

RULES AND REGULATIONS

Title 22—EDUCATION

STATE BOARD OF EDUCATION

[22 PA. CODE CH. 4]

Academic Standards and Assessment

The State Board of Education (Board) amends Chapter 4 (relating to academic standards and assessment) to read as set forth in Annex A. Notice of proposed rule-making was published at 38 Pa.B. 2270 (May 17, 2008).

Statutory Authority

The Board acts under the authority of sections 2603-B and 2604-B of the Public School Code of 1949 (School Code) (24 P. S. §§ 26-2603-B and 2604-B).

Background

Over the past 45 years the Board, through regulation, has set State requirements for instruction, assessment and high school graduation. These policies have changed relatively infrequently when compared to education policy changes made during the same period in other states. The Board first established high school graduation requirements in 1964. It required students to earn 13 academic credits in English, math, science, social studies, health and physical education in grades 10–12. Next, as directed by the General Assembly, the Board established ten Goals of Quality Education (1965). The goals described what quality education programs should include. These goals were later revised to provide additional detail and expanded to become 12 Goals of Quality Education (1974). Nineteen years later the Board established 53 student learning outcomes (1993). The outcomes were further expanded into the current curriculum framework, which is based upon 12 sets of State academic standards (1999).

In tandem with it setting graduation requirements, education quality goals, outcomes and academic standards, the Board, through its regulations, developed several assessment strategies starting with the Educational Quality Assessment (EQA), which began in 1970 and continued through 1988. EQA assessed school level performance in reading, writing, math, science, social studies, health, environment, analytical thinking, self concept in school and work opportunities and attitudes. In 1984, a student-based competency testing program, called Testing for Essential Learning and Literacy Skills (TELLS), was added. TELLs was administered through 1991. TELLs was designed to assess reading and math skills attainment for the purpose of targeting State resources to schools to be used to remediate students who were identified by TELLs as performing below grade level.

In 1992 the Pennsylvania System of School Assessment (PSSA) replaced TELLs. The PSSA, like EQA, assessed school-level performance. The PSSA assessed school-level performance in reading, writing and math. In January 1999 the Board promulgated its Chapter 4 regulations. These regulations made two major changes to the PSSA. First was to restructure the PSSA to become a criterion-referenced assessment—that is to measure attainment of the State academic standards. The PSSA was also restructured to provide measurement of both individual student and school-level performance.

With passage of the State Education Empowerment Act (24 P. S. §§ 17-1701-B—1716-B) and Federal No Child Left Behind Act of 2001 (Pub. L. No. 107-110), the PSSA was extended to assess additional grade levels, include science, and used to hold schools and districts accountable for student academic achievement.

With rare exceptions, each time the Board sought to revise these policies over the past 45 years, some stakeholders vigorously opposed the changes. This has certainly been the case with these regulations; though there is also strong support. The regulations have been endorsed by editorial boards of major daily newspapers, superintendents from districts across this Commonwealth, and postsecondary and business leaders who voice concerns about the skill level of recent high school graduates. Ambassador Dan Rooney, who testified at a public hearing of the Board in Westmoreland County, said the Commonwealth's young people "must be immediately ready to compete within a global marketplace by providing the skills, work ethic, and determination that has made the American workforce the pride of the world." Yet the Central Pennsylvania Workforce Investment Board noted that the current system of graduation requirements results in "poor performance, an inability to compete, high employee turnover and lost productivity, profits and wages."

The current State policy has now been in place 10 years, since January 1999. While this policy, together with State, local and Federal resources and supports, has produced significant increases in student achievement at the elementary and middle school levels, the policy has not yielded similar gains at the high school level. One-quarter of our students do not graduate from high school on time or at all. More than 40% of those who graduate—more than 50,000 students each year—are awarded diplomas without having passed the State's 11th-grade reading, writing and math tests. Fewer than half of our high school graduates enroll in college upon graduation and only 37% make it to their sophomore year. One-in-three high school graduates who enroll in a State-owned university or community college require remedial English or math. The cost of the remedial courses at these institutions exceeds \$26.4 million each year. This total does not include remediation costs incurred by students enrolled in the State-related universities or independent colleges.

As requested by the House Education Committee and Independent Regulatory Review Commission (IRRC), the Department of Education (Department) engaged the College of Education at Penn State University to review local assessments used by school districts to determine whether their candidates for high school graduation were proficient in reading, writing and math as required by the Chapter 4 regulations. Of 418 districts that responded to the Secretary's request for copies of their local assessments, Penn State researchers found that only 18 have graduation requirements based on tests that are both aligned with State academic standards and uniformly administered to students.

This problem is widespread across this Commonwealth. Continuing to send students into the world who are inadequately prepared limits economic opportunity for tens of thousands of graduates each year. It limits their ability to earn a living wage; it erodes the Commonwealth's overall economic competitiveness, and reduces our future tax base thereby reducing resources available

for vital government services. Every student must graduate from high school with the knowledge and skills that are essential for college and career success if our Commonwealth's economy is to fulfill its promise.

To address this concern, in September 2005 Governor Rendell established the Commission on College and Career Success. Among its charges was to define "college and career ready" in mathematics, English and science; to make specific recommendations for better alignment of academic standards and assessments across the secondary and postsecondary educational sectors, as well as industry in this Commonwealth; and encourage local school districts to adopt a core high school curriculum for all students in this Commonwealth.

The Commission delivered its report in December 2006. The Board then conducted outreach activities including six regional public roundtable meetings and one public hearing before it published proposed regulations in the *Pennsylvania Bulletin* in May 2008. The proposed regulations modified the Commission's recommendation to reflect the considerable public input provided to the Board during its public outreach effort.

This proposal, particularly regarding the assessment requirements and changes to high school graduation requirements, caused considerable controversy among stakeholders and state policymakers. The Board received written comments from 938 individuals and organizations during the 30-day public comment period. To provide additional time to consider and discuss the issue, the General Assembly, through Act 61 of 2008 placed a 1-year moratorium on the promulgation of final regulations. See 24 P. S. § 1-117 (relating to prohibition of certain regulations for the 2008-2009 fiscal year). During this period and after the moratorium expired, stakeholders continued to submit comments to the Board, legislators and IRRC.

Over the past year several commentators have questioned the authority of the Board to promulgate regulations that establish Statewide high school graduation requirements. Several expressed concern that section 1611 of the School Code (24 P. S. § 16-1611) vests the authority to award academic degrees with locally elected school boards. However, Article XXVI-B of the School Code (24 P. S. §§ 26-2601-B—26-2606B) in section 2604.B provides "(b) The Council of Basic Education shall have the power, and its duty shall be to: (2) . . . formulate policy proposals in all educational areas not within the purview of higher education, including, but not limited to. . . (v) admission, attendance, graduation and other separation requirements." The Board's authority stems from the explicit authority given to the Council of Basic Education to formulate policy regarding graduation and other separation requirements. Since its inception in 1963, the Board has set Statewide high school graduation requirements which have included successful completion of a specified number of academic credits including designated courses. These two provisions are not exclusive, rather they work together. The Board is provided authority to establish "graduation and other separation requirements." The Board, through Chapter 4, has provided local school districts authority to establish graduation requirements consistent with § 4.24. The Board is now strengthening those requirements. However, local school boards continue to retain authority to award diplomas (academic degrees) to students who meet State and local graduation requirements. Under these regulations local school boards continue to have authority to award diplomas to students who meet State and local graduation requirements.

In early 2009, the Chairpersons of the House and Senate Education Committees (Committees) brought together stakeholders along with representatives of the Department and Board to determine whether common ground existed on which to develop an agreement.

In addition, Board leadership engaged in additional outreach activities, including holding six additional regional public hearings, meetings with education groups, business officials, legislators and others that led to the March 2009 announcement of a joint agreement among the Board, the Department and the Pennsylvania School Boards Association (PDE-PSBA-SBE agreement). The new proposal renamed the State end-of-course tests "Keystone Exams," provided for the voluntary use of Keystone Exams, extended flexibility in districts choosing to use local assessments and directed the Department to provide technical guidance to school districts choosing to use local assessments.

In the midst of this effort, the Senate approved Senate Bill 281, Printers Number 1074, which would require the General Assembly to approve all future changes to the Board's high school graduation policies, following the Department's approval of a contract to develop Graduation Competency Assessments, model curriculum and diagnostic tools.

During the same period, the Board's Chairperson, Joe Torsella, pledged to work with the Chairpersons of the Committees to develop common ground regulation. He also promised to provide the Committees an opportunity to review the final regulation before presenting these to the Board for approval or transmitting the regulation for formal action by the Committees. Secretary Zahorchak then sent letters to the Committee Chairpersons committing to place a hold on contracted test development until the final regulations were approved.

Soon after the PDE-PSBA-SBE agreement was announced, a coalition of education and advocacy groups, named the Coalition for Effective and Responsible Testing (CERT), announced its own proposal. Discussions ensued in earnest between Board leadership and CERT, legislators and others. The result was a new proposal based upon combined elements of the PDE-SBE-PSBA agreement and CERT proposal.

The new proposal was publicly announced July 9, 2009. The proposal was transmitted to the majority and minority Chairpersons of the Committees to provide an opportunity for their review and comment prior to formal submission of the final regulations. On July 29, 2009, the Senate Education Committee adopted, by a vote of 10—1, Senate Resolution 156, which encouraged the Board to adopt the final-form regulations to ensure that this Commonwealth's high school diploma provides graduates with the tools to compete in the 21st Century.

In addition to the Senate Education Committee, the proposal has been endorsed by the Chairperson of the House Education Committee, the editorial boards of the *Philadelphia Inquirer* and *Pittsburgh Post-Gazette*, Pennsylvania Partnerships for Children, and 35 superintendents from across this Commonwealth who collectively educate more than 300,000 schoolchildren.

Twenty-eight states already require or are in the process of implementing state-prescribed high school comprehensive or end-of-course exams as high school graduation requirements. Twenty-three states require students to take and pass state-mandated exit exams to receive high school diplomas. Others, including Missouri, Georgia, North Carolina and South Carolina, include the

results of state-mandated end-of-course tests as a percentage of course grades. No other state that has state-level high school graduation requirements provides the kind of flexibility offered to school districts to use locally developed, validated assessments in place of the State assessment that is provided in these regulations.

States have been moving away from the use of comprehensive exams and toward end-of-course tests. According to the Center on Education Policy, 14 states expect to use end-of-course tests by 2015. Policymakers in other states believe using end-of-course exams ensures greater accountability, provides for better assessment of academic content mastery, expands opportunities to inform classroom instruction and can help to better focus professional development needs. Phasing-in the requirements along the provision of instructional tools and supports, including model curriculum and diagnostic tools, will allow schools and teachers to be ready to provide instructional and support activities needed for students to meet the new requirements.

Summary of the Final-Form Rulemaking

The final-form rulemaking makes several significant changes from the proposal published in May 2008.

1) Graduation Competency Exams, now called Keystone Exams, are voluntary end-of-course exams, administered to students at the completion of a course. Schools may use one or more Keystone Exams as part of their assessment system. In place of an all-or-nothing test that students must pass to qualify for graduation, Keystone Exams, if used, will count for 1/3 of the final course grade as part of the new high school graduation requirements. Schools may count the Keystone Exam as more than 1/3 of the final course grade at their discretion. Students who score below proficient must be provided opportunities to retake the test or modules of the test. Students who score "below basic," which indicates extremely limited knowledge or skills in the content tested, would not receive any points towards their final grade. In addition, students who score below the proficient level would be able to supplement their Keystone Exam score by successfully completing one or more project-based assessments. Points earned through the project would be added to their Keystone Exam score. This would serve as a safeguard to ensure that each student can demonstrate basic knowledge of the subject to pass the course.

2) The local assessment option is expanded to allow districts to use any type of assessment that can be validated under § 4.52 (relating to local assessment system). Validation must demonstrate that the local assessment is aligned with State standards and that the proficiency level is comparable to that of the State assessment. Additional criteria and procedures for selection of entities approved to perform validations will be recommended by a Local Assessment Validation Advisory Committee.

3) Contingent upon approval by the United States Department of Education, the four PSSA tests administered in 11th grade and 12th grade retests will be discontinued. They will be replaced by three Keystone Exams (Algebra I, Literature (reading) and Biology). The Algebra I and Literature exams will be mandatory as the measure used to determine Adequate Yearly Progress (AYP) and the Biology exam will be mandatory consistent with Federal law requiring a high-school level science exam (but will not count for AYP determinations). Use of these and other Keystone Exams will remain voluntary for purposes of determining course grades and eligibility

for high school graduation, as provided in the menu of available options to demonstrate readiness for high school graduation.

4) School districts may choose to allow students to "test out" of courses by passing the appropriate Keystone Exam.

5) The Secretary is given authority, on a case-by-case basis, to waive one or more provisions to address extenuating circumstances.

6) An advisory committee on setting the performance level descriptors and cut scores for Keystone Exams is created. Another advisory committee will advise the Department and provide oversight on validity studies of the Keystone Exams.

7) Voluntary diagnostic supports are added to provide schools with tools to help identify whether students are on the proper track for success in meeting the State graduation requirements.

8) The Department will provide technical guidance to school districts in developing local assessments that meet the local assessment validation requirements.

9) Subject to appropriations enacted by law, the cost to validate local assessments will be equally shared between the school district and Department. If the Department is not able to meet its share, the local assessment would be considered valid until the district strategic plan is updated.

10) State graduation requirements are phased in over time. The class of 2014-2015 must demonstrate proficiency in English Composition, Literature, Algebra I and Biology. Beginning with the class of 2016-2017 students must demonstrate proficiency in English composition and literature; two of the following: Algebra I, Algebra II or Geometry; Biology or Chemistry; and, one of the following: American History, World History or Civics and Government.

11) These regulations include a "grandfather" provision that protect students from having to meet requirements if implementation of Keystone Exams or validated local assessments are delayed.

12) The regulations require the Department to establish procedures to permit districts to request alternative test administration schedules for the Keystone Exams.

13) The regulations provide for alternatives and accommodations for students with disabilities and accommodations for students who are gifted and English language learners.

Summary of Public Comments and Responses to Proposed Rulemaking

The proposed rulemaking was published at 38 Pa.B. 2270 and was available on the Department's 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 Board received written comments directly from 938 individuals and organizations during the official 30-day public comment period that followed publication of the proposed regulations in the *Pennsylvania Bulletin*. Rather than provide a lengthy listing of the organizations and comments and responses in the preamble, the Board prepared a separate document that outlines the comments and the Board's response. Notification of the availability of this document was sent to each commentator and is posted on the Board's web page on the Department web site.

Since publication of the proposed regulations at 38 Pa.B. 2270, the Board has conducted extensive public outreach activities. The Board held six regional public hearings—at which 72 individuals and organizations presented testimony. Board leadership met one or more times with the majority and minority leadership of the General Assembly; the Chairpersons of the House and Senate Education Committees; individual members of the House Education Committee; and other members of the General Assembly; the Coalition for Effective and Responsible Testing (CERT); the leadership of the Pennsylvania School Boards Association, Pennsylvania Association of School Administrators, Pennsylvania State Education Association, Pennsylvania Association of Elementary and Secondary School Principals, NAACP, Pennsylvania Partnerships for Children and scores of individuals. Board leadership presented testimony at several public hearings held by the Committees. In addition, since May 2008, the Board held six public meetings where public comment periods were provided. Individuals made comments about these regulations at several meetings.

On August 12, 2009, the Council of Basic Education debated the proposal and received public comments before voting to approve the regulations. On August 13, 2009, the full Board debated the regulations and again heard public comments prior to voting to approve the regulations.

Comments and testimony received, recommendations and counter proposals were all considered and contributed to the development and drafting of the final-form regulations.

Effective Date

The final-form rulemaking is 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 these regulations 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 May 2, 2008, the Board submitted a copy of the notice of proposed rulemaking, published at 38 Pa.B. 2270, to IRRC and the 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 rulemaking, the Board 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)), the final-form rulemaking was deemed approved by the Committees on October 21, 2009. Under section 5.1(e) of the Regulatory Review Act, IRRC met on October 22, 2009, and approved the final-form rulemaking.

Contact Person

The official responsible for information on this final-form rulemaking is Joseph Torsella, Chairperson, State Board of Education, 333 Market Street, Harrisburg, PA 17126-0333, (717) 787-3787, TDD (717) 787-7367.

Affected Parties

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

Fiscal Impact and Paperwork Requirements

The cost to State government for development, administration, scoring and reporting of the Keystone Exams and project-based assessment, State share of local assessment validation costs, together with development of the diagnostic tools, model curriculum and related supports, totals \$7.9 million in 2008-2009, \$21.4 million in 2009-2010, \$25.7 million in 2010-2011, \$29.6 million in 2011-2012, \$30.5 million in 2012-2013 and \$31.4 million in 2013-2014.

The estimated cost to school districts, AVTSs and charter schools includes the local share of validating local assessments. The estimated cost is \$500,000 in 2009-2010, \$250,000 in 2010-2011, \$250,000 in 2011-2012, \$250,000 in 2012-2013, and \$250,000 in 2013-2014. The cost of providing remediation to students who do not demonstrate proficiency is estimated to average \$600 per student. The costs of providing remediation are offset through funding allocated through the Basic Education Subsidy, Accountability Block Grant and Education Assistance Program.

Cost savings to State government will result from elimination of the 11th grade PSSA and 12th grade retest. Beginning in 2012-2013 and each year thereafter, the Commonwealth will save \$5 million annually. School districts, AVTSs and charter schools will experience an estimated cost savings of \$5 million in 2009-2010, \$6 million in 2010-2011, \$7 million in 2011-2012, \$8 million in 2012-2013 and \$9 million in 2013-2014 resulting from district savings from use of Keystone Exams, model curriculum and instructional diagnostics.

Effective Date

The final-form rulemaking will become effective upon final-form publication in the *Pennsylvania Bulletin*.

Findings

The Board finds that:

(1) Public notice of the intention to adopt this final-form 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 (relating to notice of proposed rulemaking required; and adoption of regulations).

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

(3) The final-form rulemaking is 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 4, are amended by amending §§ 4.3, 4.4, 4.24, 4.51 and 4.52 to read as set forth in Annex A.

(b) The Chairperson 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 Chairperson 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*.

JOSEPH TORSELLA,
Chairperson

(*Editor's Note:* For the text of the order of the Independent Regulatory Review Commission relating to this document, see 39 Pa.B. 6524 (November 7, 2009).)

Fiscal Note: 6-312. (1) General Fund:

	PA Assessment	Teacher Professional Development
(2) Implementing Year 2008-09 is	\$6,775,000	\$1,201,000
1st Succeeding Year 2009-10 is	\$18,357,000	\$3,068,000
2nd Succeeding Year 2010-11 is	\$24,031,000	\$1,649,000
3rd Succeeding Year 2011-12 is	\$28,734,000	\$845,000
4th Succeeding Year 2012-13 is	\$30,501,000	\$0
5th Succeeding Year 2013-14 is	\$31,374,000	\$0
(3) 2007-08 Program—	\$31,619,000	\$30,367,000
2006-07 Program—	\$20,094,000	\$23,367,000
2005-06 Program—	\$20,356,000	\$13,867,000

(7) PA Assessment and Teacher Professional Development; (8) recommends adoption.

Annex A

TITLE 22. EDUCATION

PART I. STATE BOARD OF EDUCATION

Subpart A. MISCELLANEOUS PROVISIONS

CHAPTER 4. ACADEMIC STANDARDS AND ASSESSMENT

GENERAL PROVISIONS

§ 4.3. Definitions.

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

AVTS—*Area vocational-technical school*—A public school that provides vocational-technical education to secondary school students, out-of-school youth and adults in a geographical area comprised and operated by one or more school districts and established under sections 1840—1853 of the School Code (24 P. S. §§ 18-1840—18-1853).

Academic standard—What a student should know and be able to do at a specified grade level.

Apprenticeship program—A competency-based program that coordinates and integrates classroom instruction with a structured work-based employment experience designed for students.

Assessment—A valid and reliable measurement of student performance on a set of academic standards in a subject area that captures student understanding of the set as a whole and the central concepts, knowledge and skills of each content area.

Board—The State Board of Education established under sections 2601-B—2606-B of the School Code (24 P. S. §§ 26-2601-B—26-2606-B).

Cooperative vocational-technical education—A planned method of instruction developed through a signed cooperative arrangement among school representatives, stu-

dents, parents and employers in the community to provide students with an opportunity to alternate in-school academic and vocational-technical instruction in entry-level paid employment in an occupational field, in which the student's total occupational work experience is planned, coordinated and supervised by the school in close cooperation with the employer.

Curriculum—A series of planned instruction aligned with the academic standards in each subject that is coordinated and articulated and implemented in a manner designed to result in the achievement at the proficient level by all students.

Department—The Department of Education of the Commonwealth.

ESOL—English to speakers of other languages.

Employment area—A geographic area where vocational-technical education program completers are most likely to be employed.

Individuals with Disabilities Education Act—20 U.S.C.A. §§ 1400—1482.

Intermediate unit—A regional educational service agency established under sections 951—974 of the School Code (24 P. S. §§ 9-951—9-974), which provides educational services to participating school districts as part of the public school system of this Commonwealth.

Keystone Exams—State-developed end-of-course exams.

Local Assessment Validation Advisory Committee—An advisory committee established by the Department composed of up to two representatives each from the Department and Board, four representatives from the Pennsylvania School Boards Association and up to four additional members who are jointly selected by the committee. The purpose of the Committee is to develop the criteria for the local validation process and criteria for selection of approved validation entities.

NOCTI—National Occupational Competency Testing Institute.

PSSA—Pennsylvania System of School Assessment.

Parent or guardian—A person legally responsible for a student's care.

Performance Level Advisory Committee—An advisory committee established by the Department to assist the Department in developing Keystone Exam performance level descriptors and performance level cut scores. The committee includes teachers, principals, school administrators, school board members, higher education officials, representatives of the United States Armed Forces, employers and others with at least one-half of its members selected from nominations made by Statewide teachers' unions and other education stakeholder organizations.

Planned instruction—Instruction offered by a school entity based upon a written plan to enable students to achieve the academic standards under § 4.12 (relating to academic standards) and additional academic standards determined in strategic plans under § 4.13 (relating to strategic plans).

Prekindergarten—A program operated by a school district or by a community agency under contract from a school district that is open to children who are at least 3 years of age and completed prior to the school district's entry age for kindergarten.

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

School entity—A local public education provider (for example, public school district, charter school, cyber charter school, AVTS or intermediate unit).

School organization—The organization of a school district's programs into kindergarten, primary, intermediate level, middle level and high school programs, including programs operated at AVTSs.

Secretary—The Secretary of Education of the Commonwealth.

State Assessment Validation Advisory Committee—An advisory committee established by the Department to advise it on its plans to conduct a validity study of the Keystone Exams and review and provide feedback on study findings. The Committee is composed of up to two representatives each from the Department, Board, Pennsylvania State Education Association, American Federation of Teachers-Pennsylvania and up to four additional members who are jointly selected by the committee.

Strategic plan—A comprehensive plan for education developed under § 4.13.

Tech-prep program—A combined secondary and postsecondary program which leads to an associate degree or certificate and employment by providing technical preparation in engineering technology, applied science, mechanical, industrial or practical art or trade, agriculture, health or business, including development of competence in mathematics, science and communications through a sequential course of study.

Vocational-technical education—Programs under public supervision and control which provide an organized process of learning experiences designed to develop integrated academic and occupational skills, knowledge, attitudes, work habits and leadership ability for entry into and advancement within various levels of employment in occupational areas of agriculture, business, marketing and distribution, health, home economics and trade and industry and for participation in postsecondary education and training.

§ 4.4. General policies.

(a) It is the policy of the Board that the local curriculum be designed by school entities to achieve the academic standards under § 4.12 (relating to academic standards) and additional academic standards designated in strategic plans under § 4.13 (relating to strategic plans).

(b) It is the policy of the Board that local school entities have the greatest possible flexibility in curriculum planning consistent with providing quality education and in compliance with the School Code, including requirements for courses to be taught (24 P. S. §§ 15-1501 and 16-1605); subjects to be taught in the English language (24 P. S. § 15-1511); courses adapted to the age, development and needs of the pupils (24 P. S. § 15-1512); minimum school year of 180 days and minimum of 900 hours of instruction at the elementary level and 990 hours of instruction at the secondary level (24 P. S. §§ 15-1501 and 15-1504); employment of sufficient numbers of qualified professional employees (24 P. S. § 11-1106) and superintendents to enforce the curriculum requirements of State law (24 P. S. § 10-1005); and this part.

(c) Access to educational programs shall be provided without discrimination on the basis of a student's race, sex, color, religion, disability, sexual orientation or national origin.

(d) School entities shall adopt policies to assure that parents or guardians have the following:

(1) Access to information about the curriculum, including academic standards to be achieved, instructional materials and assessment techniques.

(2) A process for the review of instructional materials.

(3) The right to have their children excused from specific instruction that conflicts with their religious beliefs, upon receipt by the school entity of a written request from the parent or guardians.

(4) The right of the parent or guardian to review the State assessments in the school entity, at least 2 weeks prior to their administration, during convenient hours for parents and guardians. Necessary security requirements to maintain the validity of the assessment shall be taken in accordance with the State assessment administration instructions.

(5) If upon inspection of State assessments parents or guardians find the assessment in conflict with their religious belief and wish their students to be excused from the assessment, the right of the parents or guardians will not be denied upon written request to the applicable school district superintendent, charter school chief executive officer or AVTS director.

(6) Opportunity for involvement in the strategic planning process under § 4.13.

(7) The right to have their children excluded from research studies or surveys conducted by entities other than a school entity unless prior written consent has been obtained.

(e) The Department will provide support to school districts and AVTSs in developing educational programs that enable students to attain academic standards under § 4.12. Department support will include:

(1) Establishment of a voluntary model curriculum and diagnostic supports aligned with State academic standards in each of the content areas assessed by the Keystone Exams under § 4.51(f) (relating to State assessment system).

(2) Assistance in the development of effective student tutoring, remediation and extended instructional time programs.

(3) Opportunities for continuing professional education designed to improve instruction in each of the content areas assessed by the Keystone Exams under § 4.51(f).

(4) Technical guidance to school districts and AVTSs (including charter schools) in developing local assessments that meet the requirements of § 4.24(b)(1)(iv)(B), upon request.

CURRICULUM AND INSTRUCTION

§ 4.24. High school graduation requirements.

(a) *Requirements through the 2013-2014 school year.* Each school district, including a charter school, shall specify requirements for graduation in the strategic plan under § 4.13 (relating to strategic plans). Requirements through the 2013-2014 school year must include course completion and grades, completion of a culminating project, results of local assessments aligned with the academic standards and a demonstration of proficiency in Reading, Writing and Mathematics on either the State assessments administered in grade 11 or 12 or local assessment aligned with academic standards and State assessments under § 4.52 (relating to local assessment system) at the proficient level or better to graduate. The purpose of the culminating project is to assure that

students are able to apply, analyze, synthesize and evaluate information and communicate significant knowledge and understanding.

(b) *Requirements beginning in the 2014-2015 school year.*

(1) *General.* Beginning in the 2014-2015 school year, each school district and AVTS (including charter schools), shall specify requirements for high school graduation in the strategic plan under § 4.13 (relating to strategic plans) that, at minimum, include:

(i) Course completion and grades.

(ii) Completion of a culminating project in one or more areas of concentrated study under the guidance and direction of the high school faculty. The purpose of the project, which may include research, writing, completion of a college application or some other appropriate form of demonstration, is to assure that the student is able to apply, analyze, synthesize and evaluate information and communicate significant knowledge and understanding. Projects may be undertaken by individual students or groups of students.

(iii) Demonstration of proficiency as determined by the school district or AVTS (including charter schools), in each of the State academic standards not assessed by a State assessment under § 4.51 (relating to State assessment system).

(iv) Demonstration of proficiency or above in each of the following State academic standards: Reading, Writing and Mathematics (Appendix A); Science and Technology and Environment and Ecology (Appendix B), as determined through any one or a combination of the following:

(A) Successful completion of secondary level coursework in English Composition, Literature, Algebra I and Biology in which a Keystone Exam serves as the course final exam. A student's Keystone Exam score shall count as one-third of the final course grade. A school district or AVTS (including a charter school) may, at its discretion, elect to have the Keystone Exam count for more than one-third of the course grade. A school district or AVTS (including a charter school), at its discretion, may allow students who score at the advanced level on a particular Keystone Exam prior to taking the course to be granted course credit for the course without having to complete the course.

(B) Locally approved and administered, independently validated assessments shall be independently and objectively validated once every 6 years in conjunction with submission of the school district's strategic plan, as provided in § 4.13. Local assessments may be designed to include a variety of assessment strategies listed in § 4.52(e) and may include the use of one or more Keystone Exams. Except for replacement of individual test items that have a similar level of difficulty, a new validation is required for any material changes to the assessment. Validated local assessments must meet the following standards:

(I) Alignment with the following State academic standards: Reading, Writing (Literature and Composition); Mathematics (Algebra I), Science and Technology and Environment and Ecology (Biology).

(II) Performance level expectations and descriptors that describe the level of performance required to achieve proficiency comparable to that used for the Keystone Exams.

(III) Administration of the local assessment to all students, as a requirement for graduation, except for

those exempted by their individualized education program under subsection (e), regarding special education students, or gifted individualized education plan as provided in § 16.32 (relating to GIEP).

(IV) Subject to appropriations provided by law, the cost to validate local assessments shall be evenly divided between the school district or AVTS (including a charter school) and the Department. If the Department does not provide sufficient funding to meet its share, local assessments submitted for validation shall be deemed valid for the balance of the strategic plan period until either a new or mid-point update to the strategic plan is due to the Department.

(V) The Department will establish a list of entities approved to perform independent validations of local assessments in consultation with the local assessment validation advisory committee as provided in § 4.52(g).

(VI) School boards shall only approve assessments that have been determined to meet the requirements of this subsection by an approved entity performing the independent validation. If a school district or AVTS (including a charter school) uses a local assessment that has not been independently validated, the Secretary will direct the district to discontinue its use until the local assessment is approved through independent validation by an approved entity.

(C) Advanced placement or international baccalaureate exams that include academic content comparable to the appropriate Keystone Exam at a score established by the Secretary to be comparable to the proficient level on the appropriate Keystone Exam. Successful completion of an advanced placement course and test may be used for one or more of the courses required for graduation without the student being required to take the related Keystone Exam. Successful completion of an international baccalaureate program and tests may be used for one or more of the courses required for graduation without the student being required to take the related Keystone Exam or local assessment.

(c) *Requirements beginning in the 2016-2017 school year.* Effective with the 2016-2017 school year, History and Civics and Government (Appendix C) are added to the academic standards listed in subsection (b)(1)(iv) regarding requirements beginning in the 2014-2015 school year. Requirements listed in subsection (b)(1)(iv)(A) must include a determination of proficiency in both English Composition and Literature; two of three Mathematics (Algebra I, Geometry, Algebra II), one of two Sciences (Biology or Chemistry), and one of three Social Studies (American History, Civics and Government or World History).

(d) *Strategic plan.* Each school district, including a charter school, shall describe in its strategic plan under § 4.13 how its planned instruction is designed to prepare students to meet the requirements of subsections (a) and (b).

(e) *Special education students.* Children with disabilities who satisfactorily complete a special education program developed by an Individualized Education Program team under the Individuals with Disabilities Education Act and this part shall be granted and issued a regular high school diploma by the school district of residence. This subsection applies if the special education program of a child with a disability does not otherwise meet the requirements of this chapter.

(f) *Demonstration of proficiency.* For purposes of this section, students shall be deemed proficient in the State-

assessed standards whenever they demonstrate proficiency through any of the options in subsection (b)(1)(iv), regardless of the student's grade level or age.

(g) *Transcripts.* Beginning in the 2003-2004 school year, PSSA scores in each assessed discipline, and beginning in the 2014-2015 school year, Keystone Exam or validated local assessment scores, shall be included on student transcripts and may be released only with the permission of the student and parent or guardian, or the student only if the student is 18 years of age or older.

(h) *Release of scores.* This section does not allow for the release of individual student PSSA or Keystone Exam scores to the Department or other Commonwealth entities in accordance with § 4.51(c).

(i) *Supplemental instruction.* Beginning in the 2011-2012 school year, a student who does not demonstrate proficiency in any of the ten courses or locally validated assessments specified in subsections (b) and (c) shall be offered supplemental instructional support by the student's school entity. The supplemental instructional support must assist the student to attain proficiency in the State academic standards.

(j) *Waivers.* The Secretary may waive one or more provisions of this section on a case-by-case basis for good cause. Waivers will be based upon receipt of a written request from the chief school administrator. Waivers may be granted to accommodate students who experience extenuating circumstances (including serious illness, death in immediate family, family emergency, frequent transfers in schools, or transfer from an out-of-State school in 12th grade).

(k) *Transition.* To effect successful transition between requirements outlined in subsections (a) and (b) regarding requirements through the 2013-2014 school year and requirements beginning in the 2014-2015 school year, students who will graduate in the 2014-2015 school year or thereafter, who successfully complete courses with academic content assessed under subsection (b) or (c), regarding requirements beginning in the 2014-2015 school year, and requirements beginning in the 2016-2017 school year, for which Keystone Exams or local validated assessments were not available at the time the course was completed, shall be deemed proficient for purposes of this section.

ASSESSMENT

§ 4.51. State assessment system.

(a) The State assessment system shall be designed to serve the following purposes:

(1) Provide students, parents, educators and citizens with an understanding of student and school performance consistent with the No Child Left Behind Act of 2001 (Pub. L. No. 107-110, 115 Stat. 1425).

(2) Determine the degree to which school programs enable students to attain proficiency of academic standards under § 4.12 (relating to academic standards).

(3) Provide results to school entities for consideration in the development of strategic plans under § 4.13 (relating to strategic plans).

(4) Provide information to State policymakers including the General Assembly and the Board on how effective schools are in promoting and demonstrating student proficiency of academic standards.

(5) Provide information to the general public on school performance.

(6) Provide results to school entities based upon the aggregate performance of all students, for students with an Individualized Education Program (IEP) and for those without an IEP.

(b) All PSSA instruments administered in Reading, Writing and Mathematics in grades 5, 8 and 11 will be standards-based and criterion referenced and include essay or open-ended response items in addition to other item formats. The proportion of type of items will vary by grade level. Neither State assessments nor academic standards under § 4.12 may require students to hold or express particular attitudes, values or beliefs. The Department will make samples of assessment questions, instrument formats and scoring guides available to the public after each administration of State assessments. The criteria for judging performance on State assessments are as follows:

(1) Performance on PSSA reading assessments shall be demonstrated by students' responses to comprehension questions about age-appropriate reading passages and by their written responses to in-depth comprehension questions about the passages.

(2) Performance on PSSA mathematics assessments shall be demonstrated by students' responses to questions about grade-appropriate content and by the quality of their responses to questions that require a written solution to a problem.

(3) Performance on PSSA writing assessments shall be demonstrated by the quality of students' written compositions on a variety of topics and modes of writing.

(4) Performance on PSSA science assessments shall be demonstrated by students' responses to grade appropriate content and by the quality of their responses to questions that demonstrate knowledge of each category of the standards for science and technology and environment and ecology.

(5) Levels of proficiency shall be advanced, proficient, basic and below basic. In consultation with educators, students, parents and citizens, the Department will develop and recommend to the Board for its approval specific criteria for advanced, proficient, basic and below basic levels of performance.

(c) The Department will develop or cause to be developed PSSA assessments based on academic standards in Mathematics, Reading, Writing and Science under § 4.12 and contained in Appendix A. In developing assessments, the Department will consult with educators, students, parents and citizens regarding the specific methods of assessment. To ensure that information regarding student performance is available to parents and teachers, State assessments developed under this section must include student names. Individual test results shall be used in planning instruction only by parents, teachers, administrators and guidance counselors with a need to know based upon local board policy on testing and in reporting academic progress. The Department or other Commonwealth entities are prohibited from collecting individual student test scores, and may only collect aggregate test scores by school and district.

(d) The State assessments shall be administered annually and include assessments of the State academic standards in Mathematics and Reading at grades 3—8 and 11; in Writing at grades 5, 8 and 11; and in Science at grades 4, 8 and 11.

(e) Students not achieving at the proficient level in the administration of State assessments in grade 11 shall be

provided one additional opportunity in grade 12 to demonstrate a proficient level on the PSSA assessments.

(f) The Department will develop or cause to be developed Keystone Exams as follows:

(1) Three assessments aligned with the Mathematics standards, contained in Appendix A, that assess the academic content traditionally included in Algebra I, Algebra II and Geometry courses.

(2) Two assessments aligned with select Reading, Writing, Speaking and Listening standards, contained in Appendix A, that assess academic content traditionally included in high school literature and composition courses.

(3) Three assessments aligned with select History and Civics and Government standards, contained in Appendix C, that assess content traditionally included in high school level American History, World History and Civics and Government courses.

(4) Two assessments aligned with select standards for Science and Technology and Environment and Ecology, contained in Appendix B, that assess academic content traditionally included in high school level Biology and Chemistry courses.

(5) If a Keystone Exam is offered as a graduation requirement, it shall be offered at least 3 times each year: once each in the fall, spring and summer. Keystone Exams shall be administered, reviewed and scored so that the scores for candidates for graduation are provided to schools no later than 10 calendar days prior to graduation. A school district or AVTS (including a charter school) may request that the Department approve alternative test administration and scoring time frames. The Department will publish guidelines and procedures for approving alternative test administration and scoring time frames on its web site. The guidelines will provide for approval of all requests unless the approval is contrary to standards of test validity and scoring.

(6) Students shall be permitted to retake any Keystone Exam, or Keystone Exam module, in which the student did not score proficient or above at the next available testing date.

(7) Each Keystone Exam will be designed in modules that reflect distinct, related academic content that is common to the traditional progression of coursework to allow students who do not score proficient or above to retake those portions of the test in which they did not score proficient or above.

(8) Keystone Exams shall be scored on a 100-point scale. When used to determine proficiency to meet high school graduation requirements, a Keystone Exam shall count for one-third of the final course grade. A Keystone Exam may be counted for more than one-third of the final course grade at the sole election of the school district or AVTS (including a charter school). A student must score advanced, proficient or basic on a Keystone Exam to receive points from the exam toward a final course grade.

(9) Levels of proficiency on Keystone Exams shall be set at the advanced, proficient, basic and below basic levels. In consultation with the Performance Level Advisory Committee, the Department will develop and recommend to the Board for its approval, performance level descriptors and performance level cut scores for the Keystone Exams and any alternative assessments developed to assess students with disabilities as permitted by the No Child Left Behind Act of 2001 (Pub. L. No. 107-110, 115 Stat. 1425). The Department will use widely-

accepted psychometric procedures to establish the cut scores. Cut scores shall be presented at a public meeting of the Board for its review at least 2 weeks prior to scheduled Board action on the cut scores.

(10) The Department will provide guidance to school entities as to the appropriate accommodations school entities shall provide to students with disabilities, students who are gifted and English language learners, when appropriate.

(11) Keystone Exams in the following subjects will be developed by the Department and will be made available for voluntary use by school districts and AVTSs (including charter schools) in accordance with the following schedule:

School Year 2010-11	Algebra I Literature Biology
Fall 2011	English Composition Algebra II
Fall 2012	Geometry United States History
Fall 2016	Chemistry Civics and Government World History

(12) The Department will seek to have the Keystone Exam system approved as the high school level single accountability system under the No Child Left Behind Act of 2001. Upon approval by the United States Department of Education, the Algebra I and Literature exams will be used to determine adequate yearly progress at the high school level. The Biology Keystone Exam will be used as the high school level science assessment, which is not a factor in determining adequate yearly progress. If the Keystone Exam system receives approval as the high school level accountability measure, school districts and AVTSs (including charter schools) shall administer the Literature, Algebra I and Biology exams as end-of-course test in the grade level in which students complete the relevant coursework.

(13) The 11th grade PSSA exams in Reading, Writing, Math and Science shall be discontinued upon implementation of the Keystone Exams as the approved assessment system under section 1111(b)(2)(C) of the No Child Left Behind Act of 2001 (20 U.S.C.A. § 6311(b)(2)(C)).

(g) The Board will authorize the expansion of the State assessment system through a revision of this chapter.

(h) The Department will implement provisions for security of the State assessment system, including the following provisions:

(1) Action by a professional employee or commissioned officer that is willfully designed to divulge test questions, falsify student scores or in some other fashion compromise the integrity of the State assessment system as determined by the school entity shall be subject to disciplinary action under the Professional Educator Discipline Act (24 P. S. §§ 2070.1a—2070.18a).

(2) Cheating by students or employees other than those covered in paragraph (1) shall be subject to disciplinary action by the school district.

(3) Cheating or breaches of assessment security shall be reported to the Secretary as soon as detected.

(i) The Secretary has the authority to establish guidelines for the administration of the State assessment system.

(j) The Secretary will report each September to the Board and the General Assembly information and pertinent data relating to the State assessment system. The Secretary will also provide each school entity information and pertinent data for the school entity and its students.

(k) Children with disabilities and children with limited English proficiency shall be included in the State assessment system as required by Federal law, with appropriate accommodations, when necessary. As appropriate, the Commonwealth will develop guidelines for the participation of children with disabilities in alternate assessments for those children who cannot participate in the State assessment as determined by each child's Individualized Education Program team under the Individuals with Disabilities Education Act and this part.

(l) The Department will establish a State Assessment Validation Advisory Committee (Committee). The Committee shall advise the Department on its plans to conduct the validity study and review and provide feedback on its findings. The Department and the Committee will investigate the use of a certificate based on industry approved standards and performance on a NOCTI exam as an alternative pathway to graduation and will make a report and recommendation to the Board by January 10, 2011.

(m) At least once every 5 years, the Department will contract with a qualified, independent research organization to perform a validity study of the Keystone Exams using generally accepted education research standards. These studies will determine, at a minimum, the degree to which the Keystone Exams and performance level cut scores are valid for the purposes for which they are used; aligned with State academic standards; aligned with performance levels of other states; internationally benchmarked; and predict college and career success. In addition, all Keystone Exams, performance level descriptors and cut scores will be subject to the best available forms of content, criterion and consequential validation.

(n) If a student is unable to meet the requirements in § 4.24(b)(1)(iv)(A) (relating to high school graduation requirements), the student may supplement a Keystone Exam score through satisfactory completion of a project-based assessment as provided in subsection (o). Points earned through satisfactory performance on one or more project modules related to the Keystone Exam module or modules on which the student scored below proficient shall be added to the student's highest Keystone Exam score. The total shall count as one-third of a student's final course grade, as provided in subsection (f)(8).

(o) The Department will develop a project-based assessment system that is aligned with the modules for each of the ten Keystone Exams. The project-based assessment system shall be administered schools and scored by regional panels composed of by teachers, principals and curriculum specialists assembled by the Department. The regional review panels shall score student projects according to scoring protocols and rubrics developed by the Department. Students may qualify to participate in one or more project-based assessments if the student has met all of the following conditions:

(1) Has taken the course.

(2) Was unsuccessful in achieving a score of proficient on the Keystone Exam after at least two attempts.

(3) Has met the district's attendance requirements for the course.

(4) Has participated in a satisfactory manner in supplemental instructional services under § 4.24(i) (relating to high school graduation requirements).

§ 4.52. Local assessment system.

(a) Each school entity shall design an assessment system to do the following:

(1) Determine the degree to which students are achieving academic standards under §§ 4.12 and 4.13(c)(3) (relating to academic standards; and strategic plans). The school entity shall provide assistance to students not attaining academic standards at the proficient level or better and the assistance to be provided shall be indicated in the strategic plan under § 4.13.

(2) Use assessment results to improve curriculum and instructional practices, to guide instructional strategies and to develop future strategic plans under § 4.13.

(3) Provide information requested by the Department regarding the achievement of academic standards, which does not include student names, identification numbers or individually identifiable information.

(4) Provide summary information including results of assessments under this section to the general public regarding the achievement of students, which does not include student names, identification numbers or individually identifiable information.

(b) The local assessment system shall be implemented no later than 1 year after its strategic plan or revision is approved by the board of school directors under § 4.13.

(c) The local assessment system shall be described in the school entity's strategic plan under § 4.13(c)(5).

(d) The local assessment system shall be described in the district's (including a charter school's) or AVTS's strategic plan under § 4.13(c)(5), including industry certifications earned by vocational-technical students, Pennsylvania skill certificates earned by vocational technical education students, and projects completed by vocational-technical education students which demonstrate their occupational competency.

(e) The local assessment system shall be designed to include a variety of assessment strategies which may include the following:

(1) Written work by students.

(2) Scientific experiments conducted by students.

(3) Works of art or musical, theatrical or dance performances by students.

(4) Other demonstrations, performances, products or projects by students related to specific academic standards.

(5) Examinations developed by teachers to assess specific academic standards.

(6) Nationally-available achievement tests.

(7) Diagnostic assessments.

(8) Evaluations of portfolios of student work related to achievement of academic standards.

(9) Other measures as appropriate, which may include standardized tests.

(f) Individual test information shall be maintained in a student's educational record in a manner consistent with section 438 of the Family Educational Rights and Privacy

Act of 1974 (20 U.S.C.A. § 1232g) and 34 CFR Part 99 (relating to family educational rights and privacy).

(g) Children with disabilities shall be included in the local assessment system, with appropriate accommodations, when necessary. As appropriate, the school district, including charter schools, or AVTS shall develop guidelines for the participation of children with disabilities in alternate assessments for those children who cannot participate in the local assessment as determined by each child's Individualized Education Program team under the Individuals with Disabilities Education Act and this part.

(h) The Department will establish a Local Assessment Validation Advisory Committee. The Committee will develop the criteria for the local validation process and criteria for selection of approved validation entities as provided in § 4.24(b)(1)(iv)(B) (relating to high school graduation requirements). The Department, in consultation with the Committee, will establish a list of entities approved to perform independent validations of local assessments. The Committee will submit its recommendations for approval or disapproval to the Board. The Department will post the approved criteria, selection criteria and list of approved entities on its web site.

[Pa.B. Doc. No. 10-56. Filed for public inspection January 8, 2010, 9:00 a.m.]

Title 49—PROFESSIONAL AND VOCATIONAL STANDARDS

STATE BOARD OF MEDICINE [49 PA. CODE CHS. 16 AND 18] Acupuncture Licensure

The State Board of Medicine (Board) hereby amends §§ 16.11, 16.13, 16.15, 18.11—18.13a, 18.15, 18.15a and 18.18, to read as set forth in Annex A.

Description and Need for the Rulemaking

The act of November 29, 2006 (P. L. 1625, No. 186) (Act 186) amended the Acupuncture Registration Act (act) (63 P. S. §§ 1801—1806.1) to authorize an acupuncturist or practitioner of Oriental medicine (hereinafter referred to collectively as acupuncturists) to treat a patient's condition through acupuncture or the use of herbal therapy for up to 60 days without the condition first being diagnosed by a physician, dentist or podiatrist. See 63 P. S. § 1803.1. Subsequently, after the Board published proposed rulemaking intending to implement section 3.1 of the act, the act was amended and renamed as the Acupuncture Licensure Act by the act of October 8, 2008 (P. L. 1092, No. 91) (Act 91). Act 91 revised the act solely to refer to licensure, rather than registration, of acupuncturists. This final rulemaking implements both Act 186 and Act 91.

Summary of Comments and Responses to Proposed Rulemaking

The Board published notice of proposed rulemaking at 38 Pa.B. 2059 (May 3, 2008) with a 30-day public comment period. The Board received written comments from the Association for Professional Acupuncture in Pennsylvania, endorsing the proposed rulemaking as pub-

lished. The Board received comments from the House Professional Licensure Committee (HPLC) and the Independent Regulatory Review Commission (IRRC) as part of their review of proposed rulemaking under the Regulatory Review Act (71 P. S. §§ 745.1—745.12). The Board received no comments from the Senate Consumer Protection and Professional Licensure Committee (SCP/PLC).

The HPLC noted that the proposed regulation would require a physician, dentist or podiatrist to diagnose a condition past 60 calendar days of acupuncture treatment. The HPLC then asked if a diagnosis is the only requirement, or if it is intended that a physician, dentist or podiatrist give permission for continued treatment. The diagnosis is the only requirement, and the Board does not intend that a physician, dentist or podiatrist give permission for continued acupuncture treatment.

The HPLC also noted that § 18.15a(b) (relating to scope of practice of acupuncturists and practitioners of Oriental medicine) specifically addresses authorization for use of herbal therapy by practitioners of Oriental medicine. The HPLC suggested that the provision in proposed § 18.15(a)(7) (relating to practice responsibilities of acupuncturist and practitioner of Oriental medicine who is not a medical doctor) concerning herbal therapy would be better placed in § 18.15a. The Board agrees and has moved the reference to dispensing or administering therapeutic herbs to § 18.15a(b).

IRRC first questioned the Board's specific citation to its statutory authority in publishing the proposed rulemaking. The Board's statutory authority is section 3(b) of the act (63 P. S. §§ 1803(b)) and section 8 of the Medical Practice Act of 1985 (63 P. S. § 422.8), and not generally Act 186.

IRRC noted that by using the phrase "within 60 calendar days," proposed § 18.15(a)(4) would permit an acupuncturist to wait the full 60 days of treatment before referring a patient for care by a physician, dentist or podiatrist. Additionally, that phrase would appear to limit the subsection's requirement for referral to apply only during the first 60 days of treatment. IRRC recommended deleting the phrase "within 60 days" and requiring an acupuncturist to refer a patient as soon as it is appropriate and necessary to protect the patient. The Board agrees with this recommendation and has revised the rulemaking accordingly.

In reviewing this rulemaking, the Board noted a discrepancy in its definition of "supplemental techniques" and its use of that term elsewhere in the regulations. In § 18.11 (relating to definitions), "supplemental techniques" is defined to include herbal therapy. Section 18.13a(a) (relating to requirements for licensure as a practitioner of Oriental medicine) requires an acupuncturist who intends to use herbal therapy to become licensed by the Board as a practitioner of Oriental medicine. Section 18.15a(a) authorizes an acupuncturist to practice acupuncture and use supplemental techniques, but not use herbal therapy, and section 18.15a(b) authorizes a practitioner of Oriental medicine to practice acupuncture and use supplemental techniques including herbal therapy. To avoid any confusion as to whether an acupuncturist may use herbal therapy, the Board has amended the definition of "supplemental techniques" in § 18.11 to omit reference to the use of herbal therapy.

Additionally, the Board noted that the heading of § 18.15 should remain in the singular, despite the references to both an acupuncturist and a practitioner of Oriental medicine. In § 18.15(a)(2) and (3), the rule-

making should address an acupuncturist or practitioner of Oriental medicine who is not a physician treating the patient's symptoms, rather than the patient's condition. Similarly in § 18.15(a)(7), the rulemaking is revised to provide that the acupuncturist or practitioner of Oriental medicine may not diagnose an ailment or condition, rather than medically diagnose, as that phrase is redundant.

Finally, the Board has revised §§ 16.11(b) and (c), 16.13(d), 16.15(a), 18.11, 18.12, 18.13(a) and (b), 18.13a, and 18.18 to refer to acupuncturist licensure, rather than registration, as provided by Act 91.

Fiscal Impact and Paperwork Requirements

The final-form rulemaking will have no adverse fiscal impact on the Commonwealth or its political subdivisions and will impose no additional paperwork requirements upon the Commonwealth, political subdivisions or the private sector.

Effective date

The final-form rulemaking will become effective upon publication in the *Pennsylvania Bulletin*.

Statutory Authority

The final-form rulemaking is authorized under section 3(b) of the Acupuncture Licensure Act and section 8 of the Medical Practice Act of 1985.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on April 21, 2008, the Board submitted a copy of the notice of proposed rulemaking, published at 38 Pa.B. 2059, to IRRC and to the HPLC and the SCP/PLC for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC, the HPLC and the SCP/PLC 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 rulemaking, the Board has considered all comments received from IRRC, the HPLC, the SCP/PLC and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), on November 18, 2009, the final-form rulemaking was approved by the HPLC. On December 9, 2009, the final-form rulemaking was deemed approved by the SCP/PLC. Under section 5.1(e) of the Regulatory Review Act, IRRC met on December 10, 2009, and approved the final-form rulemaking.

Additional Information

Persons who require additional information about the final-form rulemaking should submit inquiries to Regulatory Unit Counsel, Department of State, P. O. Box 2649, Harrisburg, PA 17105-2649, (717) 783-1400, or st-medicine@state.pa.us.

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) and regulations promulgated thereunder, 1 Pa. Code §§ 7.1 and 7.2 (relating to notice of proposed rulemaking required; and adoption of regulations).

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

(3) The amendments to this final-form rulemaking do not enlarge the scope of proposed rulemaking published at 38 Pa.B. 2059.

(4) The final-form rulemaking adopted by this order is necessary and appropriate for the administration of the act and the Medical Practice Act of 1985.

Order

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

(a) The regulations of the Board, 49 Pa. Code Chapters 16 and 18, are amended by amending §§ 16.11, 16.13, 16.15, 18.11—18.13a, 18.15, 18.15a and 18.18 to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.

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

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

(d) The final-form rulemaking shall take effect upon publication in the *Pennsylvania Bulletin*.

OLLICE BATES, Jr., M. D.,
Chairperson

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 39 Pa.B. 7271 (December 26, 2009).)

Fiscal Note: Fiscal Note 16A-4924 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 16. STATE BOARD OF MEDICINE—GENERAL PROVISIONS

Subchapter B. GENERAL LICENSE, CERTIFICATION AND REGISTRATION PROVISIONS

§ 16.11. Licenses, certificates and registrations.

(a) The following medical doctor licenses are issued by the Board:

- (1) License without restriction.
- (2) Institutional license.
- (3) Extraterritorial license.
- (4) Graduate license.
- (5) Temporary license.
- (6) Interim limited license.

(b) The following nonmedical doctor licenses and certificates are issued by the Board:

- (1) Nurse-midwife license.
- (2) Nurse-midwife certificate of prescriptive authority.
- (3) Physician assistant license.
- (4) Acupuncturist license.
- (5) Practitioner of Oriental medicine license.

(c) The following registrations are issued by the Board:

- (1) Registration as a supervising physician of a physician assistant.
- (2) Biennial registration of a license without restriction.
- (3) Biennial registration of an extraterritorial license.
- (4) Biennial registration of a midwife license.
- (5) Biennial registration of a physician assistant license.
- (6) Biennial registration of a drugless therapist license.
- (7) Biennial registration of a limited license-permanent.
- (8) Biennial registration of an acupuncturist license.
- (9) Biennial registration of a practitioner of Oriental medicine license.

§ 16.13. Licensure, certification, examination and registration fees.

* * * * *

(d) *Acupuncturist licenses:*

(1) *Acupuncturist license:*

Application.....	\$30
Biennial renewal	\$40

(2) *Practitioner of Oriental medicine license:*

Application.....	\$30
Biennial renewal	\$40

* * * * *

§ 16.15. Biennial registration; inactive status and unregistered status.

(a) A person licensed, certified or registered by the Board, shall register biennially to retain the right to engage in practice unless specifically exempted within this section. Initial registration shall automatically occur when the license, certificate or registration is issued.

* * * * *

**CHAPTER 18. STATE BOARD OF
MEDICINE—PRACTITIONERS OTHER THAN
MEDICAL DOCTORS**

**Subchapter B. LICENSURE AND PRACTICE OF
ACUPUNCTURISTS AND PRACTITIONERS OF
ORIENTAL MEDICINE**

§ 18.11. Definitions.

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

Acupuncture—

(i) The stimulation of certain points on or near the surface of the body by the insertion of needles to prevent or alleviate the perception of pain or to normalize physiological functions, including pain control, for the treatment of certain diseases or dysfunctions of the body.

(ii) The term also includes the use of supplemental techniques.

Acupuncture educational program—Training and instruction in acupuncture or supplemental acupuncture techniques offered by a degree-granting institution authorized by the Department of Education that leads to a master’s degree, master’s level certificate or diploma or first professional degree, that meets the relevant and appropriate requirements of 22 Pa. Code (relating to

education) and 24 Pa.C.S. Chapter 65 (relating to private colleges, universities and seminaries) and that meets or exceeds the standards required for acupuncture or Oriental medicine programs established by an accrediting agency recognized by the United States Department of Education.

Acupuncture examination—An examination offered or recognized by the Board to test whether an individual has accumulated sufficient academic knowledge with respect to the practice of acupuncture and herbal therapy to qualify for the privilege of practicing as an acupuncturist or as a practitioner of Oriental medicine. The Board recognizes the NCCAOM component examinations in acupuncture and sterilization procedures as the examination for registration as an acupuncturist and the NCCAOM examination component in Chinese herbology as the examination for registration as a practitioner of Oriental medicine.

Acupuncture medical program—An academic or clinical program of study in acupuncture which has been given category I continuing medical education credit by an institution accredited or recognized by the Accreditation Council on Continuing Medical Education to conduct category I continuing medical education courses.

Acupuncturist—An individual licensed to practice acupuncture by the Board.

Chinese herbology—The study of the use of herbs in the Oriental medicine tradition.

Herbal therapy—The application of Chinese herbology to the treatment of acupuncture patients.

NCCAOM—The National Certification Commission for Acupuncture and Oriental Medicine.

Practitioner of Oriental medicine—An acupuncturist who is licensed by the Board to use herbal therapy.

Supplemental techniques—The use of traditional and modern Oriental therapeutics, heat therapy, moxibustion, electrical and low level laser stimulation, cupressure and other forms of massage, and counseling that includes the therapeutic use of foods and supplements and lifestyle modifications.

§ 18.12. Licensure as an acupuncturist.

A medical doctor who intends to practice acupuncture and any other individual who intends to practice acupuncture shall obtain a license from the Board as an acupuncturist.

§ 18.13. Requirements for licensure as an acupuncturist.

(a) The Board will license as an acupuncturist a person who satisfies the following requirements:

(1) Has successfully completed an acupuncture educational program which includes a course in needle sterilization techniques.

(2) Has obtained a passing grade on an acupuncture examination or has been certified by NCCAOM. If the examination was not taken in English, but is otherwise acceptable and a passing score was secured, the Board will accept the examination result if the applicant has also secured a score of 550 on the test of English as a Foreign Language (TOEFL).

(b) The Board will license as an acupuncturist a medical doctor who satisfies the following requirements:

(1) Has successfully completed 200 hours of training in acupuncture medical programs including examinations required by those programs.

(2) Submits an application to register as an acupuncturist accompanied by the required fee. For the fee amount, see § 16.13 (relating to licensure, certification, examination and registration fees).

(c) Prior to January 1, 1988, the Board will register as an acupuncturist a medical doctor who satisfies the requirements of subsection (a), (b) or the following:

(1) Has at least 3 years of acupuncture practice—a minimum of 500 patient visits per year—documented to the satisfaction of the Board.

(2) Submits an application to register as an acupuncturist accompanied by the required fee. For the fee amount, see § 16.13.

§ 18.13a. Requirements for licensure as a practitioner of Oriental medicine.

(a) An acupuncturist who also intends to use herbal therapy is required to be licensed by the Board as a practitioner of Oriental medicine.

(b) The Board will license an acupuncturist as a practitioner of Oriental medicine if the licensee, in addition to meeting the requirements under § 18.13 (relating to requirements for licensure as an acupuncturist) has fulfilled one of the following:

(1) Successfully completed an acupuncture education program that includes the study of Chinese herbology and has passed the NCCAOM examination component on Chinese herbology.

(2) Has obtained NCCAOM certification in Chinese herbology or Oriental medicine, which includes passing the NCCAOM examination component in Chinese herbology.

(c) An acupuncturist registered with the Board prior to April 14, 2007, may obtain a license as a practitioner or Oriental medicine if the acupuncturist can demonstrate one of the following:

(1) Successful completion of a Chinese herbology or Oriental medicine education program recognized by the licensing authority of another state or United States territory for the practice of herbal therapy or Oriental medicine and successful completion of an examination in Chinese herbology or Oriental medicine recognized by the licensing authority of another state or United States territory for the practice of herbal therapy or Oriental medicine.

(2) NCCAOM certification in Chinese herbology or Oriental medicine.

(3) The achievement of cumulative qualifications that the Board determines to be equivalent to the standard requirements for registration as a practitioner of Oriental medicine.

(d) This subsection does not apply to a medical doctor licensed as an acupuncturist nor does it restrict the practice of medicine by a medical doctor.

§ 18.15. Practice responsibilities of acupuncturist and practitioner of Oriental medicine who is not a medical doctor.

(a) *Responsibilities to patient.* In relation to the acupuncture patient, the acupuncturist and the practitioner of Oriental medicine:

(1) Shall perform an acupuncture or Oriental medicine evaluation and develop an acupuncture or Oriental medicine treatment plan.

(2) May treat the patient's symptoms without the condition being diagnosed by a physician, dentist or podiatrist for 60 calendar days from the date of the first treatment.

(3) May treat the patient's symptoms beyond 60 calendar days from the date of first treatment if the patient has obtained an examination and diagnosis from a physician, dentist or podiatrist.

(4) Shall promptly refer the patient to a physician, dentist or podiatrist, as appropriate to the patient's condition, if the acupuncturist or practitioner of Oriental medicine determines that further acupuncture or Oriental medicine treatment is contraindicated for the patient or determines that the patient's symptoms have worsened.

(5) Shall consult with the patient's physician, dentist, podiatrist or other health care practitioner upon request of the patient.

(6) Shall cooperate with the patient's physician, dentist or podiatrist in regard to the coordination of the patient's care, and comply with restrictions or conditions as directed by the physician, dentist or podiatrist.

(7) May not diagnose a physical or mental ailment or condition or prescribe or dispense a drug. This provision does not prohibit the use of diagnostic billing codes for billing or reimbursement purposes.

(8) Shall comply strictly with sterilization standards relative to aseptic practices.

(9) Shall maintain patient records in a manner consistent with § 16.95 (relating to medical records).

(b) *Identification of acupuncturist or practitioner of Oriental medicine.* An acupuncturist who is not a medical doctor shall wear a tag or badge with lettering clearly visible to the patient bearing the acupuncturist's name and the title "acupuncturist" or "practitioner of Oriental medicine," as appropriate. The use of the word doctor on this tag or badge is prohibited.

§ 18.15a. Scope of practice of acupuncturists and practitioners of Oriental medicine.

(a) An acupuncturist may practice acupuncture and use supplemental techniques but may not use herbal therapy.

(b) A practitioner of Oriental medicine may practice acupuncture and use supplemental techniques including herbal therapy. A practitioner of Oriental medicine is not prohibited from dispensing or administering therapeutic herbs that contain ingredients that are similar or equivalent to active ingredients in drugs as classified by the Federal Food and Drug Administration.

(c) This subsection does not limit the scope of practice of a medical doctor who is registered as an acupuncturist.

§ 18.18. Disciplinary and corrective measures.

(a) The Board may refuse, revoke, suspend, limit or attach conditions to the license of an acupuncturist or practitioner of Oriental medicine for engaging in conduct prohibited under section 41 of the act (63 P. S. § 422.41) for Board-regulated practitioners.

(b) The Board will order the emergency suspension of the license of an acupuncturist or practitioner of Oriental medicine who presents an immediate and clear danger to the public health and safety, as required under section 40 of the act (63 P. S. § 422.40).

(c) The license of an acupuncturist or practitioner of Oriental medicine shall automatically be suspended, as required under section 40 of the act.

[Pa.B. Doc. No. 10-57. Filed for public inspection January 8, 2010, 9:00 a.m.]

Title 58—RECREATION

PENNSYLVANIA GAMING CONTROL BOARD

[58 PA. CODE CH. 491a]

Corrective Amendment to 58 Pa. Code Chapter 491a

The Pennsylvania Gaming Control Board has discovered a discrepancy between the agency text of 58 Pa. Code § 491a.5(b)(2)(iv)(A) and (B) and (c) (relating to service by the Board), as deposited with the Legislative Reference Bureau and published at 37 Pa.B. 4520 (August 18, 2007) and the official text currently appearing in the *Pennsylvania Code* MTS No. 418 (September 2009). When the pages for MTS 418 were prepared, the text of § 491a.5(b)(2)(iv)(A) and (B) and (c) was inadvertently omitted.

Therefore, under 45 Pa.C.S. § 901: The Pennsylvania Gaming Control Board has deposited with the Legislative Reference Bureau a corrective amendment to 58 Pa. Code § 491a.5(b)(2)(iv)(A) and (B) and (c). The corrective amendment to § 491a.5(b)(2)(iv)(A) and (B) and (c) is effective as of September 5, 2009, the date the defective text was announced in the *Pennsylvania Bulletin*.

The correct version of § 491a.5 is set forth in Annex A.

Annex A

TITLE 58. RECREATION

PART VII. GAMING CONTROL BOARD

Subpart H. PRACTICE AND PROCEDURE

CHAPTER 491a. GENERAL RULES OF PRACTICE

§ 491a.5. Service by the Board.

(a) *Applicability.* This section applies to service of an order, notice or other document originating with the Board and other documents designated by the Board, except when the Board specifically requires a different form of service.

(b) *Service of a document initiating a proceeding.*

(1) *Registered or certified mail.* Service may be made by registered or certified mail, return receipt requested, to the person to be served, addressed to the person designated in the initial pleading, submittal or notice of appearance at the person's residence, principal office or place of business.

(2) *Personal.* Service may be made personally by anyone authorized by the Board. Service will be made by personally delivering a copy:

(i) Directly to the person named in the notice, pleading or order.

(ii) At the residence of the person named in the notice, pleading or order, to an adult member of the family with whom the person named resides. If no adult member of the family is found, then to an adult person in charge of the residence.

(iii) At the residence of the person named in the notice, pleading or order, to the clerk or manager of the hotel, inn, apartment house, boarding house or other place of lodging at which the person named resides.

(iv) At any office or usual place of business of the person named in the notice, pleading or order, to his agent or to the person who for the time being is in charge thereof. For purposes of this subsection, the phrase "any office or usual place of business of the person named in the notice, pleading or order" will include the following locations:

(A) The licensed facility at which the person named is employed, licensed in connection therewith, or routinely performs his duties of employment.

(B) The office of the agent identified by the person named to receive service of process.

(c) *Proof of service.* Proof of service shall be evidenced by a return of service filed with the Office of the Clerk.

(d) *Subsequent service.* Service of any document made subsequent to the initial filing in a proceeding may be made by first class mail at the last known address of record of the person named in the notice, pleading or order.

(e) *Change of address.* It is the duty of a party to apprise the Board of changes to the party's current address.

(f) *Supersession.* Subsections (a)—(c) supersede 1 Pa. Code § 33.31 (relating to service by the agency).

[Pa.B. Doc. No. 10-58. Filed for public inspection January 8, 2010, 9:00 a.m.]

FISH AND BOAT COMMISSION

[58 PA. CODE CH. 61]

Fishing

The Fish and Boat Commission (Commission) amends Chapter 61 (relating to seasons, sizes and creel limits). The Commission is publishing this final-form rulemaking under the authority of 30 Pa.C.S. (relating to the Fish and Boat Code) (code).

A. Effective Date

The final-form rulemaking will go into effect on January 1, 2010, or upon publication of an order in the *Pennsylvania Bulletin*, whichever occurs later.

B. Contact Person

For further information on the final-form rulemaking, contact Laurie 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 amendments to §§ 61.2 and 61.8 (relating to Delaware River and River Estuary; and Lehigh River, Schuylkill River and tributaries) are published under the statutory authority of section 2102(b) of the code (relating to rules and regulations).

D. Purpose and Background

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

E. Summary of Changes

(1) *American Shad on the Delaware River.* Since the mid-1980's, the daily creel limit for American shad in the Delaware River, the West Branch and the Estuary has been six fish with no minimum length limit, and there has been a year-round season. While in years past American shad was a popular gamefish and anglers often harvested them for consumption, in more recent years it has principally become a catch-and-release fishery. A large-scale creel survey in 2002 resulted in an estimated angler catch of 35,281 shad, of which 6,627 (19%) were harvested (Versar 2003). The 2002 harvest rate was about a third of the estimated 1986 creel survey harvest rate (49%) but was close to the estimated harvest rate for the 1995 (20%) survey. Individual angler trip data voluntarily submitted to the Delaware River and Estuary Angler Logbook Program from 2002 to 2006 indicated that anglers harvested a total of 139 shad of the 1,748 caught (8%) from 496 trips. Three or more shad were harvested on only four trips.

In 2007, the Atlantic States Marine Fisheries Commission's (ASMFC's) Shad and River Herring Technical Committee and American Shad Stock Assessment Subcommittee developed a coast wide stock assessment that indicated that adult American shad stocks in the Delaware River have been declining since 1994. Nevertheless, the annual production of juvenile shad has remained stable. In some other coastal rivers, adult shad stocks have declined as well. Despite the continued depressed abundance and documented low harvest rates of adult American shad in the Delaware River and River Estuary, the creel limit of American shad in this Commonwealth has remained at six fish per day.

The Commission therefore proposed a reduction of the daily creel limit of American shad to three fish in cooperation with the other boundary states (New Jersey, New York and Delaware). Resource managers from all four states participating in the Delaware River Fish and Wildlife Cooperative Technical Committee (DRFWCTC) have verbally agreed that this reduction in the daily creel limit will not negatively impact angler use, and it is a proactive protective measure given the declining status of shad stocks in the Delaware River and other coastal river systems.

At a February 2009, meeting between the Commission and the New Jersey Department of Environmental Protection, Division of Fish and Wildlife (NJDEP), New Jersey staff indicated that their organization is actively pursuing a reduced daily creel limit from the current six fish to three fish in the Delaware River. Their Freshwater Fishery Council has approved the proposed reduction and will solicit public comments this summer. New Jersey staff expect to have the reduced creel limit in place by January 1, 2010; however, due to the fact that the freshwater and marine divisions of the agency have jurisdiction over different parts of the river, the proposed regulation will only pertain to the Delaware River mainstem waters from the New Jersey/New York State border, downstream to the Commodore Barry Bridge. In the remaining 2.9 river miles, from off the Commodore Barry Bridge to the Delaware State line, the creel limit will remain at six in New Jersey until at least 2011, when

it is anticipated that New Jersey's Marine Fishery Council will reduce the creel limit in that section to three.

New York is moving forward with a proposed amendment to reduce the American shad creel limit to three per day in the upper Delaware River. They indicated that a 2010 date for implementation is extremely optimistic and that 2011 is more realistic.

Delaware's only recreational shad angling occurs on the Brandywine Creek, and it is extremely limited. Delaware is moving to reduce the creel limit of herring (they do not make a distinction between American shad and river herring) from 10 combined/day to six combined/day. They anticipate doing this in conjunction with a change in the commercial regulations, but they do not anticipate this change occurring for the 2010 season.

In the interest of coordination with the regulations of New Jersey and New York, the Commission has reduced the creel limit in the West Branch and the entire Delaware River mainstem from the confluence of the East and West Branches downstream to the Commodore Barry Bridge as set forth in the notice of proposed rulemaking. For the remaining 2.9 miles downstream of the Commodore Barry Bridge, the current daily limit of six will remain in effect until such time as New Jersey's Marine Council effectuates a change. At that time, the Commission will seek public comments on a proposed amendment that is consistent with New Jersey's.

The Commission has amended § 61.2 to read as set forth in the notice of proposed rulemaking.

(2) *River Herring on the Delaware, Lehigh and Schuylkill Rivers.* Since the mid-1980's, the daily creel limit for river herring, a term applied collectively to blueback herring and alewife, in the Delaware River, West Branch and Estuary, has been a total of 35 herring, with no minimum length limit, and the season is open year-round. River herring are popular with striped bass anglers who use them either as live or cut bait. Principally, this fishery exists during the spring when river herring and striped bass are migrating into the Delaware River and Estuarine waters. Traditionally, anglers jigged for river herring for use as bait at the onset of a trip and during the trip. However, it has been alleged that an illegal transport fishery has developed in which entrepreneurs catch river herring from the Delaware River and transport them to the New Jersey coast for sale as bait to coastal anglers.

In 2002, catch and harvest of river herring in the Delaware River and Estuary were estimated in a large-scale creel survey (Versar 2003). This survey resulted in an estimate of a total catch of 7,553 river herring of which 4,916 (65%) were harvested. Most of the fish harvested were taken from tidal waters (1,465 fish, Delaware Memorial Bridge to Trenton, NJ) and the lower reach of the nontidal Delaware River (5,105 fish, Trenton, NJ upstream to Delaware Water Gap). Field observations by the creel clerks during the course of the 2002 survey indicated that only a small number of anglers target river herring. Many of these anglers were noted to have elaborate live-wells in their vehicles for keeping river herring alive, which accounted for the relatively high estimated harvest rates.

The ASMFC's Draft Amendment 2 to the Interstate Fishery Management Plan for Shad and River Herring states that river herring abundance has declined precipitously since the mid-1990's and remains depressed along the Atlantic Coast. The Commission therefore proposed a reduction in the daily creel limit to ten along with the

other Delaware River and Estuary boundary states of New York and New Jersey. Delaware's herring creel limit is already ten per day. This action will unify regulations throughout the Delaware River. Resource managers participating in the DRFWCTC from all four states have verbally agreed that a reduction of the daily creel limit would not negatively impact angler use. This creel limit reduction is designed to allow for the continued use of river herring as a bait source by the individual angler, while reducing the economic incentive for the illegal sale of the fish for bait. New Jersey researchers conducted an informal survey of the most likely impacted commercial guides fishing the Delaware River. The results of the survey indicated strong support for a reduction in the daily creel limit.

At a February 2009, meeting between the Commission and the NJDEP, New Jersey staff indicated that their organization is actively pursuing the reduced river herring creel limit. Their Freshwater Fishery Council has already approved the proposed reduction, and public comments were solicited this summer. New Jersey staff expect to have the reduced river herring creel limit in place by January 1, 2010; however, due to the fact that the freshwater and marine divisions of the agency have jurisdiction over different parts of the river, the proposed regulation will only pertain to the Delaware River mainstem waters from the New Jersey/New York State border, downstream to the Commodore Barry Bridge. In the remaining 2.9 river miles from of the Commodore Barry Bridge to the Delaware State line, the creel limit will remain at 35 in New Jersey until at least 2011, when it is anticipated that New Jersey's Marine Fishery Council will reduce the creel limit in that section to ten.

New York is not proposing any changes to its river herring creel limits due to the fact that they do not anticipate river herring ascending that far up the Delaware River.

Delaware's only recreational shad angling occurs on the Brandywine Creek, and it is extremely limited. Delaware is moving to reduce its creel limit of herring (they do not make a distinction between American shad and river herring) from ten combined/day to six combined/day. They anticipate doing this in conjunction with a change in the commercial regulations, but they do not anticipate this change occurring for the 2010 season.

In the interest of coordination with the regulations of New Jersey, the Commission has reduced the creel limit in the West Branch and the entire Delaware River mainstem from the confluence of the East and West Branches downstream to the Commodore Barry Bridge as set forth in the notice of proposed rulemaking. Given the anadromous fish restoration efforts on the two major tributaries to the Delaware, the Commission also has imposed a ten fish per day creel limit on the Lehigh River and Schuylkill River as set forth in the notice of proposed rulemaking. For the remaining 2.9 miles downstream of the Commodore Barry Bridge, the current daily limit of 35 river herring will remain in effect until such time as New Jersey's Marine Council effectuates a change. At that time, the Commission will seek public comments on a proposed amendment that is consistent with New Jersey's.

The Commission has amended §§ 61.2 and 61.8 to read as set forth in the notice of proposed rulemaking.

It should be noted that after the Commission approved publication of the notice of proposed rulemaking containing these amendments, ASFMC approved Amendment 2

to the Interstate Fishery Management Plan for Shad and River Herring. The amendment prohibits commercial and recreational fisheries of river herring beginning January 1, 2012, unless a state or jurisdiction develops and submits for approval a sustainable management plan by January 1, 2010. The amendment defines a sustainable fishery as "a commercial and/or recreational fishery that will not diminish the potential future stock reproduction and recruitment." Submitted plans must clearly demonstrate that the state or jurisdiction's river herring fisheries meet this new definition of sustainability through the development of sustainability targets that must be achieved and maintained.

ASMFC's approval of Amendment 2 was taken in response to widespread concern regarding the decline of river herring stocks. While many populations of blueback herring and alewife, collectively known as river herring, are in decline or remain depressed at stable levels, lack of fishery-dependent and independent data makes it difficult to ascertain the status of river herring stocks coastwide. Between 1985 and 2007, commercial landings of river herring decreased by 97% from 13.6 million pounds to 317,000 pounds.

The Commission continues to work with other state agencies with jurisdiction that includes parts of the Delaware River or Delaware Estuary to develop a coordinated interstate approach for future regulations. This coordinated approach resulted in the Commission's adoption of the amendments set forth in the notice of proposed rulemaking. It should be noted that a total moratorium on river herring is likely for the states of New Jersey, Delaware and Pennsylvania, beginning in January 2012, as a result of the ASFMC action to approve Amendment 2 to the Interstate Fishery Management Plan for Shad and River Herring.

F. Paperwork

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

G. Fiscal Impact

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

H. Public Comments

A notice of proposed rulemaking was published at 39 Pa.B. 3455 (July 11, 2009). During the formal comment period, the Commission received two public comments concerning the American shad proposal. One comment questioned the need for a reduction in the creel limit; the other supported it. After the formal comment period, the Commission received one comment from the Delaware Riverkeeper Network, supporting the reduced creel limit for American shad but urging the Commission to extend the reduced limit to the entire river and not exempt the 2.9 miles downstream of the Commodore Barry Bridge. The Commission did not receive any public comments regarding the proposal for river herring. Copies of all public comments were provided to the Commissioners.

Findings

The Commission finds that:

(1) Public notice of intention to adopt the amendments 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 (relating to notice of proposed rulemaking required; and adoption of regulations).

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

(3) The adoption of the amendments 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 Chapters 61, are amended by amending §§ 61.2 and 61.8 to read as set forth in 39 Pa.B. 3455.

(b) The Executive Director will submit this order and 39 Pa.B. 3455 to the Office of Attorney General for approval as to legality and form as required by law.

(c) The Executive Director shall certify this order and 39 Pa.B. 3455 and deposit them with the Legislative Reference Bureau as required by law.

(d) This order shall take effect on January 1, 2010, or upon publication in the *Pennsylvania Bulletin*, whichever occurs later.

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

Fiscal Note: Fiscal Note 48A-212 remains valid for the final adoption of the subject regulations.

[Pa.B. Doc. No. 10-59. Filed for public inspection January 8, 2010, 9:00 a.m.]

FISH AND BOAT COMMISSION
[58 PA. CODE CH. 73]
Fishing

The Fish and Boat Commission (Commission) amends Chapter 73 (relating to transportation of live fish into the Commonwealth). The Commission is publishing this final-form rulemaking under the authority of 30 Pa.C.S. (relating to the Fish and Boat Code) (code).

A. Effective Date

The final-form rulemaking will go into effect immediately upon publication in the *Pennsylvania Bulletin*.

B. Contact Person

For further information on the final-form rulemaking, contact Laurie 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 amendment to § 73.3 (relating to transportation and importation of VHS-susceptible species of fish) is published under the statutory authority of section 2102(c) of the code (relating to rules and regulations).

D. Purpose and Background

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

E. Summary of Changes

Viral hemorrhagic septicemia (VHS) is an infectious disease found in a variety of fish species. Effective January 1, 2009, the Commission adopted § 73.3 to help prevent the spread of the disease in this Commonwealth. Under § 73.3(d), it is unlawful to import or cause the importation of VHS-susceptible species of fish into this Commonwealth from a VHS-affected or VHS-at risk region, except as follows: (1) VHS-susceptible species of live fish may be imported into the United States if the requirements of 9 CFR 93.910–93.916 are met; or (2) VHS-susceptible species of dead fish may be imported into the United States if the fish are recreationally caught and are for human consumption.

At the time of adoption, the language of § 73.3(d)(1) was consistent with the interim rule of the United States Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) that was slated to go into effect on January 9, 2009. However, by notice published at 74 FR 1, the United States Department of Agriculture announced that it has delayed the effective date of the interim rule indefinitely to provide APHIS with time to make some adjustments to the interim rule that are necessary for the rule to be successfully implemented. The provisions of § 73.3(d)(1), therefore, have no effect.

Accordingly, the Commission has amended § 73.3(d) to delete paragraph (1) as set forth in the notice of proposed rulemaking. This amendment is a "housekeeping" change that is limited to the movement of live VHS-susceptible species of fish from the Canadian provinces of Ontario and Quebec. It will not affect the Commission's regulations with respect to intrastate and interstate transportation or the international movement of dead fish. Under § 73.3(d)(2), VHS-susceptible species of dead fish may be imported into the United States from Ontario and Quebec if the fish are recreationally caught and are for human consumption. However, until such time as APHIS adopts a rule pertaining to the international movement of live fish, the Commission's regulations will be silent on the subject. Prior orders issued by APHIS regarding international movement of live VHS-susceptible species of fish will govern, but the Commission's waterways conservation officers will not be able to enforce them.

By notice published at 39 Pa.B. 1368 (March 14, 2009), the Executive Director, acting under the authority of 58 Pa. Code § 65.25 (relating to temporary changes to fishing regulations), took immediate action to rescind § 73.3(d)(1). The temporary modification went into effect immediately and will remain in effect until publication of this order rescinding subsection (d)(1) of the regulation.

F. Paperwork

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

G. Fiscal Impact

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

H. Public Comments

A notice of proposed rulemaking was published at 39 Pa.B. 3458 (July 11, 2009). The Commission did not receive any public comments regarding this proposal.

Findings

The Commission finds that:

(1) Public notice of intention to adopt the amendment 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 (relating to notice of proposed rulemaking required; and adoption of regulations).

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

(3) The adoption of the amendment 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 73, are amended by amending § 73.3 to read as set forth in 39 Pa.B. 3458.

(b) The Executive Director will submit this order and 39 Pa.B. 3458 to the Office of Attorney General for approval as to legality and form as required by law.

(c) The Executive Director shall certify this order and 39 Pa.B. 3458 and deposit them with the Legislative Reference Bureau as required by law.

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

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

Fiscal Note: Fiscal Note 48A-213 remains valid for the final adoption of the subject regulation.

[Pa.B. Doc. No. 10-60. Filed for public inspection January 8, 2010, 9:00 a.m.]