, as well as procedures for case selection, sampling, conducting the survey, analyzing results and reporting to the Commission.

§ 62.35. *NGDCs with fewer than 100,000 residential accounts.*

Although we received no comments regarding a clarity issue here, we revised the language of this section because we believe that the revision increases clarity and consistency. We added the word "residential" before the word "accounts" in order to make this section consistent with its title:

Beginning September 1, 2002, each NGDC with less than 100,000 residential accounts shall report to the Commission the following information in lieu of §§ 62.33 and 62.34 (relating to reporting requirements; and customer surveys):

§ 62.35.

*Paragraph (1).*

IRRC commented that this section requires an NGDC with fewer than 100,000 residential accounts to report to the Commission the results of a mail survey of a sample of the NGDC customers who have had interactions with the NGDC. IRRC noted that the regulation does not specify the required sample size and notes that for clarity, the Commission should include the required sample size in the final-form regulations. In a discussion with IRRC, we indicated that we intended to ask each small NGDC to survey every 10th customer that contacts the company. IRRC recommends that we include this quota in the regulation. IRRC also suggested that the phrase "one or more representatives of" is unnecessary and should be deleted.

*Response:* We agree with IRRC's suggestion to specify a sampling plan for the smaller NGDCs and have revised the language of this section accordingly. We also agree with IRRC's suggestion regarding the unnecessary phrase and have deleted it from the final regulation. Thus, the revised paragraph is as follows:

(1) The results of a mail survey of a sample of the NGDC customers who have had interactions with a representative of the NGDC. The survey sample shall consist of every 10th consumer who has contacted the company.

*Paragraph (3).*

IRRC requested that we address the approval process that the Commission will use to approve the mail survey questionnaire.

*Response:* The BCS will approve the mail survey through an informal process. We expect that we will

follow the same procedure as we did in the electric industry when the small EDCs petitioned the Commission for permission to conduct a mail survey rather than a telephone survey. The BCS modified the telephone survey agreed to by larger EDCs into a draft mail format. The BCS circulated the draft mail survey to the smallest EDCs who made suggestions for revisions. The BCS incorporated the suggested revisions and produced the final mail survey questionnaire. The BCS sent it to the EDCs who added their company names and/or logos to the form. The companies began using the questionnaire to survey their customers shortly thereafter.

We expect that a similar process will take place with the gas industry. However, we have modified the language of the regulation slightly to indicate that the BCS will "develop" the survey questionnaire that all the smaller NGDCs will use, based on the telephone questionnaire that the larger NGDCs will use. This should reduce the burden that the smaller NGDCs may be anticipating regarding the development of the survey. Thus, this paragraph is as follows:

(3) Each NGDC shall use the same mail survey questionnaire which shall be developed by the BCS, with advice from the relevant NGDCs. The mail survey questions shall measure customer perceptions regarding:

§ 62.36. *Informal complaints to the BCS.*

(a) *Residential informal consumer complaints and payment arrangement requests.*

IRRC notes a discrepancy in the proposed regulation between the term "justified consumer complaint rate" here and "justified informal consumer complaint rate" in the definition section.

*Response:* With respect to IRRC's suggestion, we revised this section to use the term as it appears in the definitions.

(b) *Informally verified infractions.*

IRRC points out that in this section the term infraction rate appears in quotation marks and thus may not be the same infraction rate that is defined in § 62.32.

*Response:* The infraction rate in § 62.36(b) is the same as the infraction rate that appears in § 62.32 Definitions and should not appear in quotation marks. The BCS accepted IRRC's recommendation and removed the quotation marks from the final-form regulations.

*Other Issues.*

Various parties made the following comments to the proposed rulemaking. These comments did not pertain to a specific section. The comments and our responses appear in the paragraphs that follow:

IRRC asks us to consider adding a section that cross-references the requirements for petitioning for a waiver of the requirements of this regulation. The preamble to the proposed regulation references § 5.43 (relating to petition for issuance, amendment waiver or repeal of regulations).

*Response:* It is the position of the Commission's Law Bureau that the regulations in § 5.43 adequately provide any affected party the right to petition the Commission for the amendment or waiver of a regulation. Therefore it is the Law Bureau's position that it is not necessary to add a specific waiver section to the instant regulation. As a result, we did not add a section that cross-references the requirements for petitioning for a waiver in § 5.43.

The PGA argues that the proposed reporting requirements may not be necessary since competitive forces are sufficient in themselves to ensure high quality customer service. It describes natural gas as an elective service and largely a matter of customer choice.

*Response:* We do not agree that for most customers gas service is a matter of choice. Although theoretically, the opportunity for choosing an alternative fuel is an option for Pennsylvania gas customers who are dissatisfied with the service an NGDC provides, in reality, the costs associated with such a choice make it financially unlikely.

The homeowner confronted with the price tag associated with switching to an alternative fuel for heating that would include a new furnace would likely not find this option fiscally feasible. Likewise, a renter faced with moving to a different rental property with an alternative cooking, heating or water heating fuel because he or she is dissatisfied with his or her gas service may be hard pressed to view this as a viable option. We believe that inexpensive ways of choosing alternative sources of energy are not available to consumers and that the Commission has the responsibility of assuring that the quality of gas service to customers is maintained under gas competition. Therefore we fail to see the validity of the PGA's argument and will not withdraw the instant rulemaking.

Both the PGA and Columbia present arguments in their comments that the gas choice legislation does not call for NGDCs to be measured against each other but rather against itself and its previous performance. Further, the PGA contends that it is not appropriate for the Commission to establish performance benchmarks and standards for the NGDCs using the measures in this rulemaking.

The OCA recommends that the Commission should promptly create a database of the service quality data that each utility has gathered for the past 3—5 years and make this information available to the public. Further, the OCA recommends that the NGDC should be required to analyze and compare, to the extent possible, its historical performance with the performance it submits in its first report in compliance with the reporting requirements.

*Response:* Within the next several months, the Commission has plans to request data from each major NGDC on its historical performance in the measures included in this rulemaking. We are proposing that the Commission request this information within the next several months through a Secretarial letter to the NGDCs. However, we are not certain that the NGDCs were collecting all of this data in the past. Further, if they have been, we cannot be certain that they have been collecting it in a uniform way. The purpose of these reporting requirements is to allow the Commission to gather uniform information about important measures of customer service quality. Again, this uniformity will allow the Commission to compare "apples with apples" rather than using the various means that individual NGDCs have used in the past to measure performance.

We expect that this proposal will satisfy the OCA who suggests in its comments that the Commission should create a database of the service quality data that each NGDC has gathered in the recent past. Further, the instant regulations in § 62.33(c) require that the NGDC's report to the Commission contain an analysis and comparison of the data in the report with its earlier performance in each of the measurements. At this point we cannot agree with the OCA's recommendation that the

NGDC historical information should be made available to the public. We will first request the data and review the information before we make a determination as to whether it should be available to the public. However, as in the past, the UCARE will be available to the public. This report will show each NGDC's performance in justified informal consumer complaint rate, justified payment request rate and infraction rate.

With respect to the PGA's expressed concern regarding the setting of benchmarks and standards, the Commission does plan to establish benchmarks and standards at a later date. However, that is not the purpose of the instant rulemaking. The Commission will institute a separate proceeding to propose standards or bands of acceptable performance only after it has been able to analyze the statistics reported in compliance with this rulemaking. The PGA and all interested parties will have the opportunity to comment and make recommendations on the Commission's proposal at that time. For that reason, we do not think it is appropriate or of any value to discuss benchmarks and standards in the instant order.

The OCA submits that the Commission should set forth the timelines for establishing performance standards and benchmarks, as well as enforcement mechanisms in this rulemaking. The OCA justifies its recommendation with the example of other states who have experienced deterioration in utility service quality because they have failed to establish performance areas, baseline performance standards and clear enforcement mechanisms. It proposes that the final rule require that the NGDCs submit their recommendations for baseline performance standards with their 2001 annual report.

*Response:* We appreciate the OCA's concern that Pennsylvania may suffer significant deterioration in service quality as has occurred in other states. However, we do not believe that it is appropriate to establish a timeline for establishing benchmarks and standards at this time. We believe that we need to establish a pattern of receiving and reviewing this information before we can decide when it is appropriate to move forward with a rulemaking proceeding to establish standards and what these standards will be. We respect the OCA's suggestion that the NGDCs should submit their recommendations for baseline performance standards and will keep that suggestion in mind when we commence the future rulemaking proceeding.

We also decline to set forth a timeline for establishing enforcement mechanisms. At this point in time, the Commission has not taken a position as to whether it is prepared to set forth enforcement mechanisms or penalties. However, we would like to assure the OCA that the Commission will carefully keep watch over the performance of the NGDCs until such time as standards and benchmarks are set. The Commission will review the statistics that the NGDCs report as well as information from contacts to the BCS and will promptly investigate any possible deterioration in service quality. We have undertaken a similar strategy with the EDCs when we identified any deterioration in service performance.

Finally, the PGA recommended that the final rulemaking should expressly acknowledge that the costs that the NGDCs incur to comply with these requirements are

recoverable under the natural gas choice and competition act. The PGA specifically suggested that the call center requirements could be viewed as consumer education expenses and therefore subject to nonbypassable recovery mechanisms. Further, it recommends that the Commission should recognize that all the compliance costs imposed through this docket are eligible for deferred recovery, with capitalization and amortization, as provided in 66 Pa.C.S. § 2211(b).

*Response:* We disagree with the PGA's recommendation that we include an acknowledgment of the costs associated with compliance with these reporting requirements. The proposed rulemaking reflects careful financial considerations and we do not believe it necessary to detail methods of cost recovery in the final regulation. To keep NGDC costs to a minimum, we purposefully selected measures from Chapter 56 that have been in effect for more than two decades. Concerning the call center statistics, we fail to see how any large NGDC that operates a call center would not have these statistics available to them. The successful operation of a call center frequently involves a daily, weekly and monthly review of the statistics that are required in the instant regulations. We believe that the NGDC call center managers are familiar with the required call center measures and may already have them available. We believe that we will be able to show the NGDCs how to administer the required transaction survey at minimal cost. Again, we believe that the survey results will be of value to the managers of the NGDCs as well as to the Commission.

*Conclusion*

In finalizing these regulations, we believe we have met the intent of section 2206(a) of the act to ensure that the level of quality regarding customer service will not deteriorate under retail gas competition in this Commonwealth. Accordingly, under section 501 of the Public Utility Code, and the Commonwealth Documents Law and regulations promulgated thereunder at 1 Pa. Code §§ 7.1—7.4, we propose to amend our regulations by adding §§ 62.31—62.37. The Commission hereby adopts final-form regulations as noted and as set forth in Annex A; *Therefore,*

*It Is Ordered that:*

1. The regulations of the Commission, 52 Pa. Code Chapter 62, are amended by adding §§ 62.31—62.37 to read as set forth in Annex A.
2. The Secretary shall submit a copy of this order and Annex A to the Office of the Attorney General for review as to legality.
3. The Secretary shall submit a copy of this order and Annex A to the Governor's Budget Office for review of fiscal impact.
4. The Secretary shall submit this order and Annex A for formal review by the designated standing committees of both houses of the General Assembly, and for review and approval by IRRC.
5. The Secretary shall deposit this order and Annex A with the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin*.
6. A copy of this order and Annex A shall be served upon all jurisdictional NGDCs, and all parties that submitted comments in this rulemaking proceeding.
7. A copy of this order shall be posted on the Commission's website and shall be made available, upon request, to all interested parties.

8. The regulations adopted with this order are effective upon publication in the *Pennsylvania Bulletin*.

*By the Commission,*

JAMES J. MCNULTY,  
*Secretary*

*(Editor's Note:* For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 30 Pa.B. 6020 (November 18, 2000).)

**Fiscal Note:** Fiscal Note 57-213 remains valid for the final adoption of the subject regulations.

**Annex A**

**TITLE 52. PUBLIC UTILITIES**

**PART I. PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**Subpart C. FIXED SERVICE UTILITIES**

**CHAPTER 62. NATURAL GAS SUPPLY CUSTOMER CHOICE**

**Subchapter B. REPORTING REQUIREMENTS FOR QUALITY OF SERVICE BENCHMARKS AND STANDARDS**

See.	
62.31.	Purpose.
62.32.	Definitions.
62.33.	Reporting requirements.
62.34.	Customer surveys.
62.35.	NGDCs with fewer than 100,000 residential accounts.
62.36.	Informal complaints to the BCS.
62.37.	Public information.

**§ 62.31. Purpose.**

(a) This subchapter establishes a means by which the Commission can develop uniform measurement and reporting to assure that the customer services of the NGDCs that are required to file restructuring plans under the act are maintained, at a minimum, at the same level of quality under retail competition.

(b) This subchapter sets forth uniform measurements and reporting requirements for monitoring the level of the customer service performance of two separate classes of these NGDCs:

- (1) NGDCs serving more than 100,000 residential customers.
- (2) Those NGDCs serving less than 100,000 residential customers.

(c) This subchapter also establishes the effective dates of the reporting requirements.

**§ 62.32. Definitions.**

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

*Act*—Chapter 22 of 66 Pa.C.S. (relating to the natural gas choice and competition act).

*BCS*—Bureau of Consumer Services of the Commission.

*Busy-out rate*—The number of calls to an NGDC's call center or business office that received a busy signal divided by the number of calls that were received.

*Call center*—A centralized facility established by a utility for transactions concerning installation and repair of service, billing and other inquiries between residential and small commercial customers and NGDCs representatives, but not including special purpose call centers established to respond to service emergencies and operating for a temporary period of time.



*Call abandonment rate*—The number of calls to an NGDC's call center or business office that were abandoned divided by the total number of calls received.

*Customer*—A retail gas customer as defined in section 2202 of the act (relating to definitions).

*Informal consumer complaint*—An appeal by a consumer to the BCS about a utility's proposed resolution of a dispute related to billing, service delivery, repairs and all other issues not related to requests for payment arrangements.

*Informally verified infraction*—An apparent misapplication of Commission regulations as determined by the BCS through its examination of information obtained as part of its review of informal consumer complaints and payment arrangement requests.

(i) The informal verification process implemented by the BCS notifies a utility of the information which forms the basis of an alleged infraction, affords the utility the opportunity to affirm or deny the accuracy of the information and concludes with a BCS determination regarding the alleged infraction.

(ii) An informally verified infraction is not equivalent to a formal violation under 66 Pa.C.S. § 3301 (relating to civil penalties for violations) unless otherwise determined through applicable Commission procedures.

*Infraction*—A misapplication of a Commission regulation, particularly the standards and billing practices for residential service.

*Infraction rate*—The number of informally verified infractions, as determined by the BCS, per 1,000 residential customers.

*Justified informal consumer complaint*—A complaint where the BCS has determined that an NGDC did not follow Commission procedures or regulations.

*Justified informal consumer complaint rate*—The number of justified informal, residential consumer complaints, as determined by the BCS, per 1,000 residential customers.

*Justified payment arrangement request*—A payment arrangement request where an NGDC did not follow Commission negotiation procedures or regulations.

*Justified payment arrangement request rate*—The number of justified payment arrangement requests, as determined by the BCS, from residential customers per 1,000 residential customers.

*NGDC*—Natural gas distribution company.

*Payment arrangement request*—A customer request for payment terms to the BCS.

*Promptness*—The state or condition of acting or responding with speed or readiness to a customer's question, complaint, dispute or request. An example of promptness might be the NGDC responding to a customer's request for a premise visit with an appointment in 5 days rather than in 5 weeks.

*Small business customer*—A person, sole proprietorship, partnership, corporation, association or other business whose annual gas consumption does not exceed 300 Mcf.

*Timeliness*—The state or condition of acting at the appropriate or correct time as previously determined or promised when responding to a customer's question, complaint, dispute or request. An example of timeliness might be an NGDC representative arriving at the custom-

er's residence on the date and at the time previously agreed upon by the NGDC and the customer.

*Transaction survey*—A survey targeted toward individuals that have had a recent interaction with an NGDC.

### § 62.33. Reporting requirements.

#### (a) Report deadlines.

(1) Unless otherwise specified in this subchapter, each covered NGDC shall file its first report with the Commission on or before August 1, 2001. The August report shall contain data, reported by month, from the first 6 months of the calendar year, as well as a 6-month cumulative average.

(2) Each NGDC shall file its second report on or before February 1, 2002. The February report shall contain data, reported by month, from the second 6 months of the year as well as a 6-month cumulative average and a 12-month cumulative average for the preceding calendar year.

(3) Thereafter, the NGDCs shall file reports annually with the Secretary of the Commission on or before February 1.

(4) Each report shall contain data, reported by month, as well as a 12-month cumulative average for the preceding calendar year.

(5) Each report shall include the name and telephone number of the utility contact person responsible for the report.

(b) *Recordkeeping.* Each NGDC shall report the following data to the Commission:

#### (1) Telephone access.

(i) The percentage of calls answered at each NGDC's call center within 30 seconds with the NGDC representative ready to render assistance and to accept information necessary to process the call. An acknowledgment that the customer or applicant is waiting on the line does not constitute an answer.

(ii) The average busy-out rate for each call center. If the NGDC reports data for more than one call center, the NGDC should also provide the combined busy-out rate for the NGDC as a whole.

(iii) The call abandonment rate for each call center. If the NGDC reports data for more than one call center, the NGDC should also provide the combined call abandonment rate for the NGDC as a whole.

#### (2) Billing.

(i) The number and percent of residential bills that the NGDC failed to render once every billing period to residential ratepayers under § 56.11 (relating to billing frequency).

(ii) The number and percent of bills that the NGDC failed to render once every billing period to small business customers.

#### (3) Meter reading.

(i) The number and percent of residential meters for which the company has failed to obtain an actual or ratepayer supplied reading within the past 6 months to verify the accuracy of estimated readings under § 56.12(4)(ii) (relating to meter reading; estimated billing; or ratepayer readings).

(ii) The number and percent of residential meters for which the company has failed to obtain an actual meter

reading within the past 12 months to verify the accuracy of the readings, either estimated or ratepayer read under § 56.12(4)(iii).

(iii) The number and percent of residential remote meters for which it has failed to obtain an actual meter reading at least once every 5 years to verify the accuracy of the remote reading device under § 56.12(5)(i).

(4) *Response to disputes.* The actual number of disputes as described in Chapter 56, Subchapter F (relating to disputes; termination disputes; informal and formal complaints) for which the company did not provide a response to the complaining party within 30 days of the initiation of the dispute under § 56.151(5) (relating to general rule).

(c) *Comparison.* Each NGDC report to the Commission shall contain an analysis and comparison of the quality of service data in each performance area during the most recent report period with its previous service quality in these areas.

#### § 62.34. Customer surveys.

Each NGDC shall report to the Commission the results of telephone transaction surveys of customers who have had interactions with the NGDC.

(1) *Purpose.* The purpose of the transaction surveys shall be to assess the customer perception regarding the most recent interaction with the NGDC. Survey questions shall measure access to the utility, employe courtesy, employe knowledge, promptness of NGDC response or visit, timeliness of the NGDC response or visit and satisfaction with the handling of the interaction.

(2) *Questions.* The transaction survey questions shall specifically address the circumstances that generated the most recent transaction. Interaction categories shall include the following:

- (i) Credit/collection.
- (ii) Billing.
- (iii) Reliability and safety.
- (iv) Service installation and application.
- (v) Service disconnection.
- (vi) Other similar interactions.

(3) *Uniform data.* The NGDCs shall carry out the transaction survey process using survey questionnaires, sample selection procedures, methods of conducting the surveys and any other procedures associated with the survey to provide the Commission with uniform data that can be used to directly compare customer service performance among NGDCs in this Commonwealth.

(4) *Timely response.* A customer or consumer being surveyed shall be contacted within 30 days of the date that the interaction with the NGDC took place.

(5) *Sampling plan.* The sampling plan shall be designed so that the results are statistically valid within plus or minus 5 percentage points.

(6) *Commission approval.* On or before December 1, 2001, the Commission will approve the survey questionnaire, as well as procedures for case selection, sampling, conducting the survey, analyzing results and reporting to the Commission.

(7) *Timetable.*

(i) The first report on survey results shall be submitted to the Commission on or before October 1, 2002. The October report shall contain survey results, reported by month, from the first 6 months of the calendar year.

(ii) The second report shall be submitted on or before April 1, 2003. The April report shall contain results, reported by month, from the second 6 months of the previous year as well as cumulative 12-month results.

(iii) Thereafter, the NGDC shall submit survey results annually, on or before April 1.

(iv) Each annual report shall contain results reported by month as well as cumulative 12-month results.

#### § 62.35. NGDCs with fewer than 100,000 residential accounts.

Beginning September 1, 2002, each NGDC with less than 100,000 residential accounts shall report to the Commission the following information in lieu of §§ 62.33 and 62.34 (relating to reporting requirements; and customer surveys):

(1) The results of a mail survey of a sample of the NGDC customers who have had interactions with a representative of the NGDC. The survey sample shall consist of every 10th consumer who has contacted the company.

(2) The mail survey shall address the circumstances that generated the customer/company transaction

(3) Each NGDC shall use the same mail survey questionnaire which shall be developed by the BCS with advice from the relevant NGDCs. The mail survey questions shall measure customer perceptions regarding:

- (i) Access to the utility.
- (ii) Employe courtesy.
- (iii) Employe knowledge.
- (iv) Promptness and timeliness of the utility representative response.

(v) Satisfaction with the NGDC representative's handling of the interaction.

(4) The mail survey questionnaire shall be mailed to a customer within 30 days of the date that the transaction took place.

(5) The first report on survey results shall be submitted to the Commission on or before September 1, 2002. The September report shall contain survey results from the first 6 months of the calendar year.

(6) The second report shall be submitted on or before March 1, 2003, and shall contain survey results from the second 6 months of the calendar year.

(7) Thereafter, the NGDC shall submit survey results annually, on or before March 1.

#### § 62.36. Informal complaints to the BCS.

(a) The BCS will review and analyze residential informal consumer complaints and payment arrangement requests filed with the Commission and will report the justified informal consumer complaint rate and the justified payment arrangement request rate for each NGDC with more than 100,00 residential accounts to the Commission on an annual basis.

(b) The BCS will report to the Commission the number of informally verified infractions of applicable statutes and regulations relating to the treatment of residential accounts by each NGDC with more than 100,000 residential accounts. The BCS will calculate and report to the Commission an infraction rate for each NGDC with more than 100,000 residential accounts.

**§ 62.37. Public information.**

The Commission will annually produce a summary report on the customer service performance of each covered NGDC using the statistics collected as a result of these reporting requirements. The reports will be public information. The Commission will provide the reports to any interested party and post the reports on the Commission's World Wide Website.

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