

RULES AND REGULATIONS

Title 22—EDUCATION

STATE BOARD OF EDUCATION

[22 PA. CODE CH. 16]

Special Education for Gifted Students

The State Board of Education (Board) amends Chapter 16 (relating to special education for gifted students) to read as set forth in Annex A. Notice of proposed rulemaking was published at 37 Pa.B. 4872 (September 8, 2007), with an invitation to submit written comments.

Statutory Authority

The Board acts under the authority of sections 1372 and 2603-B of the Public School Code of 1949 (code) (24 P. S. §§ 13-1372—26-2603-B).

Background

These final-form regulations set forth requirements for gifted education programs and services in the public schools of this Commonwealth. They address the screening and evaluation process, gifted individualized education program, educational placement and procedural safeguards for students identified as gifted. As provided in section 1749-A of the code (24 P. S. § 17-1749), these final-form regulations do not apply to charter schools and cyber charter schools.

A committee of the Board held five regional public roundtable meetings during December 2006 and January 2007 where stakeholders were provided the opportunity to share their concerns about gifted education. The committee then circulated draft regulations and conducted three regional public hearings to solicit public input on the draft regulations in March 2007. Notices of the meetings were distributed to those on the Board's stakeholder list, school district superintendents, intermediate unit executive directors, area vocational technical school directors and others through the Department's PennLINK email system. Legal notices of the hearings were published in regional newspapers, public notice was posted on the Board web site and Sunshine Act notices were posted at the meeting sites. State education groups alerted their members and others about the meetings through e-mail distribution lists, web sites and publications.

Throughout the process of drafting the proposed and final-form regulations, the Board prepared and posted updated drafts on the Board's web site. The Chapter 16 Committee met in public meetings during 2007 on September 19, November 1 and November 14, and during 2008 on January 16, February 25 and March 19. Drafts of both the proposed and final-form regulations were reviewed and discussed at the meeting. Members of the public were provided opportunities to provide comments at these meetings.

Notice of proposed rulemaking was published at 37 Pa.B. 4872. The Board received comments from 47 individuals and organizations during the 30-day public comment period. Additionally, the Board received 21 letters and e-mails after the 30-day public comment period.

Summary of Public Comments and Responses to Proposed Rulemaking

The proposed rulemaking was published at 37 Pa.B. 4872 and was available on the Department of Education's

(Department) web site at www.pde.state.pa.us. The Board accepted formal written comments during a 30-day public comment period that began upon publication of the proposed rulemaking. The House Education Committee held a hearing on October 4, 2007. The Board also discussed the proposed amendments with numerous individuals, education groups and individual members of the General Assembly.

The Board received written comments directly from 47 individuals and organizations during the 30-day public comment period. An additional 21 comments were received after the comment period. Rather than provide a lengthy listing of the organizations and comments and responses in the Preamble, the Board has prepared a separate document that outlines the comments and the Board's response. This document was sent to each commentator and is posted on the Board web page of the Department's web site.

Summary of the Final-Form Regulations

A summary of substantive changes is provided as follows:

§ 16.1. Definitions.

The definition of "GIEP" is changed to "Gifted Individualized Education Plan."

§ 16.4. Strategic plans.

A requirement is added stipulating that the gifted education portion of each school district's strategic plan address the process for identifying children who are gifted and in need of specially designed instruction. It also is to outline the gifted special education programs offered by the school district and to provide the Department with reports of students, personnel and program elements.

§ 16.6. General supervision.

The final-form regulations add a requirement that the Department conduct onsite monitoring of school entities to ensure compliance with this chapter, as well as an obligation to establish a complaint procedure for parents to file complaints and school districts to respond. The Department is directed to outline the process and schedule for monitoring in a Basic Education Circular (BEC), which would become available on the Department's web site with other BECs. The Department also must report to the Board, by October 1 of each year, the number and disposition of complaints filed and the schedule and results of monitoring activities.

§ 16.7. Special education.

A new requirement is added stipulating the development of a single Individualized Education Program for students who are both gifted and have a disability under Chapter 14 (relating to special education services and programs).

§ 16.21. General.

The final-form regulations add new language outlining the types of awareness activities that school districts are to conduct each year to inform parents about gifted education. Additional new language clarifies the criteria each school district shall use to determine whether a student is mentally gifted. Also, new language is added stipulating that deficits in memory or processing cannot be the sole basis for determining that a student is ineligible for gifted education services. Finally, new lan-

guage was added referring to the Federal definition of disabilities in 34 CFR 300.8 (relating to child with a disability).

§ 16.22. Gifted multidisciplinary evaluation.

The final-form regulations require school districts to have readily available an evaluation request form that professional staff and administrators can provide to parents who request an evaluation of their child. The final-form regulations require the parent be provided the evaluation request form within 10 calendar days of an oral request. Additionally, this section adds a requirement that the Gifted Multidisciplinary Team include, in its written report, its recommendations for each student's educational programming. This section also revises the number of days in which the initial student evaluation must be completed from 45 school days to 60 calendar days after the school receives written parental consent for the evaluation or an order of a court or hearing officer. The calendar days from the day after the last day of the spring school term up to and including the day before the first day of the subsequent fall school term will not be counted. This aligns the time frame with the requirements of Chapter 14 so that school districts have just one standard to follow.

§ 16.23. Gifted multidisciplinary reevaluation.

New language provides that the reevaluation be completed and presented to parents no later than 60 calendar days after the school district receives written permission to reevaluate. The calendar days from the day after the last day of the spring school term up to and including the day before the first day of the subsequent fall school term will not be counted.

§ 16.31. General.

The final-form regulations revise this section to "grandfather" students already receiving gifted education services at the time these final-form regulations become effective.

§ 16.32. GIEP.

The final-form regulations require present education levels to be included in both the initial and all revisions to the GIEP. Additionally, this section adds a requirement that a teacher of the gifted be included on the GIEP team. The final-form regulations also require that the GIEP be based on the gifted multidisciplinary team's written report. New language is also added to require the GIEP to include accommodations and modifications as required by Federal regulation in 34 CFR 300.320(a)(4) (relating to definition of individualized education program) for students with a disability identified as eligible under the Federal regulation in 34 CFR 300.8. Additional language is added requiring the GIEP to include the anticipated frequency, and location of gifted education. New language is also added to require the school to notify teachers of their responsibilities to each of their students who are identified as gifted as provided in the students' GIEP. Finally, the final-form regulations add language requiring a GIEP meeting to be convened at the request of a GIEP team member, the parent, the student or the school district.

§ 16.41. General.

The final-form regulations revise the total number of gifted students on an individual gifted teacher's caseload from 75 to 65 and stipulate that this change occur beginning July 1, 2010. They require the total number of gifted students on an individual teacher's class roster to remain at the current level of 20 students. These changes

reflect feedback provided from schools regarding the current caseload and class roster limitations.

§ 16.63. Impartial due process hearing.

The final-form regulations require a student involved in a due process hearing to remain in his current educational placement until the outcome of the hearing, unless the school district and the parent of the student agree otherwise. It also adds language allowing a school district to request a hearing to proceed with an initial evaluation or reevaluation when a parent fails to respond to the district's proposed evaluation or reevaluation. Additionally, these regulations permit a school district to request an impartial due process hearing when a parent rejects the district's proposed educational placement that is different from the initial placement. The final-form rule-making further stipulates that if the parent fails to respond or refuses to consent to the initial provision of gifted services, neither due process nor mediation may be used to obtain agreement or a ruling that the services may be provided.

The final-form regulations provide for the compensation of hearing officers for hearings related to a child who is gifted or thought to be gifted. Additional language is added stating that the compensation of hearing officers does not cause them to become employees of the Department.

Additionally, the final-form regulations require the Department to provide an annual report to the Board as to the number and summarized results of the due process hearings. The report must also include actions taken by the Department as well as future plans to strengthen the due process hearings.

Finally, the final-form regulations require the school district, upon receipt of a final decision from the hearing officer or court, to provide to the Department an assurance of its implementation of an order within 30 school days of the date of the final decision.

Effective Date

The final-form regulations are effective upon publication in the *Pennsylvania Bulletin*.

Sunset Date

In accordance with its policy and practice regarding regulations, the Board will review the effectiveness of this chapter after 4 years. Therefore, no sunset date is necessary.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on August 23, 2007, the Board submitted a copy of the notice of proposed rulemaking, published at 37 Pa.B. 4872, to IRRC and the Chairpersons of the House and Senate Committees on Education (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 the final-form regulations, the Department has considered all comments from IRRC, the Committees and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), on September 17, 2008, the final-form regulations were deemed approved by the Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on September 18, 2008, and approved the final-form regulations.

Contact Person

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

Affected Parties

The final-form regulations will affect the students and professional employees of public schools in this Commonwealth.

Findings

The Board finds that:

(1) Public notice of the intention to adopt these final-form 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, 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 final-form regulations are necessary and appropriate for the administration of the code.

Order

The Board, acting under authorizing statute, orders that:

(a) The regulations of the Board, 22 Pa. Code Chapter 16, are amended by amending §§ 16.1, 16.4, 16.6, 16.7, 16.21—16.23, 16.31, 16.32, 16.41 and 16.63 to read as set forth in Annex A.

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

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

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

(Editor's Note: The amendment of § 16.1 was not included in the proposed rulemaking at 37 Pa.B. 4872.)

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 38 Pa.B. 5509 (October 4, 2008).)

Fiscal Note: Fiscal Note 6-307 remains valid for the final adoption of the subject regulations.

JIM BUCKHEIT,
Executive Director

Annex A

TITLE 22. EDUCATION

PART I. STATE BOARD OF EDUCATION

Subpart A. MISCELLANEOUS PROVISIONS

CHAPTER 16. SPECIAL EDUCATION FOR GIFTED STUDENTS

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 Plan.

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—

(i) 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).

(ii) The 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.

§ 16.4. Strategic plans.

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

(b) Each school district shall address the following in its gifted education plan:

- (1) The process for identifying children who are gifted and in need of specially designed instruction.
- (2) The gifted special education programs offered.
- (c) 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.

§ 16.6. General supervision.

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

(d) The Department will conduct onsite monitoring of school districts on a cyclical basis, or more frequently when necessary, to ensure school district implementation of this chapter. The Department will outline the process and schedule for monitoring in a Basic Education Circular (BEC). The BEC will include:

- (1) A description of the elements to be reviewed and the criteria for determining compliance with each element.
- (2) A process and procedure to present the monitoring findings to school districts.
- (3) A process for school districts to respond to monitoring findings.
- (4) A process for resolution of findings, which may include a requirement that school districts develop corrective action plans.

(e) The Department will establish a complaint process that includes:

- (1) A process for parents or guardians to file complaints and for school districts to respond.
- (2) An opportunity for the district and parent to reach amicable resolution of the issue or, if necessary, a process for the Department to determine the validity of complaints.
- (3) Development of an individual corrective action plan, if necessary, to address and correct findings of a valid complaint against a school district.
- (4) Enumeration of enforcement steps to be employed by the Department if the district does not implement the corrective action.
- (f) The Department will report to the Board, by October 1 of each year, the number and disposition of complaints filed and the schedule and results of monitoring activities.

§ 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 under Chapter 14 (relating to special education services and programs) and sections 601—619 of the Individuals with Disabilities Education Act (20 U.S.C.A. §§ 1400—1419).

(b) If a student is determined to be both gifted and eligible for special education, the procedures in Chapter 14 take precedence. For these students identified with dual exceptionalities, the needs established under gifted status in this chapter shall be fully addressed in the procedures required in Chapter 14.

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

(d) A single IEP shall be developed and implemented, revised and modified in accordance with this chapter and Chapter 14, for students who are identified as eligible under this chapter and Chapter 14.

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. Awareness activities shall be conducted annually and include providing information in local newspapers, other media, student handbooks and on the school district web site.

(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 or when multiple criteria as set forth in this chapter and in

Department Guidelines indicate gifted ability. Determination of gifted ability will not be based on IQ score alone. Deficits in memory or processing speed, as indicated by testing, cannot be the sole basis upon which a student is determined to be ineligible for gifted special education. 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 must 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 judgment.

(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, disabilities defined in 34 CFR 300.8 (relating to child with a 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 must be in writing. The school district shall make the permission to evaluate form readily available for that purpose. If a request is made orally to any professional employee or administrator of the school district, that individual shall provide a copy of the permission to evaluate form to the parents within 10 calendar days of the oral request.

(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 must 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 must 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 that brings together the information and findings from the evaluation or reevaluation concerning the student's educational needs and strengths. The report must make recommendations as to whether the student is gifted and in need of specially designed instruction, indicate the basis for those recommendations, include recommendations for the student's programming and indicate the names and positions of the members of the GMDT.

(i) The GMDT shall determine eligibility as defined in §§ 16.1 and 16.21 (relating to definitions; and general).

(j) The initial evaluation shall be completed and a copy of the evaluation report presented to the parents no later than 60 calendar days after the agency receives written parental consent for evaluation or receives an order of a court or hearing officer to conduct a multidisciplinary evaluation, except that the calendar days from the day after the last day of the spring school term up to and

including the day before the first day of the subsequent fall school term may not be counted.

§ 16.23. Gifted multidisciplinary reevaluation.

(a) Gifted students shall be reevaluated before a change in educational placement is recommended for the student. In addition, gifted students may be reevaluated at any time under recommendation by the GIEP team.

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

(c) Reevaluations must 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.

(d) The reevaluation timeline for gifted students will be 60 calendar days, except that the calendar days from the day after the last day of the spring school term up to and including the day before the first day of the subsequent fall school term may not be counted.

GIEP

§ 16.31. General.

(a) A GIEP is a written plan describing the education to be provided to a gifted student. The initial GIEP must be based on and be responsive to the results of the evaluation and 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 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 prior to July 1, 2008, shall continue to receive gifted education until the student meets one of the following conditions:

- (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) The GIEP team, in accordance with the requirements of this chapter shall, based upon the evaluation report, develop an initial GIEP 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, present levels of educational performance, as well as on information in the most recent evaluation.

(b) Each GIEP team must 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.

(6) A teacher of the gifted.

(c) 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 must 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.

(d) The GIEP of each gifted student shall be based on the GMDT's written report and 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. For a student with disability identified as eligible under 34 CFR 300.8 (relating to child with a disability), this would include accommodations and modifications in accordance with 34 CFR 300.320(a)(4) (relating to definitions of individualized education program).

(4) Projected dates for initiation anticipated frequency, location 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.

(e) 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).

(f) The school district shall notify teachers who work with a student who has been identified as gifted and in need of specially designed instruction of their responsibilities under the student's GIEP.

(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.

(4) A GIEP team meeting shall also be convened at the request of a GIEP team member, the parent, the student or the school district.

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 must:

(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 must 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 that can be on an individual gifted teacher's caseload to a maximum of 75 students. Beginning July 1, 2010, the total number of gifted students that can be on an individual gifted teacher's caseload is limited to a maximum of 65 students.

(4) Limit the total number of gifted students that 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.

PROCEDURAL SAFEGUARDS

§ 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. Unless the school district and the parent of the child agree otherwise, the child involved in the hearing shall remain in the child's current educational placement pending the outcome of the hearing.

(b) A school district may request a hearing to proceed with an initial evaluation or a reevaluation when a parent fails to respond to the district's proposed evaluation or reevaluation. When a parent rejects the district's proposed educational placement, other than the initial placement, the school district may request an impartial due process hearing. If the parent fails to respond or refuses to consent to the initial provision of gifted services, neither due process nor mediation may be used to obtain agreement or a ruling that the services may be provided.

(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 must be set forth in the form provided for requesting a hearing.

(d) The hearing must be an oral, personal hearing and 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 must include findings of fact, a discussion and conclusions of law. Although technical rules of evidence will not be followed, the decision must 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 court of competent jurisdiction. In notifying the parties of the decision, the hearing officer 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 for hearings related to a child who is gifted or thought to be gifted. The coordination services may

include arrangements for stenographic services, arrangements for hearing officer services (including the compensation of hearing officers), scheduling of hearings and other functions in support of procedural consistency and the rights of the parties to hearings.

(2) A hearing officer may not be an employee 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. The compensation of hearing officers does not cause them to become employees of the Department.

(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 must include the qualifications of each hearing officer. School districts shall provide parents with information as to the availability of the list and make copies of it available upon request.

(p) The Department will report to the Board by October 1 each year on the number of impartial due process hearings held during the previous school year. The report will also provide a Statewide summary of the results of the hearings in a manner that will not violate the confidentiality of children and families. The report will also address actions taken during the previous school year and future plans to strengthen the activities of due process hearings.

(q) Upon receipt of a final decision from a hearing officer or a court, the school district shall provide to the Department an assurance of its implementation of the order. The assurance shall be filed within 30 school days of the date of the final decision.

[Pa.B. Doc. No. 08-1965. Filed for public inspection October 31, 2008, 9:00 a.m.]

Title 34—LABOR AND INDUSTRY

DEPARTMENT OF LABOR AND INDUSTRY

[34 PA. CODE CH. 33]

Mines and Other Excavations

In accordance with sections 2(f) and 12 of the act of May 18, 1937 (P. L. 654, No. 174) (43 P. S. §§ 25-2(f) and 25-12), the Department of Labor and Industry (Department) rescinds Chapter 33 (relating to mines and other excavations).

The regulations in Chapter 33 are unnecessary and redundant. The Department of Environmental Protection (DEP) is now the administrative agency responsible for implementing section 2(f) of the act. The Environmental Quality Board (EQB) has promulgated regulations implementing section 2(f) of the act. See 25 Pa. Code Chapter 207 (relating to noncoal underground mines).

Proposed Rulemaking Omitted

The Department finds that notice of proposed rulemaking is unnecessary, under section 4 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. § 1204). The regulations being rescinded are unnecessary, redundant and no longer enforceable. These regulations were superseded by new regulations enacted by the EQB and therefore are no longer in use or enforced. The Department no longer has the authority to enforce the existing regulations.

Statutory Authority

This rulemaking is issued under the authority provided by sections 2(f) and 12 of the act. Section 2(f) of the act requires all pits, quarries, mines other than coal mines, trenches and other excavations to be operated and conducted to provide adequate protection to workers. Section 12 of the act gives the Department the authority to promulgate implementing regulations.

Background

The Department was originally responsible for administering and enforcing section 2(f) of the act. To implement this section, the Department promulgated Chapter 33. Authority to administer and enforce these provisions and the rulemaking authority under section 2(f) of the act was transferred to DEP (formerly the Department of Environmental Resources) in 1975. Reorganization Plan No. 2 of 1975 (71 P. S. § 751-22). DEP continued to enforce regulations found in Chapter 33 to apply section 2(f) of the act to underground noncoal mines and mined-out underground noncoal mines used to house other businesses. The EQB promulgated regulations that would implement section 2(f) of the act under sections 2(f) and 12 of the act, Reorganization Plan No. 2 of 1975 (71 P. S. § 751-22) and sections 1917-A and 1920-A of The Administrative Code of 1929 (71 P. S. §§ 510-17 and 510-20). DEP and the EQB have promulgated regulations in 25 Pa. Code Chapter 207. Accordingly, the provisions of Chapter 33 are unnecessary and redundant.

Affected Persons

Owners and operators are now required to comply with the regulations issued by the EQB at 34 Pa.B. 2041 (April 10, 2004). DEP had jurisdiction over pits, quarries and mines since 1975. There is no impact to the Department or persons regulated by it.

Fiscal Impact

Owners and operators would have to comply with the costs of the regulations issued by DEP and the EQB. There is no impact on the Department or persons regulated by it.

Reporting, Recordkeeping and Paperwork Requirements

Owners and operators are required to comply with DEP's requirements. There is no impact on the Department or persons regulated by it.

Executive Order 1996-1, Regulatory Review and Promulgation

DEP engaged in public outreach in developing the amendments to its regulations, implementing section 2(f) of the act. The Department determined that it was unnecessary to duplicate DEP's outreach efforts. The Department coordinated this rulemaking with DEP.

Purpose and Summary

This rulemaking would rescind Chapter 33.

Sunset Date

A sunset date is not appropriate. The Department is rescinding Chapter 33.

Effective Date

The rescission of Chapter 33 becomes effective upon publication of this order in the *Pennsylvania Bulletin*.

Contact Person

The contact person is Edward Leister, Director, Bureau of Occupational and Industrial Safety, Department of Labor and Industry, Room 1613, Labor and Industry Building, 7th and Forster Streets, Harrisburg, PA 17120, eleister@state.pa.us.

Regulatory Review

Under section 5.1(c) of the Regulatory Review Act (71 P. S. § 745.5a(c)), on September 10, 2008, the Department submitted a copy of the final-form regulations, proposed rulemaking omitted, to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the Senate Committee on Labor and Industry and the House Labor Relations Committee (Committees). In addition to submitting the final-form regulations, the Department also provided IRRC and the Committees with a copy of a detailed Regulatory Analysis Form prepared by the Department.

Under section 5.1(j.1)—(j.3) of the Regulatory Review Act, these final-form regulations were deemed approved by the House and Senate Committees on October 15, 2008. IRRC met on October 16, 2008 and approved the rescission in accordance with section 5.1(e) of the Regulatory Review Act.

Findings

The Department finds that:

(1) Good cause exists for rescission of these regulations through omission of notice of proposed rulemaking under section 204 of the act of July 31, 1968 (P. L. 769, No. 240) and the regulations thereunder, 1 Pa. Code § 7.4.

(2) The rescission of the regulations in the manner provided in this order is necessary and appropriate for the administration and enforcement of the authorizing statute.

Order

The Department, acting under authorizing statute, orders that:

(a) The regulations of the Department, 34 Pa. Code Chapter 33, are amending by deleting §§ 33.1—33.7, 33.11—33.15, 33.21—33.27, 33.31—33.38, 33.41—33.43, 33.51—33.58, 33.61—33.65, 33.71, 33.72, 33.81—33.84, 33.91—33.94, 33.111—33.117, 33.121—33.130, 33.141—33.148, 33.151, 33.161—33.165, 33.171—33.178, 33.181—33.187, 33.191—33.193, 33.201, 33.202, 33.211—33.214, 33.221—33.225, 33.231—33.238, 33.241, 33.242, 33.251—33.255, 33.261—33.263, 33.271—33.276, 33.281—33.289, 33.291—33.297, 33.301 and 33.311—33.319 to read as set forth in Annex A.

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

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

(d) This order shall become effective upon final-form publication in the *Pennsylvania Bulletin*.

SANDI VITO,
Acting Secretary

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 38 Pa.B. 6123 (November 1, 2008).)

Fiscal Note: 12-83. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 34. LABOR AND INDUSTRY

PART I. DEPARTMENT OF LABOR AND INDUSTRY

CHAPTER 33. (Reserved)

(Editor's Note: The Department is deleting Chapter 33 in its entirety. The present text of Chapter 33 appears at 34 Pa. Code §§ 33.1—33.319, pages 33-1—33-80, serial pages (237723) to (237800) and (242045) to (242046).)

§§ 33.1—33.7. (Reserved).

§§ 33.11—33.15. (Reserved).

§§ 33.21—33.27. (Reserved).

§§ 33.31—33.38. (Reserved).

§§ 33.41—33.43. (Reserved).

§§ 33.51—33.58. (Reserved).

§§ 33.61—33.65. (Reserved).

§§ 33.71, 33.72. (Reserved).

§§ 33.81—33.84. (Reserved).

§§ 33.91—33.94. (Reserved).

§§ 33.111—33.117. (Reserved).

§§ 33.121—33.130. (Reserved).

§§ 33.141—33.148. (Reserved).

§ 33.151. (Reserved).

§§ 33.161—33.165. (Reserved).

§§ 33.171—33.178. (Reserved).

§§ 33.181—33.187. (Reserved).

§§ 33.191—33.193. (Reserved).

§§ 33.201, 33.202. (Reserved).

§§ 33.211—33.214. (Reserved).

§§ 33.221—33.225. (Reserved).

§§ 33.231—33.238. (Reserved).

§§ 33.241, 33.242. (Reserved).

§§ 33.251—33.255. (Reserved).

§§ 33.261—33.263. (Reserved).

§§ 33.271—33.276. (Reserved).

§§ 33.281—33.289. (Reserved).

§§ 33.291—33.297. (Reserved).

§ 33.301. (Reserved).

§§ 33.311—33.319. (Reserved).

[Pa.B. Doc. No. 08-1966. Filed for public inspection October 31, 2008, 9:00 a.m.]

Title 58—RECREATION

FISH AND BOAT COMMISSION

[58 PA. CODE CH. 65]

Fishing

The Fish and Boat Commission (Commission) amends Chapter 65 (relating to special fishing regulations). The Commission is publishing this final-form regulation under the authority of 30 Pa.C.S. (relating to the Fish and Boat Code) (code).

A. *Effective Date*

The final-form regulation will go into effect on January 1, 2009.

B. *Contact Person*

For further information on the final-form rulemaking, contact Laurie E. Shepler, Esq., P. O. Box 67000, Harrisburg, PA 17106-7000, (717) 705-7810. This final-form rulemaking is available on the Commission's web site at www.fish.state.pa.us.

C. *Statutory Authority*

The addition of § 65.19 (relating to approved trout waters open to year-round fishing) is published under the statutory authority of section 2102(a) of the code (relating to rules and regulations).

D. *Purpose and Background*

The final-form regulation is designed to improve, enhance and update the Commission's fishing regulations. The specific purpose of the regulation is described in more detail under the summary of changes.

E. *Summary of Changes*

Currently, there are a number of waters listed in the *Pennsylvania Fishing Summary* as approved trout waters open to year-round fishing. These waters are regulated the same as approved trout waters except that they are open to fishing from March 1 through the opening day of trout season. Fishing for trout is permitted during this period, but no trout may be taken or possessed. In a recent review of the Commission's regulations, staff discovered that this special regulation program was never formally adopted by the Commission. To correct this oversight, the Commission proposed that a new section in Chapter 65 be adopted, thereby formally establishing this regulatory program.

Under the proposed rulemaking, it is unlawful to fish in waters designated as approved trout waters open to year-round fishing except in compliance with the prescribed seasons and size and creel limits. It is not a violation of the proposed rulemaking if a trout is immediately returned unharmed to the waters from which it is taken. The proposed rulemaking further provided that it is unlawful to fish in waters designated as approved trout waters open to year-round fishing without a current trout/salmon permit.

Based upon the public comments that were received and upon further consideration of the trout/salmon permit requirement, the Commission adopted the final-form regulation to limit the trout/salmon permit requirement to designated rivers and streams and chose not to require a permit to fish in designated lakes and ponds unless a person takes, kills or possesses, while in the act of fishing, a trout or salmon on or in these waters. As recognized by several of the individuals who submitted public comments, there will be anglers who will fish these

waters for species other than trout. In addition, limiting the permit requirement to designated rivers and streams is consistent with the current regulation (§ 63.20(e) (relating to permits for the protection and management of trout and salmon)) that provides that a person fishes for trout or salmon and therefore is required to have a permit when the person fishes in streams or rivers that are approved trout waters or their tributaries during the period 12:01 a.m. on March 1 until midnight May 31.

The Commission adopted the regulation to read as set forth in Annex A.

F. *Paperwork*

The final-form regulation will not increase paperwork and will not create new paperwork requirements.

G. *Fiscal Impact*

The final-form regulation will have no adverse fiscal impact on the Commonwealth or its political subdivisions. The final-form regulation will impose no new costs on the private sector or the general public.

H. *Public Comments*

A notice of proposed rulemaking was published at 38 Pa.B. 1588 (April 5, 2008). Prior to the formal public comment period, the Commission received two comments opposing the trout/salmon permit requirement because there are anglers who will fish these waters for species other than trout. The Commission received a total of four comments during the formal comment period—three generally support the program and one opposed the permit requirement. After the public comment period, the Commission received one comment opposing the permit requirement. Copies of all public comments were provided to the commissioners.

Findings

The Commission finds that:

(1) Public notice of intention to adopt the regulation adopted 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 promulgated thereunder, 1 Pa. Code §§ 7.1 and 7.2.

(2) A public comment period was provided, and the comments that were received were considered.

(3) The adoption of the regulation of the Commission in the manner provided in this order is necessary and appropriate for administration and enforcement of the authorizing statutes.

Order

The Commission, acting under the authorizing statutes, orders that:

(a) The regulations of the Commission, 58 Pa. Code Chapter 65, are amended by adding § 65.19 to read as set forth in Annex A.

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

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

(d) This order shall take effect on January 1, 2009.

DOUGLAS J. AUSTEN, Ph.D.,
Executive Director

Fiscal Note: Fiscal Note 48A-200 remains valid for the final adoption of the subject regulation.

Annex A
TITLE 58. RECREATION
PART II. FISH AND BOAT COMMISSION
Subpart B. FISHING

CHAPTER 65. SPECIAL FISHING REGULATIONS

§ 65.19. Approved trout waters open to year-round fishing.

(a) The Executive Director, with the approval of the Commission, may designate waters as approved trout

waters open to year-round fishing. The designation of waters as approved trout waters open to year-round fishing shall be effective upon publication of a notice of designation in the *Pennsylvania Bulletin*.

(b) It is unlawful to fish in waters designated as approved trout waters open to year-round fishing except in compliance with the following seasons and size and creel limits. It is not a violation of this section if a trout is immediately returned unharmed to the waters from which it is taken.

<i>SPECIES</i>	<i>SEASONS</i>	<i>MINIMUM SIZE</i>	<i>DAILY LIMIT</i>
ALL SPECIES OF TROUT AND SALMON (except landlocked Atlantic salmon)	Regular Season: 8 a.m. first Saturday after April 11 (or the first Saturday after March 28 for waters in the Regional Opening Day of Trout Season Program) to midnight Labor Day	7 inches	5 (combined species)
	Extended Season: 12:01 a.m. day after Labor Day to midnight last day of February of the following year.	7 inches	3 (combined species)
	12:01 first day of March to first Saturday after April 11 (or the first Saturday after March 28 for waters in the Regional Opening Day of Trout Season Program)		NO HARVEST —Catch and immediate release only

(c) It is unlawful to fish in rivers and streams designated as approved trout waters open to year-round fishing without a current trout/salmon permit. A trout/salmon permit is not required to fish in lakes and ponds that have been designated as approved trout waters open to year-round fishing unless the person takes, kills or possesses, while in the act of fishing, a trout or salmon on or in these waters.

[Pa.B. Doc. No. 08-1967. Filed for public inspection October 31, 2008, 9:00 a.m.]