

RULES AND REGULATIONS

Title 7—AGRICULTURE

DEPARTMENT OF AGRICULTURE

[7 PA. CODE CH. 130b]

Nutrient Management Certification

The Department of Agriculture (Department), under section 7(a) and (b) of the Nutrient Management Act (act) (3 P. S. § 1707(a) and (b)), amends Chapter 130b (relating to nutrient management certification). The Department published a notice of proposed rulemaking at 35 Pa.B. 2101 (April 9, 2005). On July 6, 2005, Governor Rendell signed the act of July 6, 2005 (P. L. 112, No. 38) (Act 38), codified at 3 Pa.C.S. Chapters 3 and 5 (relating to local regulation; and nutrient management and odor management). Among other things, Act 38 consolidates the act (3 P. S. §§ 1701—1718) and adds provisions prohibiting and providing for enforcement of unauthorized local government unit actions, providing for nutrient management and odor management certification and maintaining, but recodifying, many of the provisions of the Nutrient Management Act in 3 Pa.C.S. Chapters 3 and 5. The Department amends Chapter 130b under the specific authority in 3 Pa.C.S. § 508(a) (relating to nutrient management certification program and odor management certification program).

Authority

The Department has the power and authority to promulgate and adopt this final-form rulemaking. This authority is established in 3 Pa.C.S. § 508(a), which charges the Department, in consultation with the State Conservation Commission (Commission), with the duty of establishing “. . . a nutrient management certification program for the purpose of certifying individuals who have demonstrated the competency necessary to develop nutrient management plans. . . .” The Department, or its designees, is charged under 3 Pa.C.S. § 508(a) with the duty of developing “. . . such written testing procedures, educational requirements and examinations as it deems appropriate to carry out its responsibilities under this section. The Department shall by regulation establish fees and terms and conditions of certification as it deems appropriate. The Department shall establish individual, commercial and public certification categories, including a certification category for farmers to develop and certify nutrient management plans. . . on their own operations.” Under the authority originally in section 7 of the act, the Department promulgated nutrient management certification regulations published at 26 Pa.B. 4723 (September 28, 1996). The current regulations in Chapter 130b set forth the criteria for certification and establish criteria for interim certification as required by section 7(b) of the act.

Need for the Final-Form Rulemaking

These amendments to Chapter 130b are required to bring the Nutrient Management Certification Program (NMCP), created by the current regulations, into compliance with changes in the industry and pending changes to 25 Pa. Code Chapter 83, Subchapter D (relating to nutrient management). The final-form rulemaking adds definitions to provide clarity, streamline and redefine the certification process and make other changes in response to problems, concerns and input from those administering the NMCP over the past 9 years and from persons currently certified under the regulations. The final-form

rulemaking also deletes the section setting forth interim certification requirements, since interim certification is no longer necessary.

Comments

Notice of proposed rulemaking was published at 35 Pa.B. 2101 and provided for a 30-day public comment period. The Department did not receive any comments from the general public or the Senate or House Agricultural and Rural Affairs Committees regarding the proposed rulemaking. The Department did receive comments from the Independent Regulatory Review Commission (IRRC). The Department acknowledges those comments and thanks IRRC for its review and its insightful comments which should help to clarify and streamline the final-form rulemaking. IRRC's comments and the Department's responses are available upon request.

Fiscal Impact

Commonwealth

The final-form rulemaking will impose no additional fiscal impacts on the Commonwealth. The final-form rulemaking will not require the Department to commit any additional amount of time and manpower to review of applications or the certification process.

Political Subdivisions

The final-form rulemaking will not impose costs or fiscal impact upon political subdivisions. The final-form rulemaking does not impose any additional burden of enforcement or review on political subdivisions.

Private Sector

The final-form rulemaking will not impose significant costs on the private sector. The only additional costs to the regulated community may be in increased fees necessary to administer the NMCP.

General Public

The final-form rulemaking will not impose costs or have fiscal impact on the general public.

Paperwork Requirements

The final-form rulemaking will not result in a substantial increase of paperwork. The Department will not have to develop new application forms or review procedures.

Contact Person

Further information is available by contacting the Department of Agriculture, Nutrient Management Certification Program, Attn: Johan Berger, 2301 North Cameron Street, Harrisburg, PA 17110-9408, (717) 772-4189.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on March 30, 2005, the Department submitted a copy of the notice of proposed rulemaking, published at 35 Pa.B. 2101, to IRRC and the Chairpersons of the House and the Senate Agriculture and Rural Affairs 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 Department has considered all comments from IRRC, the House and Senate Committees and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), on November 2, 2005, the final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on November 3, 2005, and approved the final-form rulemaking.

Findings

The Department finds that:

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

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

(3) The amendments that were made to the final-form rulemaking in response to comments received do not enlarge the purpose of the proposed rulemaking published at 35 Pa.B. 2101.

(4) The adoption of the amendments in the manner provided in this order is necessary and appropriate for the administration of the authorizing statute.

Order

The Department, acting under authority of the authorizing statute, orders that:

(a) The regulations of the Department, 7 Pa. Code Chapter 130b, are amended by deleting § 130b.4; by amending §§ 130b.2, 130b.3, 130b.11, 130b.12, 130b.21, 130b.22, 130b.31 and 130b.41; and by adding § 130b.5 to read as set forth in Annex A.

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

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

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

DENNIS C WOLFF,
Secretary

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 35 Pa.B. 6390 (November 19, 2005).)

Fiscal Note: Fiscal Note 2-147 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 7. AGRICULTURE

PART V. BUREAU OF PLANT INDUSTRY

CHAPTER 130b. NUTRIENT MANAGEMENT CERTIFICATION

Subchapter A. GENERAL PROVISIONS

§ 130b.2. Definitions.

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

Act—3 Pa.C.S. §§ 311—522.

Agricultural operations—The management and use of farming resources for the production of crops, livestock or poultry.

BMP—Best management practice—

(i) A practice or combination of practices determined by the Commission to be effective and practicable (given technological, economic and institutional considerations) to manage nutrients to protect surface and groundwater taking into account applicable nutrient requirements for crop utilization.

(ii) The term includes:

(A) Conservation tillage.

(B) Crop rotation.

(C) Soil testing.

(D) Manure testing.

(E) Diversions.

(F) Manure storage facilities.

(G) Stormwater management practices.

(H) Nutrient application.

(I) Practices set forth in the nutrient management regulations.

Certificate year—The period from January 1 to December 31.

Certification—The completion of all requirements of a nutrient management specialist contained in this chapter.

Commission—The State Conservation Commission established by the Conservation District Law (3 P. S. §§ 849—864).

Competency—Demonstrating a high level of technical or scientific knowledge as evidenced by successfully meeting the requirements of § 130b.11 (relating to determination of competence) for commercial and public nutrient management specialists, or meeting the requirements of § 130b.21 (relating to determination of competence) for individual nutrient management specialists.

Conservation district—A county conservation district established under the Conservation District Law.

Department—The Department of Agriculture of the Commonwealth.

Designee—A person chosen or appointed by the Secretary of the Department to carry out the Secretary's duties under this chapter.

Nutrient—

(i) A substance or recognized plant nutrient, element or compound which is used or sold for its plant nutritive content or its claimed nutritive value.

(ii) The term includes livestock and poultry manures, compost as fertilizer, commercially manufactured chemical fertilizers, sewage sludge or combinations thereof.

Nutrient management plan—A written site-specific plan which incorporates BMPs to manage the use of plant nutrients for crop production and water quality protection consistent with the criteria established in sections 504 and 506 of the act (relating to powers and duties of commission; and nutrient management plans).

Nutrient management regulations—The regulations in 25 Pa. Code Chapter 83, Subchapter D (relating to nutrient management).

Nutrient management specialist—

(i) *Individual*—A person certified to develop nutrient management plans for his agricultural operation.

(ii) *Commercial*—A private sector person certified to develop nutrient management plans for another person's agricultural operation.

(iii) *Public*—A State, Federal or other public employee certified to develop or review, or both, nutrient management plans and make recommendations for approval or denial of nutrient management plans to a conservation district or the State Conservation Commission, or both.

(A) *Review specialist*—A public nutrient management specialist certified to review nutrient management plans and make recommendations for approval or denial of nutrient management plans.

(B) *Dual specialist*—A public nutrient management specialist certified to review and develop nutrient management plans for another person's agricultural operation and make recommendations for approval or denial of nutrient management plans which the specialist has not personally written or developed.

Precertification training—The initial nutrient management training courses which shall be completed by persons seeking to become nutrient management specialists.

Provisional certification—The level of certification obtained by a nutrient management specialist applicant who has successfully completed the precertification training and passed the written examination, but has not yet developed or reviewed, or both, the required number of nutrient management plans.

Recertification training—The completion of continuing education and training requirements in § 130b.31 (relating to recertification).

§ 130b.3. Fees.

(a) *Certification fees*. Certification fees are nonrefundable. The Department establishes the following certification fees for each level of nutrient management specialist:

- (1) Individual nutrient management specialist—\$15.
- (2) Commercial nutrient management specialist—\$200.
- (3) Public nutrient management specialist:
 - (i) Review specialist—\$25.
 - (ii) Dual specialist—\$50.

(b) *Examination fees*. Examination fees are nonrefundable. The Department establishes the following examination fees for each level of nutrient management specialist:

- (1) Individual nutrient management specialist—No charge
- (2) Commercial nutrient management specialist—\$50
- (3) Public nutrient management specialist:
 - (i) Review specialist—\$50
 - (ii) Dual specialist—\$50

§ 130b.4. (Reserved).

§ 130b.5. Certification authority.

(a) *Individual certification authority*. A person certified under this chapter as an individual nutrient management specialist is authorized to develop nutrient management plans for his own agricultural operation. An individual nutrient management specialist has no authority to develop a nutrient management plan for another person or review and recommend action on a nutrient management plan.

(b) *Commercial certification authority*. A person certified under this chapter as a commercial nutrient management specialist is authorized to develop nutrient management plans for another person's agricultural operation. A commercial nutrient management specialist has no authority to review or recommend action on a nutrient management plan.

(c) *Public certification authority*. A public employee certified as a public nutrient management specialist has authority to review and recommend action or develop a nutrient management plan for another person, or both, dependent on the certification requirements he has successfully completed.

(1) *Public nutrient management review specialist*. A person certified under this chapter as a public nutrient management review specialist is authorized to review nutrient management plans and make recommendations for approval or denial of nutrient management plans.

(2) *Public nutrient management dual specialist*. A person certified under this chapter as a public nutrient management dual specialist is authorized to review and develop nutrient management plans for another person's agricultural operation and make recommendations for approval or denial of nutrient management plans which the specialist has not personally developed.

Subchapter B. CERTIFICATION

COMMERCIAL AND PUBLIC NUTRIENT MANAGEMENT SPECIALISTS

§ 130b.11. Determination of competence.

(a) *Commercial nutrient management specialist*. Determination of competence for a commercial nutrient management specialist shall be based on the successful completion of precertification training and examinations as set forth in this section. Precertification requirements for a commercial nutrient management specialist include an orientation training course, a nutrient management plan writing course and a written examination approved by the Department. As advancements in science and technology make new nutrient management techniques and BMPs available and after these techniques and BMPs are approved by the State Conservation Commission, the precertification requirements may include other course work related to those techniques and best management requirements, as well as, any new requirements set forth in the nutrient management regulations, as part of the certification course and training requirements. The new techniques and BMPs will not become part of the final certification requirements until after training manuals and course work have been modified to include the information necessary to impart knowledge of these new techniques and BMPs. Nutrient management plans developed under this subsection shall be determined to be adequate by the Department or its designee.

(b) *Public nutrient management specialist*. Determination of competence for a public nutrient management specialist shall be based on the level of certification sought to be attained.

(1) *Public nutrient management review specialist*. To be certified as a public nutrient management review specialist the applicant shall successfully complete precertification training and examinations as set forth in this section. The precertification requirements for a public nutrient management review specialist include an orientation training course, a nutrient management plan review course, a nutrient management plan writing course and a written examination approved by the Department.

As advancements in science and technology make new nutrient management techniques and BMPs available and after these techniques and BMPs are approved by the State Conservation Commission, the precertification requirements may include other course work related to those techniques and best management requirements, as well as, any new requirements set forth in the nutrient management regulations, as part of the certification course and training requirements. The new techniques and BMPs will not become part of the examination until after training manuals and course work have been modified to include the information necessary to impart knowledge of these new techniques and BMPs. Nutrient management plan reviews completed and nutrient management plans developed under this subsection will be determined to be adequate by the Department or its designee.

(2) *Public nutrient management dual specialist.* To be certified as a public nutrient management dual specialist, the applicant shall successfully complete precertification training and examinations set forth in this section. The precertification requirements for a public nutrient management dual specialist include an orientation training course, a nutrient management plan review course, a nutrient management plan writing course and a written examination approved by the Department. As advancements in science and technology make new nutrient management techniques and BMPs available and after these techniques and BMPs are approved by the State Conservation Commission, the precertification requirements may include other course work related to those techniques and best management requirements, as well as, any new requirements in the nutrient management regulations, as part of the certification course and training requirements. The new techniques and BMPs will not become part of the final certification requirements until after training manuals and course work have been modified to include the information necessary to impart knowledge of these new techniques and BMPs. Nutrient management plan reviews completed and nutrient management plans developed under this subsection will be determined to be adequate by the Department or its designee.

(c) *Precertification.* The precertification training courses must, at a minimum, consist of the following areas of nutrient management planning:

- (1) Nutrient application including:
 - (i) Determination of the cropping system and crop nutrient requirements.
 - (ii) Determination of sources of nutrients available for application on the farm.
 - (iii) Determination of additional nutrients required to obtain realistic expected crop yields.
 - (iv) Application records.
- (2) Manure management.
- (3) Excess manure alternatives.
- (4) Stormwater runoff control.
- (5) Applicable laws and regulations.
- (6) Proper nutrient management plan review procedures (public nutrient management specialists only).
- (7) Proper nutrient management plan writing procedures (commercial, public nutrient management specialists only).

(8) Other areas and course work related to requirements set forth in the nutrient management regulations, as determined appropriate by the Department.

(d) *Examination.* The written examination will be proctored by the Department or its designee. The Department will administer the examination at least twice per year, or more often as deemed necessary by the Department. At a minimum, the successful completion of the examination will demonstrate an examinee's technical knowledge relating to nutrient management planning and nutrient management plan development in the following areas:

- (1) Competency in soil science and soil fertility.
- (2) Competency in nutrient application and management.
- (3) Competency in crop production.
- (4) Competency in soil and manure testing and interpretation.
- (5) Understanding in determining needed BMPs related to proper utilization of nutrients and stormwater management.
- (6) Competency in fertilizer materials and their characteristics.
- (7) Understanding of environmental and economic impacts associated with nutrient management.
- (8) Understanding of the act and other applicable laws and regulations.
- (9) Other areas related to new technology and BMPs that become available and are approved by the State Conservation Commission, as well as, new requirements set forth in the nutrient management regulations. These other areas will not become part of the final certification requirements until training manuals and course work have been modified to include information necessary to impart knowledge of these new techniques and BMPs.

(e) *Other examinations.* The Department may approve the use of written examinations other than the Pennsylvania nutrient management examination, if the written examinations meet the requirements in subsection (d).

(f) *Provisional certification.* Upon the successful completion of the requirements in subsections (c) and (d), the applicant for certification as a commercial or public nutrient management specialist will be issued the appropriate provisional certification. The holder of a provisional certification is qualified, dependant on the type of provisional certification attained, to develop or review, or both, nutrient management plans for the purpose of satisfying the requirements of this section regarding final certification. Provisional certification is valid for 3 years ending on the last day of the month from the date of issuance.

(g) *Final certification requirements.* Once provisional certification has been granted the provisionally certified specialist shall complete one of the following dependant on the type of provisional certification granted and final certification sought.

(1) *Commercial nutrient management specialist.* To attain final certification, a provisionally certified commercial nutrient management specialist shall develop three approved nutrient management plans which meet the requirements of section 6(e) of the act (relating to nutrient management plans). Nutrient management plans developed by the applicant shall be submitted to the Department or its designee for approval.

(2) *Public nutrient management specialist.* To attain final certification, a provisionally certified public nutrient

management specialist shall do one of the following dependant upon the level of provisional certification attained and the level of final certification sought.

(i) *Public nutrient management review specialist.* To attain final certification, a provisionally certified public nutrient management review specialist shall successfully review two nutrient management plans and develop one approved nutrient management plan which meets the requirements of section 6(e) of the act. Nutrient management plan reviews completed and nutrient management plans developed by the applicant shall be submitted to the Department or its designee for approval.

(ii) *Public nutrient management dual specialist.* To attain final certification, a provisionally certified public nutrient management dual specialist shall successfully review two nutrient management plans and develop two approved nutrient management plan in accordance with section 6(e) of the act. Nutrient management plan reviews completed and nutrient management plans developed by the applicant shall be submitted to the Department or its designee for approval.

(h) *Public nutrient management specialist to commercial nutrient management specialist.* A certified public nutrient management specialist may obtain certification as a commercial nutrient management specialist. To attain this certification, a certified public nutrient management review specialist shall develop two approved nutrient management plans or a certified public nutrient management dual specialist shall develop one approved nutrient management plan in accordance with section 6(e) of the act. The certified public nutrient management specialist seeking this certification shall submit the nutrient management plans or plan to the Department or its designee for review and approval.

(i) *Public nutrient management review specialist to public nutrient management dual specialist.* A certified public nutrient management review specialist may obtain certification as a public nutrient management dual specialist. To attain this certification, the certified public nutrient management review specialist shall develop one approved nutrient management plan in accordance with section 6(e) of the act. The applicant seeking to attain this certification shall submit the nutrient management plan to the Department or its designee for review and approval.

(j) *Commercial nutrient management specialist to public nutrient management specialist.* A certified commercial nutrient management specialist who wishes to obtain certification as a public nutrient management specialist shall complete a nutrient management plan review course covering proper nutrient management plan review procedures and shall successfully review two nutrient management plans in accordance with section 6(e) of the act. The applicant seeking to attain this certification shall submit the nutrient management plan reviews to the Department or its designee for review and approval.

§ 130b.12. Final certification.

(a) *Application for final certification.* Upon completion of all the requirements of this chapter, a commercial nutrient management specialist or a public nutrient management specialist may submit an application to the Department for final certification. The appropriate certification fee, as set forth in § 130b.3(a) (relating to fees) shall accompany the application for final certification.

(b) *Eligibility for final certification.* A person is eligible to apply for final certification as a commercial or public nutrient management specialist upon fulfilling the appli-

able requirements established under § 130b.11 (relating to determination of competence). An application for final certification may be obtained from the Department.

(c) *Time period for filing application.* An application for final certification shall be filed with the Department within 120-calendar days of notification by the Department of meeting the appropriate requirements in § 130b.11. If the applicant fails to file an application with the Department within the prescribed 120-calendar days, that person shall again satisfy the appropriate competency requirements as provided in § 130b.11.

(d) *Time period final certification is valid.* A final certification is valid for 3 years ending on December 31 of the third year following the date of final certification. However, the Department will authorize an additional year when the certification is issued during the last 2 months of the initial certificate year.

INDIVIDUAL NUTRIENT MANAGEMENT SPECIALISTS

§ 130b.21. Determination of competence.

(a) Determination of competence for an individual nutrient management specialist shall be based on the completion of precertification training which includes an orientation training course and a written examination approved by the Department.

(b) The orientation training course shall at a minimum consist of the same requirements as in § 130b.11(c) (relating to determination of competence).

(c) The written examination will be proctored by the Department or its designee. The Department will administer the examination on an as needed basis, which will be determined by the number of requests for the testing. At a minimum, the successful completion of the examination will demonstrate an examinee's technical knowledge relating to nutrient management planning and nutrient management plan development in the following areas:

- (1) Competency in nutrient application and management.
- (2) Competency in crop production.
- (3) Competency in soil and manure testing and interpretation.
- (4) Understanding in determining needed BMPs related to proper utilization of nutrients and stormwater management.
- (5) Understanding of soil science and soil fertility.
- (6) Understanding of fertilizer materials and their characteristics.
- (7) Understanding of environmental and economic impacts associated with nutrient management.
- (8) Understanding of the act and other applicable laws and regulations.
- (9) Other areas and coursework related to the requirements in the nutrient management regulations as determined appropriate by the Department.

(d) The Department may approve the use of written examinations other than the Pennsylvania nutrient management examination, if the written examinations meet the requirements in subsection (c).

(e) Individual nutrient management specialists are exempt from the nutrient management plan preparation requirement.

§ 130b.22. Final certification.

(a) A person is eligible to apply for final certification as an individual nutrient management specialist upon fulfilling the requirements under § 130b.21 (relating to determination of competence). An application for certification may be obtained from the Department. The appropriate fee shall accompany the specialist's application for certification.

(b) An application for certification shall be filed with the Department no later than 120-calendar days after the applicant's completion of the competency requirements. If the applicant fails to file an application with the Department within the prescribed 120-calendar days, that person shall again satisfy the competency requirements as provided in § 130b.21(a)—(d).

(c) A certificate is valid for 3 years ending on December 31 of the third year following the date of certification. However, the Department will authorize an additional year when the certification is issued during the last 2 months of the initial certificate year.

RECERTIFICATION

§ 130b.31. Recertification.

(a) At intervals of 3 years, final certified commercial, public or individual nutrient management specialists shall provide written documentation of having received continuing education and training in Department-approved training courses in nutrient management planning and nutrient management plan development. Training must address the specific areas in § 130b.11(c) and (d) (relating to determination of competence) for commercial and public specialists and § 130b.21(b) and (c) (relating to determination of competence) for individual specialists.

(b) Recertification credits approved by the Department will be given on the basis of attendance at approved training sessions, as provided in subsection (a). The Department will evaluate the training and assign the appropriate credits. Commercial and public specialists are required to obtain 20 credits with one quarter or 5 of those credits being obtained through Department or Commission conducted courses. Individual specialists are required to obtain 6 credits during the recertification interval. The Department may, if deemed necessary, require specific training for certified nutrient management specialists, in addition to the required training in §§ 130b.11 and 130b.21. The Department will provide written notification to the certified nutrient management specialists of required specific training.

(c) Training will be approved for recertification credits at the rate of 1 credit per hour of applicable instruction, exclusive of coffee breaks, lunches, visits to exhibits, and the like. Credits will be assigned to each training session based upon the subjects covered and the amount of time expended on each subject. Credits assigned may be modified if either the content or length of the training substantially differs from the originally approved course.

(d) Sponsors of recertification training shall first submit a written request for course approval to the Department of Agriculture, Bureau of Plant Industry, 2301 North Cameron Street, Harrisburg, Pennsylvania 17110-9408. A request shall be submitted to the Department at least 15 working days prior to the training date and include the following information:

(1) The name and phone number of the contact person who is coordinating the training.

(2) The specific location of the training.

(3) The date of the training.

(4) A listing of the speakers, subject matter and time allotted to each subject.

(5) A statement whether the training is open to the public and if there is a charge to attend.

(e) A recertification training course will be approved if at a minimum it consists of the same requirements as set forth in § 130b.11(c) and (d) and is conducted or sponsored by an educational institution, an association, a business, a governmental agency or other qualified source. Preapproval of recertification courses is vested solely with the Department.

(f) Falsification by a course sponsor of information required under this section may result in the withdrawal of credits or course approval, or both.

(g) If the Department or its designee is unable to monitor the training, the sponsor shall be responsible for verifying attendance and shall compile a list of Pennsylvania certified specialists in attendance. The list shall be returned to the Department within 10 working days following the training date and include the name of each person attending and their certification number.

(h) If a nutrient management specialist allows his final certification to expire and does not obtain recertification in accordance with this chapter, his final certification shall be suspended and the specialist must refrain from all duties relating to his certification until all delinquent recertification credits are acquired as described in subsection (b).

(i) If a nutrient management specialist whose final certification has been suspended as set forth in subsection (h) fails to complete delinquent recertification credits within 1 year from the expiration date of his final certification, then his final certification shall be revoked and that person shall again satisfy the requirements of § 130b.11 and § 130b.12 (relating to eligibility) for commercial and public specialists, and § 130b.21 and § 130b.22 (relating to final certification) for individual specialists.

RECIPROCITY

§ 130b.41. General.

(a) A person who has a valid certificate or license from another state may obtain certification in this Commonwealth if:

(1) The state in which that person is certified has a reciprocal agreement with the Department.

(2) The applicant satisfies the required precertification training as set forth in § 130b.11(c) (relating to determination of competence). The applicant will not be required to take a written examination to determine competence if the applicant satisfies the requirements of this subsection.

(b) Upon the successful completion of the requirements in subsection (a), the applicant for certification as a commercial or public nutrient management specialist will be issued provisional certification and shall complete the requirements in § 130b.11(g). Provisional certification is valid for 3 years ending on the last day of the month from the date of issuance.

(c) In addition to the requirements in subsection (a), if the applicant is a commercial nutrient management specialist, that person shall develop three approved nutrient management plans which meet the requirements of

section 6(e) of the act (relating to nutrient management plans). If the applicant is a public nutrient management review specialist, that person shall successfully review two nutrient management plans and develop one approved nutrient management plan which meets the requirements of section 6(e) of the act. If the applicant is a public nutrient management dual specialist, that person shall successfully review two nutrient management plans and develop two approved nutrient management plans which meet the requirements of section 6(e) of the act. Nutrient management plan reviews completed and nutrient management plans developed by the applicant shall be submitted to the Department or its designee for approval.

(d) The applicant shall complete all requirements for reciprocity in the manner and within the time frames established in § 130b.11 and § 130b.12 (relating to final certification).

DENIAL, SUSPENSION AND REVOCATION OF CERTIFICATES

§ 130b.51. Denial, suspension and revocation of certificates.

(a) The Department may, after notice, including a statement of the reasons therefore, deny, suspend or revoke a commercial, public or individual nutrient management specialists certification for any of the following:

- (1) A violation of the act or this chapter.
- (2) Failure to obtain the required recertification credits.
- (3) Inconsistency and demonstration of a lack of knowledge of nutrient management plan writing and review skills.
- (4) Three or more occurrences within a 3-year period of delay or noncommunication with landowner or review agency during plan development or review.
- (5) Falsifying information.
- (6) Misrepresentation of the Nutrient Management Act Program.
- (7) A violation of program policy established by the Department, its designee or the State Conservation Commission.

(b) An applicant or nutrient management specialist may request a hearing, in writing, within 15 days of receipt of notice of the denial, suspension or revocation from the Department. The request shall be sent to the Bureau of Plant Industry, Agriculture Building, 2301 North Cameron Street, Harrisburg, Pennsylvania 17110.

[Pa.B. Doc. No. 05-2197. Filed for public inspection December 2, 2005, 9:00 a.m.]

Title 22—EDUCATION

STATE BOARD OF EDUCATION [22 PA. CODE CHS. 7 AND 12] Students and Student Services

The State Board of Education (Board) deletes Chapter 7 and amends Chapter 12 (relating to students and student services) to read as set forth in Annex A. Notice of

proposed rulemaking was published at 33 Pa.B. 5735 (November 22, 2003) with an invitation to submit written comments.

Chapter 12 addresses student rights and responsibilities and student services. The final-form rulemaking amends Chapter 12 and replaces Chapter 7 by adding new sections to Chapter 12. The overarching purpose of the final-form rulemaking is to update and align the regulations with current statutory provisions and relevant case law. In addition, the final-form rulemaking adds a subchapter regarding student services and updates the same subject matter now included in Chapter 7.

Statutory Authority

The Board takes this action under the authority granted to it by section 2603-B of the Public School Code of 1949 (code) (24 P. S. § 26-2603-B) and other sections of the code.

Background

Chapter 7 sets forth the requirements for pupil services in public schools. Chapter 12 sets forth the requirements for students' rights and responsibilities. The final-form rulemaking consolidates the two chapters and generally reflects statutory changes that have been made, Department of Education policies and practices and court decisions that have been rendered since Chapter 12 was last amended in 1984. In addition, the Board is amending some provisions to afford public schools additional flexibility. The amendment to § 12.5 (relating to corporal punishment) reflects a change in Board policy, which the Board is authorized to make under the regulatory authority delegated to it in the code.

Summary of Amendments

Title. The title of Chapter 12 has been changed from "Students" to "Students and Student Services." In all of its regulations, the Board is using the term "students," rather than "pupils," to conform to common usage. The addition of "student services" to the title reflects the consolidation of Chapter 7 into Chapter 12.

Chapter 7. The Board believes the Chapter 7 regulations are too prescriptive in today's educational environment. The regulations are inconsistent with other Board regulations in that they limit flexibility provided to school entities in the planning, implementation and administration of cost effective, comprehensive student services programs.

The Board has reinserted the term "full" into § 12.1(a) (relating to free education and attendance). In addition, in subsection (b)(3), the term "handicapping condition" has been replaced with the term "disability" to reflect current usage.

The Board has added homework to the student responsibilities listed in § 12.2 (relating to student responsibilities).

The Board has amended § 12.3 (relating to school rules) to provide that school policies may not be discriminatory.

In § 12.4 (relating to discrimination), the Board has reinserted the term "full" to state that students may not be denied access to a "free and full public education." The Board also has added language to provide that students may not be subject to disciplinary action because of race, sex, color, religion, sexual orientation, national origin or disability.

The Board has amended § 12.5 (relating to corporal punishment) to prohibit use of corporal punishment as a

form of student discipline. The section permits use of reasonable force to quell a disturbance, take possession of weapons or dangerous objects and to protect persons or property.

Section 12.6(a) (relating to exclusions from school) has been amended to update cross-references to Chapter 14 (relating to special education services and programs) and Federal regulations under the Individuals With Disabilities Education Act (IDEA) (20 U.S.C.A. §§ 1400—1482).

Section 12.6(d) replaces current language that permits time extensions for conducting a formal disciplinary hearing if the hearing would not be unreasonably delayed. New language limits the extension to 15 days unless mutually agreed upon by both parties.

Section 12.6(e)(2) has been amended to clarify the obligation of parents of expelled students to notify their board of school directors within 30 days if they are unable to provide for the education of their children. The school entity is then obligated to provide for the student's education. New language has also been added to clarify that a student with a disability must be provided educational services as required by IDEA.

Section 12.8(b)(1)(ii) (relating to hearings) provides that students be given at least 3 days' notice of the time and place of a formal disciplinary hearing. This section also provides that students may be represented by counsel at their parents' expense and that parents or guardians may attend the hearing.

Section 12.8(b)(1)(viii) has been updated to reflect current technology used to record and maintain a record of the formal hearing. The Board also has added a requirement that a copy of the hearing record be provided at no cost to a student who is indigent.

Section 12.8(b)(1)(ix) requires a formal hearing to be held within 15 school days of notification of the charges except when one of the following is needed: laboratory reports from law enforcement; evaluations, court or administrative proceedings regarding rights under IDEA are pending; or it is in the best interests of the victim of a sexual assault or victim of serious bodily injury. The section also provides that notice of appeal rights must be provided with the expulsion decision.

Section 12.8(c) has been amended to add the subsection heading "informal hearings" to clarify the meaning and application of the subsection.

Section 12.9(a) (relating to freedom of expression) has been amended to remove the legal reference to the *Tinker v. Des Moines Community School District*, 393 U. S. 503 (1969), decision of the United States Supreme Court and to replace it with a general statement that student rights to freedom of expression are guaranteed by the Constitution of the United States and the Constitution of the Commonwealth. The United States Supreme Court has issued additional decisions that further clarify and define student rights to free expression since the *Tinker v. Des Moines Community School District* decision was issued in 1969. Rather than list each of these cases, the Board has rewritten the subsection to refer to the basic source of student free speech rights, the Federal and State constitutions.

In amending § 12.9, the Board does not intend to restrict or limit the long-held tradition of the Commonwealth to provide to students free speech rights that might be somewhat broader than those that are guaranteed by the United States Constitution. The Board intends to maintain this tradition as a matter of policy. In

fact, to better reflect the Board's intent, the Office of General Counsel, in reviewing the amendments to § 12.9 for form and legality after the Board approved the final-form rulemaking, directed the Board to use the word "guarantee" in subsection (a) in place of the word "established" and to add "shall" to subsection (b). These two amendments make clear that § 12.9 establishes students rights to freedom of expression, with the Constitution of the United States and the Constitution of the Commonwealth guaranteeing rights cannot be denied to students by any public school entity, official or employee.

Section 12.9(b) has been amended in response to comments received by the Board during the official public comment period and during a hearing of the House Education Committee. The amended language provides that students may express themselves unless the expression materially and substantially interferes with the educational process, threatens serious harm to the school or community, encourages unlawful activity or interferes with another individual's rights. The term "serious" has been inserted to assure that student speech that presents a serious threat, regardless of whether the threat is "immediate," a term that the Board deleted from § 12.9(b), is not speech protected by the regulation. The term "serious" is to be interpreted as used in the opinion of the Supreme Court of Pennsylvania in its ruling in *J.S. v. Bethlehem School District*, 569 Pa. 638, 807 A.2d 847 (2002). The Court in that case held that if the communication were a serious expression of intent to inflict harm, a court would consider the statements, the context in which they were made, the reaction of listeners and others, as well as the nature of the comments in determining whether the communications constitute a true threat.

Section 12.11 (relating to hair and dress) has been amended to reflect recent statutory authority that provides school boards authority to adopt dress codes or to require that students wear school uniforms. The section also has been amended to indicate when the length or style of hair presents a health or safety hazard, the hair shall be covered.

Section 12.14 (relating to searches) has been amended to update language regarding searches of student lockers to make it consistent with current case law.

Section 12.16 (relating to definitions) has been added to include definitions of "corporal punishment," "governing board," "school entity," "student assistance program" and "student services."

Section 12.31 (relating to general requirements) has been amended to provide that copies of the student record plan be submitted to the Department only upon request of the Secretary of Education (Secretary).

Section 12.32 (relating to elements of the plan) has been amended to require that student records plans conform to applicable State and Federal laws, regulations and directives.

Section 12.41(a) (relating to student services) requires that school entities prepare a written plan for the implementation of a comprehensive and integrated K-12 program of student services. The plan must be prepared and revised consistent with strategic planning requirements outlined in Chapter 4 (relating to academic standards and assessment).

Section 12.41(b) describes the developmental services; diagnostic, intervention and referral services; and consultation and coordination services that must be provided by each school entity.

Section 12.41(c) describes additional requirements for student services programs.

Section 12.41(d) addresses the rights of students and parents to refuse to participate in surveys covered under section 445 of the General Education Provisions Act (20 U.S.C.A. § 1232h), regarding the Protection of Pupil Rights amendment.

Section 12.42 (relating to student assistance program) has been added to require school entities to plan and provide for a student assistance program.

Summary of Public Comments and Changes

The proposed amendments were published at 33 Pa.B. 5735. The proposed rulemaking was also published on the Department's website at www.pde.state.pa.us. The Board accepted formal written comments within a 30-day public comment period after publication of the proposed rulemaking.

The Board received comments from members and staff of the House Education Committee and the Independent Regulatory Review Commission (IRRC). In addition, comments were received from 14 commentators during the 30-day public comment period. These included comments submitted by: the Education Law Center; the Pennsylvania School Boards Association (PSBA); the Pennsylvania Parent Teacher Association (PTA); the Pennsylvania Psychological Association; the Colonial School District; Goehring Rutter & Boehm—Attorneys at Law; the Behavioral Health Training and Education Network; the National Coalition to Abolish Corporal Punishment in Schools; the National Center for the Study of Corporal Punishment and Alternatives at Temple University; the Center for Safe Schools; and four private citizens—Terry Hasenauer, Harold Smith, Hosla Carter and Eloise C. Stoehr. Comments were also received after the official comment period but before the Board adopted the final-form rulemaking from the School District of Philadelphia, the Pennsylvania State Education Association (PSEA) and scores of private citizens.

Following is a summary of the comments and the Board's response to those comments:

§ 12.1. Free education and attendance.

Comment: The Education Law Center supports the amendment.

§ 12.4. Discrimination.

Comment: The Education Law Center and IRRC suggested replacing the term "handicaps" with "disabilities."

Response: The Board amended the term as suggested.

§ 12.5. Corporal punishment.

Comment: Letters in support of the Board's action to ban corporal punishment were received from: the Democratic Chairperson of the House Education Committee; the Education Law Center; the PTA; the Pennsylvania Psychological Association; the National Coalition to Abolish Corporal Punishment in Schools; the National Center for the Study of Corporal Punishment and Alternatives at Temple University, Center for Safe Schools; the Colonial School District; and two private citizens.

A letter opposing the ban and recommending that use of corporal punishment be permitted was received from a private citizen. The PSBA suggested the issue was one that should be addressed by the General Assembly, not the Board. The House Education Committee also provided comments from several of its members who expressed concern that corporal punishment can be an effective

method of improving student behavior and should not be eliminated. The letter suggested language that would permit continued use of corporal punishment under carefully defined circumstances. In addition, at a hearing held on February 23, 2005, members of the House Education Committee, supported by a memorandum of the House Education Committee's staff, suggested that the ban on corporal punishment contradicts statutory provisions in the code.

Response: The Board believes the use of corporal punishment, as a method of student discipline in public schools, is ineffective and unsupported by research. Research shows that corporal punishment is used more often on poor children and minorities. Schools where corporal punishment is used generally have poorer academic achievement, higher truancy, greater school violence and higher dropout rates. Research also shows that corporal punishment is frequently used as the first method of discipline for minor misbehaviors rather than a form of discipline of the last resort. Corporal punishment is a risk factor for a number of negative outcomes. It also does not model good adult behavior as it teaches children that it is permissible to hit someone smaller and weaker when they are not compliant.

The Board also believes that it has the statutory authority under Article XXVI-B of the code (24 P.S. §§ 26-2601-B—26-2606-B) to define and prohibit corporal punishment in the public schools. In *Girard School District v. Pittenger*, 481 Pa. 91, 99-100, 392 A.2d 261, 265 (1978), the Supreme Court of Pennsylvania held that "in issuing the regulations on 'Student Rights and Responsibilities[.]' the State Board [of Education] was acting within the field of education and, as such, was not exceeding the authority of the General Assembly's grant of legislative rule-making power . . ." Inasmuch as there is no provision of the code expressly empowering school districts or school personnel to inflict corporal punishment as part of its policy of disciplining students, the Board believes that it has the statutory authority to ban the practice of corporal punishment, as that term is defined in new § 12.16.

Comment: During a hearing held on February 23, 2005, members of the House Education Committee shared concerns that without a definition of "corporal punishment," any type of physical activity could be construed to be corporal punishment.

Response: The Board agrees and has included a definition of "corporal punishment" in § 12.16.

§ 12.6. Exclusions from school.

Comment: In subsection (a), IRRC suggested changing the term "exceptional students" to "students with disabilities."

Response: The Board amended the regulation as suggested.

Comment: The Education Law Center supports the amendment to subsection (d).

Comment: The PSBA suggested retaining the current language in subsection (d) and suggested that there are situations when the 15-day time frame to hold a hearing is problematic.

Response: The Board believes a 15-day time frame is reasonable and appropriate. Sufficient flexibility is provided to school entities while also ensuring that students are not excluded from school for long periods without appropriate due process.

Comment: The Education Law Center commented that it believes the language in subsection (e), though an improvement over current regulation, is too weak to ensure that an expelled child receives a sufficient educational program. It also suggested including a statement that students with a disability are entitled to a Free Appropriate Public Education (FAPE) as provided by IDEA.

Response: The Board believes standards established by court rulings have addressed this matter and does not believe it should prescribe additional requirements beyond those established by the courts. The Board has added language stating that students with a disability are entitled to FAPE.

Comment: IRRC recommended the Board clarify when a school district is required to begin providing educational services after being notified by the parent that they are unable to provide their child with an education.

Response: The Board added language that requires school districts to provide educational services within 10 days of notification.

§ 12.8. Hearings.

Comment: IRRC suggested identifying the minimum time period that qualifies as sufficient notice.

Response: The Board established 3 days as sufficient notice.

Comment: The Education Law Center suggested the notice of a right to appeal the expulsion decision should be provided with notification of expulsion decision, not with the notification of charges as proposed. It also suggested that a copy of the hearing transcript be provided at no cost to a student who cannot afford it.

Response: The Board agrees and made both changes.

Comment: The School District of Philadelphia expressed concerns about the 15-day time frame and noted situations where the time frame is not practical. It suggested exceptions to the time frame, such as when laboratory tests are needed from law enforcement, an administrative hearing or judicial proceeding is pending resulting from the student invoking their rights under IDEA or a victim of a sexual assault or serious bodily injury is not available due to their physical or emotional condition.

Response: The Board agrees and incorporated the exceptions to the regulation.

Comment: The PSBA expressed a number of concerns and raised questions about the regulation. It recommended that the Board maintain the existing language. Goehring, Rutter and Boehm also expressed concerns that providing a copy of the expulsion policy to students together with notification of charges would provide a small but additional paperwork burden on schools.

Response: The Board believes expulsion hearings are serious matters in which students should be entitled to information relevant to the rules and procedures followed by the school entity. The Board believes the additional paperwork requirement is minimal and justified given the serious action contemplated by the governing board. Except for the changes to this section previously noted, the Board has retained the regulation as proposed.

§ 12.9. Freedom of expression.

Comment: IRRC recommended that in subsection (a), the citation to Supreme Court's *Tinker* decision issued in 1969 be replaced with a citation to the Supreme Court's 1986 opinion in *Bethel School District v. Fraser*; 478 U. S.

675. The PSBA also expressed its concerns that *Bethel School District and Hazelwood School District v. Kulmeier*; 484 U. S. 260, from 1988 are relevant to this section and are needed to reflect accurately the rulings of the United States Supreme Court on the subject.

Response: The Board amended the regulation to reflect that the Constitution of the United States and the Constitution of the Commonwealth guarantee students a right to freely express themselves in school. This language will ensure that its meaning and intent is preserved when additional court rulings are issued regarding student freedom of expression in the future.

Comment: The PSBA expressed a concern that, in subsection (b), the term "immediate harm" might suggest that there must be an immediacy of harm before a threat falls outside the protection of the First Amendment. It suggested deletion of the word "immediate." In addition, at a hearing held by the House Education Committee on February 23, 2005, a number of its members expressed concern about this subsection, particularly about the term "immediate and serious harm to the welfare of the school or community."

Response: The Board agrees with comments submitted by the PSBA and by members of the House Education Committee. The Board amended the clause to read "serious harm to the school or community." The Board believes this new language appropriately balances the rights of students with the need of school officials to maintain a well-ordered educational environment.

Comment: The PSBA expressed concern that the regulation is contrary to a 1989 court decision that ruled the hallways of a public school during the school day are not considered public forums. In addition, the PSBA stated the regulations encroach upon authority declared by the United States Supreme Court in its *Hazelwood* decision.

Response: The Board believes that the regulation provides sufficient authority to school officials to regulate student conduct and the distribution of materials in public schools buildings.

§ 12.14. Searches.

Comment: The PSBA expressed concern that the regulation provides a more stringent standard for locker searches than is constitutionally required.

Response: The Board chose to maintain the long-standing standard as outlined in the regulation.

§ 12.16. Definitions.

Comment: At a hearing of the House Education Committee, some members expressed concern that "corporal punishment" was not defined in the regulation.

Response: The Board agrees and has added a definition of "corporal punishment."

Comment: A private citizen commented that the definition for "student assistance program" should be amended to state that the program is designed to assist students who are experiencing a barrier to learning consistent with language contained in a Department Basic Education Circular.

Response: The Board believes that it is the purpose and function of all student services to address barriers to learning. It is not solely the purview of the student assistance program, which was first established to address substance abuse issues in schools.

§ 12.32. Elements of the plan.

Comment: IRRC expressed concerns to the Board about the requirement for the Department to issue guidelines

on student services because guidelines are not binding. The PSBA recommended that the Board create regulations since delegating issuance of guidelines to the Department would not allow for public input.

Response: The Board amended this section using language suggested by IRRC.

§ 12.41. *Student services.*

Comment: Several members of the House Education Committee, the Pennsylvania Psychological Association and a private citizen recommended that the descriptors for educational specialists outlined in Chapter 7 be retained, or that Chapter 7 itself be retained. These commentators share a concern that the quality and effectiveness of student services would be reduced as a consequence of the proposed rulemaking.

Response: The Board believes that Chapter 7 is too prescriptive in today's educational environment. The regulations are inconsistent with other Board regulations in that they limit flexibility provided to school entities in the planning, implementation and administration of cost effective, comprehensive student services programs. The Board believes that the final-form rulemaking provides an appropriate balance between defining what services school entities must provide while providing them flexibility in delivery of the services.

Comment: The PSBA, the Education Law Center, the Pennsylvania Psychological Association, a private citizen and IRRC commented that subsection (d) was unclear and needed additional work, or may even be unnecessary.

Response: The Board agrees and has rewritten subsection (d) to address parental and student rights under the Federal Protection of Pupil Rights amendment.

Comment: IRRC suggested clarity would be improved in subsection (a) by defining developmental, diagnostic, intervention, referral, consultation and coordination services. The PSEA and a private citizen also commented that the proposed language suffers from a lack of specificity and suggested that the Board restore the descriptors in Chapter 7.

Response: The Board concurs that the regulation required additional clarity and has described the activities more fully in the final-form rulemaking. However, the Board believes that the descriptors in Chapter 7 are too detailed and limit the flexibility of school entities in the design of a comprehensive system of student support services.

Comment: A private citizen commented that the Board should clarify who may administer medications in schools.

Response: School health regulations and guidance generally fall under the authority of the Department of Health. Therefore, it would not be appropriate for the Board to issue regulations on this issue.

Comment: The PSBA commented that subsection (e), which states that student services staff must be specifically licensed or certified, is unnecessary since Chapter 49 (relating to certification of professional personnel) provides for certification and that the proposed language can only restrict staffing decisions by school officials.

Response: The Board believes that it is important that personnel, both those employed by the school entity and those employed by community agencies, be properly licensed or certified. Chapter 49 and Department policies describe the qualifications and scope of responsibilities for professional school employees. With staff from community agencies now providing services to students in schools on

a routine basis, the Board believes that all individuals providing services to students should be properly credentialed.

Comment: The Pennsylvania Psychological Association and the Colonial School District support the addition of language to clarify that outside agencies providing services in schools are to be coordinated by and under the general direction of the school entity.

Additional Comments.

Comment: IRRC suggested clarity would be improved through consistent use of a single term when referring to a school board, board of school directors, governing board, and the like. The Education Law Center also suggested that it be made clear that charter schools must follow Chapter 12 regulations.

Response: The Board concurs and is using the term "governing board" throughout the regulations and has included it in the definitions in § 12.16. The definition includes charter schools to clearly indicate these regulations apply to charter schools.

Comment: IRRC suggested using the term "parents" or "guardians" consistently throughout the regulations.

Response: The Board has amended the regulations to reflect this suggestion.

Comment: A private citizen suggested that the Board address school policies regarding off-campus student conduct, as many school entities now have these policies. These policies principally address acceptable off-campus student conduct as a condition of student participation in extracurricular activities, such as intramural and inter-scholastic sports, clubs and related activities that are considered privileges, not entitlements.

Response: The General Assembly has delegated broad authority to school boards to "prescribe, adopt, and enforce such reasonable rules and regulations as it may deem proper regarding [extracurricular activities]." See section 510(a) of the code (24 P. S. § 5-510(a)). Therefore, the Board has chosen not to regulate on this issue.

Application of Education Empowerment Act

In consolidating the regulations in Chapter 7 into Chapter 12, the question arose: How does the Board's reorganization affect those chapters under the Mandate Waiver Program established by section 1714-B of the Education Empowerment Act (EEA) (24 P. S. § 17-1714-B)?

Under the Mandate Waiver Program, the Department is empowered to waive certain statutory and regulatory mandates in response to applications of a school district, intermediate unit or area vocational-technical school. The EEA expressly exempts from the Department's waiver authority certain specified statutes and regulations. Among the regulations exempted from the waiver program is Chapter 12. See section 17-1714-B(h) of the EEA.

The Board previously considered the effect of moving regulatory language from one chapter to another and its effect on the Mandate Waiver Program. The Board established Chapter 16 (relating to special education for gifted students) after having previously addressed gifted education as part of Chapter 14. In that case, the Secretary asked the Department's Office of Chief Counsel to render an opinion on the issue. The Office of Chief Counsel advised the Secretary that because the General Assembly clearly intended to exempt from the Mandate Waiver Program all of Chapter 14, including the provisions governing gifted education, new Chapter 16 governing

gifted education would also be exempt from the Mandate Waiver Program under section 1714-B(h) of the EEA. The change in numbering of the regulations by the Board would not alter the clear legislative intent to exempt from the program all Board regulations contained in Chapter 14 at the time the EEA went into effect.

The Board believes this principle also applies to the consolidation of Chapters 7 and 12. The General Assembly clearly intended to include Chapter 7 in the Mandate Waiver Program, including all of the provisions governing pupil personnel services. The change in numbering or title of the regulations by the Board would not alter the clear legislative intent to permit inclusion in the program all Board regulations in Chapter 7 at the time the EEA went into effect. Therefore, the Board submits its final-form rulemaking with a statement of its understanding that § 12.41 would be eligible for waiver under the Mandate Waiver Program established by the EEA, on application of a school district, intermediate unit or area vocational-technical school to the Department.

Fiscal Impact and Paperwork Requirements

Because the final-form rulemaking largely reflects changes in Federal and State statutes, Federal regulations and court decisions, costs associated with compliance with the final-form rulemaking should be negligible. The final-form rulemaking is aligned with current statutory provisions and relevant case law. To comport with the new provisions of the final-form rulemaking, school districts might have to change their disciplinary policies and procedures, as well as their expulsion hearing policies. School districts also might have to revise their student records policies to comply with the guidance provided by the Department. There may be limited costs associated with each of these changes.

The student assistance program, which is currently operated under Department guidelines, is mandated by the regulations. This change should not result in additional costs. The regulations require the Department to issue program guidelines for student services programs. This includes the development of a comprehensive written plan for student services. Since school entity strategic planning requirements in Chapter 4 already require school entities to address student support services as part of the overall strategic plan, costs associated with this final-form rulemaking should be minimal.

School entities may need to revise and update school district policies regarding student discipline and the maintenance of student records due to these regulations. Based on guidance to be provided by the Department, each school entity would need to update its student records policy. Compliance with these requirements is estimated to be less than \$20,000. Actual costs incurred by each school entity for compliance with these requirements will vary from school entity to school entity. However, school entities that have updated student records policies based on Federal laws and court decisions already meet these new requirements. Schools that currently describe student services in their strategic plans, as required by § 4.13 (relating to strategic plans), or in other documents, may currently meet this requirement as well.

By consolidating the regulations into the new student services section of Chapter 12, previously addressed in Chapter 7, schools will be provided additional flexibility to deliver a comprehensive program of student services to their students. Depending upon implementation on the

local level, this might lead to improving the scope and quality of services provided to students while also providing cost savings.

Effective Date

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

Sunset Date

In accordance with its policy and practice respecting all regulations promulgated by it, the Board will review the effectiveness of Chapter 12 after 4 years. Therefore, no sunset date is necessary.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on August 30, 2003, the Board submitted a copy of the notice of proposed rulemaking, published at 33 Pa.B. 5735, to IRRC and the Chairpersons of the House and Senate Committees on Education 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 Department has considered all comments from IRRC, the House and Senate Committees and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), on October 5, 2005, the final-form rulemaking was approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on October 6, 2005, and approved the final-form rulemaking.

Contact Person

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

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.

(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 Chapters 7 and 12, are amended by deleting §§ 7.1, 7.2, and 7.11—7.14 and 12.33 and Exhibit A and Sample Forms A—D of Chapter 12; and by amending §§ 12.1—12.9, 12.11, 12.12, 12.14, 12.31 and 12.32; and by adding §§ 12.16, 12.41 and 12.42 to read as set forth in Annex A.

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

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

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

JIM BUCKHEIT,
Executive Director

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 35 Pa.B. 5893 (October 22, 2005).)

Fiscal Note: 6-280. (1) General Fund; (2) Implementing Year 2004-05 is \$5,000; (3) 1st Succeeding Year 2005-06 is \$0; 2nd Succeeding Year 2006-07 is \$0; 3rd Succeeding Year 2007-08 is \$0; 4th Succeeding Year 2008-09 is \$0; 5th Succeeding Year 2009-10 is \$0; (4) 2003-04 Program—\$26,219,000; 2002-03 Program—\$26,674,000; 2001-02 Program—\$27,820,000; (7) General Government Operations; (8) recommends adoption. This is a onetime cost associated with consulting with stakeholders in the development of guidelines for maintenance of student records and for student support services.

Annex A

TITLE 22. EDUCATION

PART I. STATE BOARD OF EDUCATION

Subpart A. MISCELLANEOUS PROVISIONS

CHAPTER 7. (Reserved)

§ 7.1. (Reserved).

§ 7.2. (Reserved).

§§ 7.11—7.14. (Reserved).

CHAPTER 12. STUDENTS AND STUDENT SERVICES

STUDENT RIGHTS AND RESPONSIBILITIES

§ 12.1. Free education and attendance.

(a) All persons residing in this Commonwealth between the ages of 6 and 21 years are entitled to a free and full education in the Commonwealth's public schools.

(b) Parents or guardians of all children between the ages of 8 and 17 are required by the compulsory attendance law to ensure that their children attend an approved educational institution, unless legally excused. Students who have not graduated may not be asked to leave school merely because they have reached 17 years of age if they are fulfilling their responsibilities as students. A student may not be excluded from the public schools or from extracurricular activities because:

- (1) The student is married.
- (2) The student is pregnant.
- (3) The student has a disability as identified by Chapter 15 (relating to protected handicapped students).
- (4) The student is an eligible student identified under Chapter 14 (relating to special education services and programs).

§ 12.2. Student responsibilities.

(a) Student responsibilities include regular school attendance, conscientious effort in classroom work and homework, and conformance to school rules and regulations. Most of all, students are responsible to share with the administration and faculty a responsibility to develop a climate within the school that is conducive to wholesome learning and living.

(b) No student has the right to interfere with the education of fellow students. It is the responsibility of each student to respect the rights of teachers, students, administrators and all others who are involved in the educational process.

(c) Students should express their ideas and opinions in a respectful manner.

(d) It is the responsibility of the students to conform to the following:

(1) Be aware of all rules and regulations for student behavior and conduct themselves in accordance with them. Students should assume that, until a rule is waived, altered or repealed in writing, it is in effect.

(2) Volunteer information in matters relating to the health, safety and welfare of the school community and the protection of school property.

(3) Dress and groom to meet standards of safety and health, and not to cause substantial disruption to the educational processes.

(4) Assist the school staff in operating a safe school for the students enrolled therein.

(5) Comply with Commonwealth and local laws.

(6) Exercise proper care when using public facilities and equipment.

(7) Attend school daily and be on time at all classes and other school functions.

(8) Make up work when absent from school.

(9) Pursue and attempt to complete satisfactorily the courses of study prescribed by local school authorities.

(10) Report accurately in student media.

(11) Not use obscene language in student media or on school premises.

§ 12.3. School rules.

(a) The governing board has the authority to make reasonable and necessary rules governing the conduct of students in school. The rulemaking power, however, is not unlimited; it must operate within statutory and constitutional restraints. A governing board has only those powers that are enumerated in the statutes of the Commonwealth, or that may reasonably be implied or necessary for the orderly operation of the school.

(b) Governing boards may not make rules that are arbitrary, capricious, discriminatory or outside their grant of authority from the General Assembly. A rule is generally considered reasonable if it uses a rational means of accomplishing some legitimate school purpose.

(c) Each governing board shall adopt a code of student conduct that includes policies governing student discipline and a listing of students' rights and responsibilities as outlined in this chapter. This conduct code shall be published and distributed to students and parents or guardians. Copies of the code shall also be available in each school library.

§ 12.4. Discrimination.

Consistent with the Pennsylvania Human Relations Act (43 P. S. §§ 951—963), a student may not be denied access to a free and full public education, nor may a student be subject to disciplinary action on account of race, sex, color, religion, sexual orientation, national origin or disability.

§ 12.5. Corporal punishment.

(a) Corporal punishment is defined as physically punishing a student for an infraction of the discipline policy. Use of corporal punishment is prohibited.

(b) Teachers and school authorities may use reasonable force under the following circumstances:

- (1) To quell a disturbance.
- (2) To obtain possession of weapons or other dangerous objects.
- (3) For the purpose of self-defense.
- (4) For the protection of persons or property.

§ 12.6. Exclusions from school.

(a) The governing board shall define and publish the types of offenses that would lead to exclusion from school. Exclusions affecting certain students with disabilities shall be governed by § 14.143 (relating to disciplinary placements) and 34 CFR 300.519—300.529 (relating to discipline procedures).

(b) Exclusion from school may take the form of suspension or expulsion.

(1) Suspension is exclusion from school for a period of from 1 to 10 consecutive school days.

(i) Suspensions may be given by the principal or person in charge of the public school.

(ii) A student may not be suspended until the student has been informed of the reasons for the suspension and given an opportunity to respond. Prior notice of the intended suspension need not be given when it is clear that the health, safety or welfare of the school community is threatened.

(iii) The parents or guardians and the superintendent of the district shall be notified immediately in writing when the student is suspended.

(iv) When the suspension exceeds 3 school days, the student and parent shall be given the opportunity for an informal hearing consistent with the requirements in § 12.8(c) (relating to hearings).

(v) Suspensions may not be made to run consecutively beyond the 10 school day period.

(vi) Students shall have the responsibility to make up exams and work missed while being disciplined by suspension and shall be permitted to complete these assignments within guidelines established by the governing board.

(2) Expulsion is exclusion from school by the governing board for a period exceeding 10 school days and may be permanent expulsion from the school rolls. Expulsions require a prior formal hearing under § 12.8.

(c) During the period prior to the hearing and decision of the governing board in an expulsion case, the student shall be placed in his normal class except as set forth in subsection (d).

(d) If it is determined after an informal hearing that a student's presence in his normal class would constitute a threat to the health, safety or welfare of others and it is not possible to hold a formal hearing within the period of a suspension, the student may be excluded from school for more than 10 school days. A student may not be excluded from school for longer than 15 school days without a formal hearing unless mutually agreed upon by

both parties. Any student so excluded shall be provided with alternative education, which may include home study.

(e) Students who are under 17 years of age are still subject to the compulsory school attendance law even though expelled and shall be provided an education.

(1) The initial responsibility for providing the required education rests with the student's parents or guardian, through placement in another school, tutorial or correspondence study, or another educational program approved by the district's superintendent.

(2) Within 30 days of action by the governing board, the parents or guardians shall submit to the school district written evidence that the required education is being provided as described in paragraph (1) or that they are unable to do so. If the parents or guardians are unable to provide the required education, the school entity shall, within 10 days of receipt of the notification, make provision for the student's education. A student with a disability shall be provided educational services as required by the Individuals With Disabilities Education Act (20 U.S.C.A. §§ 1400—1482).

(3) If the approved educational program is not complied with, the school entity may take action in accordance with 42 Pa.C.S. Chapter 63 (relating to the Juvenile Act) to ensure that the child will receive a proper education. See § 12.1(b) (relating to free education and attendance).

§ 12.7. Exclusion from classes—in-school suspension.

(a) A student may not receive an in-school suspension unless the student has been informed of the reasons for the suspension and has been given an opportunity to respond before the suspension becomes effective.

(b) Communication to the parents or guardian shall follow the suspension action taken by the school.

(c) When the in-school suspension exceeds 10 consecutive school days, an informal hearing with the principal shall be offered to the student and the student's parent or guardian prior to the 11th school day in accordance with the procedures in § 12.8 (relating to hearings).

(d) The student's school entity has the responsibility to make provision for the student's education during the period of the in-school suspension.

§ 12.8. Hearings.

(a) *General.* Education is a statutory right, and students shall be afforded due process if they are to be excluded from school. In a case involving a possible expulsion, the student is entitled to a formal hearing.

(b) *Formal hearings.* A formal hearing is required in all expulsion actions. This hearing may be held before the governing board or an authorized committee of the board, or a qualified hearing examiner appointed by the board. When a committee of the board or a hearing examiner conducts the hearing, a majority vote of the entire governing board is required to expel a student. The following due process requirements shall be observed with regard to the formal hearing:

(1) Notification of the charges shall be sent to the student's parents or guardians by certified mail.

(2) At least 3 days' notice of the time and place of the hearing shall be given. A copy of the expulsion policy, notice that legal counsel may represent the student and hearing procedures shall be included with the hearing

notice. A student may request the rescheduling of the hearing when the student demonstrates good cause for an extension.

(3) The hearing shall be held in private unless the student or parent requests a public hearing.

(4) The student may be represented by counsel, at the expense of the parents or guardians, and may have a parent or guardian attend the hearing.

(5) The student has the right to be presented with the names of witnesses against the student, and copies of the statements and affidavits of those witnesses.

(6) The student has the right to request that the witnesses appear in person and answer questions or be cross-examined.

(7) The student has the right to testify and present witnesses on his own behalf.

(8) A written or audio record shall be kept of the hearing. The student is entitled, at the student's expense, to a copy. A copy shall be provided at no cost to a student who is indigent.

(9) The proceeding shall be held within 15 school days of the notification of charges, unless mutually agreed to by both parties. A hearing may be delayed for any of the following reasons, in which case the hearing shall be held as soon as reasonably possible:

(i) Laboratory reports are needed from law enforcement agencies.

(ii) Evaluations or other court or administrative proceedings are pending due to a student invoking his rights under the Individuals With Disabilities Education Act (20 U.S.C.A. §§ 1400—1482).

(iii) In cases in juvenile or criminal court involving sexual assault or serious bodily injury, delay is necessary due to the condition or best interests of the victim.

(10) Notice of a right to appeal the results of the hearing shall be provided to the student with the expulsion decision.

(c) *Informal hearings.* The purpose of the informal hearing is to enable the student to meet with the appropriate school official to explain the circumstances surrounding the event for which the student is being suspended or to show why the student should not be suspended.

(1) The informal hearing is held to bring forth all relevant information regarding the event for which the student may be suspended and for students, their parents or guardians and school officials to discuss ways by which future offenses might be avoided.

(2) The following due process requirements shall be observed in regard to the informal hearing:

(i) Notification of the reasons for the suspension shall be given in writing to the parents or guardians and to the student.

(ii) Sufficient notice of the time and place of the informal hearing shall be given.

(iii) A student has the right to question any witnesses present at the hearing.

(iv) A student has the right to speak and produce witnesses on his own behalf.

(v) The school entity shall offer to hold the informal hearing within the first 5 days of the suspension.

§ 12.9. Freedom of expression.

(a) The right of public school students to freedom of speech is guaranteed by the Constitution of the United States and the Constitution of the Commonwealth.

(b) Students shall have the right to express themselves unless the expression materially and substantially interferes with the educational process, threatens serious harm to the school or community, encourages unlawful activity or interferes with another individual's rights.

(c) Students may use publications, handbills, announcements, assemblies, group meetings, buttons, armbands and any other means of common communication, provided that the use of public school communications facilities shall be in accordance with the regulations of the authority in charge of those facilities.

(1) Students have the responsibility to obey laws governing libel and obscenity and to be aware of the full meaning of their expression.

(2) Students have the responsibility to be aware of the feelings and opinions of others and to give others a fair opportunity to express their views.

(d) Identification of the individual student or at least one responsible person in a student group may be required on posted or distributed materials.

(e) School officials may require students to submit for prior approval a copy of materials to be displayed, posted or distributed on school property.

(f) Bulletin boards must conform to the following:

(1) School authorities may restrict the use of certain bulletin boards.

(2) Bulletin board space should be provided for the use of students and student organizations.

(3) School officials may require that notices or other communications be officially dated before posting, and that the materials be removed after a prescribed reasonable time to assure full access to the bulletin boards.

(g) School newspapers and publications must conform to the following:

(1) Students have a right and are as free as editors of other newspapers to report the news and to editorialize within the provisions in paragraphs (4) and (5).

(2) School officials shall supervise student newspapers published with school equipment, remove obscene or libelous material and edit other material that would cause a substantial disruption or interference with school activities.

(3) School officials may not censor or restrict material simply because it is critical of the school or its administration.

(4) Prior approval procedures regarding copy for school newspapers must identify the individual to whom the material is to be submitted and establish a limitation on the time required to make a decision. If the prescribed time for approval elapses without a decision, the material shall be considered authorized for distribution.

(5) Students who are not members of the newspaper staff shall have access to its pages. Written criteria for submission of material by nonstaff members shall be developed and distributed to all students.

(h) The wearing of buttons, badges or armbands shall be permitted as another form of expression within the restrictions listed in subsection (c).

(i) School officials may set forth the time and place of distribution of materials so that distribution would not materially or substantially interfere with the requirements of appropriate discipline in the operation of the school.

(1) A proper time and place set for distribution is one that would give the students the opportunity to reach fellow students.

(2) The place of the activity may be restricted to permit the normal flow of traffic within the school and at exterior doors.

§ 12.11. Hair and dress.

(a) The governing board may establish dress codes or require that students wear school uniforms. Policies may apply to individual school buildings or to all school buildings.

(b) Students have the right to govern the length or style of their hair, including facial hair. Any limitation of this right must include evidence that length or style of hair causes disruption of the educational process or constitutes a health or safety hazard. When length or style of the hair presents a health or safety hazard, some types of covering shall be used.

(c) Students may be required to wear certain types of clothing while participating in physical education classes, shops, extracurricular activities or other situations when special attire may be required to insure the health or safety of the student.

(d) Students have the responsibility to keep themselves, their clothes and their hair clean. School officials may impose limitations on student participation in the regular instructional program when there is evidence that the lack of cleanliness constitutes a health hazard.

§ 12.12. Confidential communications.

(a) Use of a student's confidential communications to school personnel in legal proceedings is governed by statutes and regulations appropriate to the proceeding. See, for example, 42 Pa.C.S. § 5945 (relating to confidential communications to school personnel).

(b) Information received in confidence from a student may be revealed to the student's parents or guardians, the principal or other appropriate authority when the health, welfare or safety of the student or other persons is clearly in jeopardy.

§ 12.14. Searches.

(a) The governing board of every school entity shall adopt reasonable policies and procedures regarding student searches. The local education agency shall notify students and their parents or guardians of the policies and procedures regarding student searches.

(b) Illegal or prohibited materials seized during a student search may be used as evidence against the student in a school disciplinary proceeding.

(c) Prior to a locker search, students shall be notified and given an opportunity to be present. When school authorities have a reasonable suspicion that the locker contains materials that pose a threat to the health, welfare or safety of students in the school, student lockers may be searched without prior warning.

§ 12.16. Definitions.

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

Corporal punishment—A form of physical discipline that is intended to cause pain and fear and in which a student is spanked, paddled or hit on any part of the body with a hand or instrument.

Governing board—The board of school directors of a school district, joint school committee of a joint school or joint vocational school, intermediate unit board of directors, or the board of trustees of a charter school or cyber-charter school.

School entity—A local public education provider (for example—public school, charter school, cyber-charter school, area vocational-technical school or intermediate unit).

Student assistance program—A systematic process designed to assist school personnel to identify issues, including alcohol, drugs and others, which pose a barrier to a student's learning and school success. Student assistance is a systematic process using effective and accountable professional techniques to mobilize school resources to remove the barriers to learning, and, when the problem is beyond the scope of the school, to assist the parent and the student with information so they may access services within the community.

Student services—Services designed by a school entity to support the instructional program and to help students attain their educational and career goals.

(i) Services may include school guidance counseling, health services (under Article XIV of the Public School Code of 1949 (24 P.S. §§ 14-1401—14-1423) and 28 Pa. Code Chapter 23 (relating to school health)), psychological services, social work and home and school visitor services.

(ii) School entities may supplement, but may not supplant, these services through school-based, school-linked, or coordinated services provided by locally available social and human services agencies.

STUDENT RECORDS

§ 12.31. General requirements.

(a) The governing board of every school entity shall adopt a plan for the collection, maintenance and dissemination of student records

(b) Copies of the adopted plan shall be maintained by the school entity and updated as required by changes in State or Federal law.

(c) Copies of the plan shall be submitted to the Department only upon request of the Secretary.

§ 12.32. Elements of the plan.

The plan for student records must conform with applicable State and Federal laws, regulations and directives identified in guidelines issued by the Department.

§ 12.33. (Reserved).

**EXHIBIT A. (Reserved)
Sample Forms
A—E (Reserved)**

SERVICES TO STUDENTS

§ 12.41. Student services.

(a) Each school entity shall prepare a written plan for the implementation of a comprehensive and integrated K—12 program of the student services based on the needs of its students. The plan shall be prepared and revised in accordance with the time frames and procedures described in § 4.13(a), (b), (d), (e) and (f) (relating to

strategic plans). Services offered by community agencies in public schools shall be coordinated by and under the general direction of the school entity. The plan must include policies and procedures for emergency care and administration of medication and treatment under The Controlled Substance, Drug, Device and Cosmetic Act (35 P. S. §§ 780-101—780-144) and guidelines issued by the Department of Health. The Department of Health guidelines are available from the Division of School Health, Department of Health, P. O. Box 90, Harrisburg, Pennsylvania 17108.

(b) Though the variety of student services offered will differ from school to school depending upon its size and the needs of its students, the following categories of services shall be provided by each school entity in planning its student services:

(1) Developmental services for students that address their developmental needs throughout their enrollment in school. Developmental services include guidance counseling, psychological services, health services, home and school visitor services and social work services that support students in addressing their academic, behavioral, health, personal and social development issues.

(2) Diagnostic, intervention and referral services for students who are experiencing problems attaining educational achievement appropriate to their learning potential.

(i) Student services staff use diagnostic services to identify barriers that limit a student's success in school. Intervention services actively engage student services staff in activities planned to reduce or eliminate specific barriers to student success.

(ii) Student services staff may arrange for referrals to other school-based or school-linked professionals or may refer parents and guardians to appropriate community-based services for assistance.

(3) Consultation and coordination services for students who are experiencing chronic problems that require multiple services by teams or specialists.

(i) Consultation services are used by student services staff, in partnership with parents or guardians, to obtain assistance to address barriers and issues that are outside the scope of the student services professional.

(ii) Consultation and coordination services may be used to assist in the diagnosis, intervention or referral of students who face barriers to success.

(iii) Coordination services connect school resources with other available resources to assist students in meeting their educational objectives.

(c) Student services must:

(1) Be an integral part of the instructional program at all levels of the school system.

(2) Provide information to students and parents or guardians about educational opportunities of the school's instructional program and how to access these opportunities.

(3) Provide career information and assessments so that students and parents or guardians might become aware of the world of work and of a variety of career options available to individual students.

(4) Provide basic health services outlined in Article XIV of the Public School Code of 1949 (24 P. S. §§ 14-1401—14-1423) for students and information to parents or guardians about the health needs of their children.

(d) When student assessments using individual surveys are administered, parents or guardians shall be informed of the nature and scope of the surveys and of their relationship to the educational program of their child, consistent with section 445 of the General Education Provisions Act (20 U.S.C.A. § 1232h) regarding protection of pupil rights. Parents or guardians, or the student if the student is 18 years of age or older, shall have the right to refuse to participate in the survey by means of procedures established by the school entity.

(e) Persons delivering student services shall be specifically licensed or certified as required by statute or regulation.

(f) The Department will provide guidelines and technical assistance to local education agencies in planning student services.

§ 12.42. Student assistance program.

School entities shall plan and provide for a student assistance program under the Early Intervention Services System Act (11 P. S. §§ 875-101—875-503).

[Pa.B. Doc. No. 05-2198. Filed for public inspection December 2, 2005, 9:00 a.m.]

Title 49—PROFESSIONAL AND VOCATIONAL STANDARDS

STATE BOARD OF COSMETOLOGY

[49 PA. CODE CH. 7]

Biennial Renewal Fee Increase

The State Board of Cosmetology (Board) amends § 7.2 (relating to fees). The final-form rulemaking increases the biennial license renewal fee for all classes of licenses issued by the Board.

A. *Effective Date*

The final-form rulemaking will be effective upon publication in the *Pennsylvania Bulletin*. The new fees will take effect for the biennial period beginning February 1, 2006.

B. *Statutory Authority*

The final-form rulemaking is authorized under section 16 of the act of May 3, 1933 (P. L. 242, No. 86) (Act 86) (63 P. S. § 522) which requires the Board to fix fees by regulation for the biennial renewal of licenses and to increase fees by regulation to meet or exceed projected expenditures if the revenues raised by fees, fines and civil penalties are not sufficient to meet Board expenditures.

C. *Background and Purpose*

The Board is required by law to support its operations from the revenue it generates from fees, fines and civil penalties. In accordance with section 16(c) of Act 86, if the revenue raised by fees, fines and civil penalties is not sufficient to meet expenditures over a 2-year period, the Board must increase fees by regulation so that its projected revenues will meet or exceed projected expenditures.

The Board raises virtually all of its operating revenue (except application and services fees) through biennial

renewal fees. The biennial license renewal fee is the most substantial revenue-generating fee of all the fees charged by the Board. The Board's current biennial license renewal fees for cosmetologists, manicurists, teachers, cosmetology shops and cosmetology schools were established by regulation in 1986, while the current biennial renewal fees for cosmeticians and cosmetician or manicurist shops were established by regulation in 1991.

At the Board's December 6, 2004, meeting, the Bureau of Finance and Operations (BFO) presented a summary of the Board's revenue and expenses for Fiscal Year (FY) 2001-2002 through FY 2003-2004 and projected revenue and expenses for FY 2004-2005 through FY 2010-2011. The summary, presented in the following table, demonstrated that the Board must raise fees to meet or exceed projected expenditures to comply with section 16 of Act 86. The BFO projected a deficit of \$286,531.06 in FY 2007-2008, a deficit of \$1,073,531.06 in FY 2008-2009, a deficit of \$1,662,531.06 in FY 2009-2010 and a deficit of \$2,606,531.06 in FY 2010-2011. Therefore, the BFO recommended that the Board raise fees to meet projected expenditures, in compliance with section 16 of the act.

2001-2002 beginning balance	1,718,075.05
FY 01-02 revenue	2,229,690.06
Prior year returned funds	146,300.49
FY 01-02 expenses	2,376,000.00
Remaining balance	1,718,065.60
2002-2003 beginning balance	1,718,065.60
FY 02-03 revenue	1,959,902.11
Prior year returned funds	0.00
FY 02-03 expenses	2,583,000.00
Remaining balance	1,094,967.71
2003-2004 beginning balance	1,094,967.71
FY 03-04 revenue	2,199,623.23
Prior year returned funds	0.00
FY 03-04 expenses	2,533,000.00
Remaining balance	761,590.94
2004-2005 beginning balance	761,590.94
FY 04-05 projected revenue	1,950,000.00
Prior year returned funds (estimated)	902,878.00
FY 04-05 projected expenses	2,569,000.00
Remaining balance	1,045,468.94
2005-2006 beginning balance	1,045,468.94
FY 05-06 projected revenue	2,230,000.00
FY 05-06 projected expenses	2,505,000.00
Remaining balance	770,468.94
2006-2007 beginning balance	770,468.94
FY 06-07 projected revenue	1,950,000.00
FY 06-07 projected expenses	2,580,000.00
Remaining balance	140,468.94
2007-2008 beginning balance	140,468.94
FY 07-08 projected revenue	2,230,000.00
FY 07-08 projected expenses	2,657,000.00
Remaining balance	(286,531.06)
2008-2009 beginning balance	(286,531.06)
FY 08-09 projected revenue	1,950,000.00
FY 08-09 projected expenses	2,737,000.00
Remaining balance	(1,073,531.06)
2009-2010 beginning balance	(1,073,531.06)
FY 09-10 projected revenue	2,230,000.00
FY 09-10 projected expenses	2,819,000.00

Remaining balance	(1,662,531.06)
2010-2011 beginning balance	(1,662,531.06)
FY 10-11 projected revenue	1,950,000.00
FY 10-11 projected expenses	2,904,000.00
Remaining balance	(2,616,531.06)

As the previous table indicates, the BFO estimates that at the close of FY 2007-2008, the Board's expenses will exceed its revenues by \$286,531.06. The BFO anticipates that in subsequent fiscal years, the deficit will increase proportionally. Without an increase, the projected deficit in FY 2010-2011 would be \$2,616,531.06.

The increases in the Board's biennial expenses occurred primarily in the area of investigative and inspection costs, attributable to increased numbers of complaints being filed and the accompanying increased number of investigations and enforcement actions (citations for minor violations under the act of July 2, 1993 (P. L. 345, No. 48)) initiated by inspectors and investigators on behalf of the Board. For example, investigative expenditures increased from \$808,769.05 in FY 2002-2003 to approximately \$977,912.05 in FY 2003-2004. Because investigative and inspection costs are largely driven by the number of complaints received and the number of inspections performed (a number dependent in part on the number of new applications filed with the Board), the Board has little control over these expenses.

There were also increases in Legal Office costs, related to prosecuting and adjudicating many more cases than in prior years, which contribute to the need to raise biennial renewal fees. In FY 2003-2004, the Board imposed 632 disciplinary sanctions, which was significantly more than in any prior fiscal year. The FY 2003-2004 figure is in comparison to 386 disciplinary sanctions imposed in FY 2002-2003, 370 in FY 2001-2002, 393 in FY 2000-2001 and 310 in FY 1999-2000. Additionally, the Board imposed more serious sanctions than in any prior year, 17 in FY 2003-2004, as opposed to 9 in FY 2002-2003, 11 in FY 2001-2002, 3 in FY 2000-2001 and 3 in FY 1999-2000. Finally, the Board closed more cases in FY 2003-2004 than in any prior year, closing 962 cases as compared with 580 cases in FY 2002-2003, 675 in FY 2001-2002, 740 in FY 2000-2001 and 529 in FY 1999-2000. As of December 9, 2004, there were 395 cases currently open, as opposed to 220 cases open as of December 9, 2003.

The Board carefully reviewed several options in fee increases to ensure the most reasonable fee increase possible while keeping the Board out of a long run deficit. Additionally, in developing this final-form rulemaking, the Board reviewed fees of other states. It found that the proposed fees are comparable to the renewal fees charged in surrounding states and should cause no competitive disadvantage to the Commonwealth. The Board also determined that making fees uniform across comparable license classes would be more equitable and would promote ease of administration. Consequently, the Board made the renewal fees for all individual license classes equal, with the exception of cosmetology teacher licenses, as it did with the renewal fees for the various shop licenses.

D. Description of Amendments

Based upon the previous expense and revenue estimates provided to the Board, the Board is amending its fee schedule in § 7.2(c) to increase the fee for biennial renewal of licenses for cosmeticians from \$21 to \$35; for cosmetologists from \$23 to \$35; for cosmetology teachers from \$36 to \$55; for manicurists from \$21 to \$35; for

cosmetician shops from \$25 to \$60; for cosmetology shops from \$41 to \$60; for manicurist shops from \$25 to \$60; and for cosmetology schools from \$66 to \$150.

The amendment also deletes reference in § 7.2 to a cosmetology manager's license, based on the amendments to Act 86 made by section 3 of the act of June 29, 2002 (P. L. 645, No. 98) (63 P. S. § 510.4) (Act 98), which removed the requirement that a cosmetology shop owner employ a licensed manager if the owner does not manage the shop.

E. *Summary of Comments and Responses to Proposed Rulemaking*

The proposed rulemaking was published at 35 Pa.B. 2400 (April 23, 2005) followed by a 30-day public comment period. The Board did not receive any comments from the general public or the Senate Consumer Protection and Professional Licensure Committee (SCP/PLC). However, the Board received comments from the House Professional Licensure Committee (HPLC) and the Independent Regulatory Review Commission (IRRC).

Both the HPLC and IRRC noted that Act 98 deleted the requirement that a cosmetology shop be under the direction of a manager and that this amendment to § 7.2 deletes the fee for a cosmetology shop manager license, but that elsewhere in Chapter 7 references to a cosmetology shop manager remain. Accordingly, the HPLC and the IRRC commented that the Board should review its regulations and delete all references to a cosmetology shop manager's license wherever they appear so that the regulations are consistent with the existing statute and with amended § 7.2. IRRC specifically stated that the Board should delete all references to a cosmetology shop manager's license from Chapter 7 when the Board submits the final-form rulemaking.

The Board is currently in the process of amending Chapter 7 to delete all references to a cosmetology shop manager and intends to send out an exposure draft to stakeholders and interested parties for comment before engaging in proposed rulemaking on the subject. Because Act 98 changed the requirements for management of cosmetology shops from a licensed cosmetology shop manager to a "designated person in charge," the Board believes that amendment of Chapter 7 simply by deleting all references to "cosmetology shop manager" is not sufficient. The Board must also make some substantive changes to its regulations that address shop management. Accordingly, the Board does not believe that the amendment should be made through this final-form rulemaking, and will, instead, proceed with amending its regulations related to shop management through a separate rulemaking.

F. *Fiscal Impact and Paperwork Requirements*

The final-form rulemaking will increase the biennial renewal fee for all classes of Board licensees. The final-form rulemaking should have no other fiscal impact on the private sector, the general public or political subdivisions. The final-form rulemaking will require the Board to alter some of its forms to reflect the new biennial renewal fees. However, the final-form rulemaking should not create additional paperwork for the private sector.

G. *Sunset Date*

Act 86 requires that the Board monitor its revenue and expenses on a fiscal year and biennial basis. Therefore, no sunset date has been assigned.

H. *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on April 23, 2005, the Board submitted a copy of the notice of proposed rulemaking, published at 35 Pa.B. 2400, to the IRRC and the Chairpersons of 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 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 October 18, 2005, the final-form rulemaking was approved by the HPLC. On November 2, 2005, the final-form rulemaking was deemed approved by the SCP/PLC. Under section 5.1(e) of the Regulatory Review Act, IRRC met on November 3, 2005, and approved the final-form rulemaking.

I. *Contact Person*

Further information may be obtained by contacting Hilarene Staller, Board Administrator, State Board of Cosmetology, P. O. Box 2649, Harrisburg, PA 17105-2649, (717) 783-7130.

J. *Findings*

The Board finds that:

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

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

(3) The amendment does not enlarge the purpose of the proposed rulemaking published at 35 Pa.B. 2400.

(4) The amendment is necessary and appropriate for administration and enforcement of the authorizing act identified in Part B of this preamble.

K. *Order*

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

(a) The regulations of the Board, 49 Pa. Code Chapter 7, are amended by amending § 7.2 to read as set forth at 35 Pa.B. 2400.

(b) The Board shall submit this order and 35 Pa.B. 2400 to the Office of General Counsel and to the Office of the Attorney General as required by law.

(c) The Board shall certify this order and 35 Pa.B. 2400 and deposit them with the Legislative Reference Bureau as required by law.

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

SUSAN E. RINEER,
Chairperson

(*Editor's Note:* For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 35 Pa.B. 6390 (November 19, 2005).)

Fiscal Note: Fiscal Note 16A-4512 remains valid for the final adoption of the subject regulation.

[Pa.B. Doc. No. 05-2199. Filed for public inspection December 2, 2005, 9:00 a.m.]

STATE BOARD OF FUNERAL DIRECTORS
[49 PA. CODE CH. 13]
Continuing Education

The State Board of Funeral Directors (Board) amends §§ 13.1, 13.12 and 13.231 (relating to definitions; fees; and biennial registration; unregistered status and inactive status; failure to renew) and adds §§ 13.401—13.406 (relating to continuing education) to read as set forth in Annex A.

Description and Need for Proposed Rulemaking

As required by the act of June 22, 2000 (P. L. 376, No. 48), this final-form rulemaking adopts regulations implementing continuing education for licensed funeral directors.

Summary of Comments and Responses to Proposed Rulemaking

The Board published notice of proposed rulemaking at 33 Pa.B. 4569 (September 13, 2003) with a 30-day public comment period. The Board received comments from the Pennsylvania Funeral Directors Association (PFDA). The Board also received comments from the Independent Regulatory Review Commission (IRRC) as part of its review of proposed rulemaking under the Regulatory Review Act (71 P. S. §§ 745.1—745.12). The Board did not receive comments from the House Professional Licensure Committee (HPLC) or the Senate Consumer Protection and Professional Licensure Committee (SCP/PLC) as part of their review of proposed rulemaking under the Regulatory Review Act.

The PFDA commented that it fully supports the regulations for continuing education for funeral directors, as published in the *Pennsylvania Bulletin*.

In regard to § 13.231, IRRC questioned whether the term “verify” rather than “certify” would be more accurate in describing the action of the licensee regarding compliance with the required continuing education. In developing the final-form rulemaking, the Board reviewed the renewal regulations and forms for other licensing boards in the Bureau of Professional and Occupational Affairs (Bureau). These boards require the licensee to “certify” that the facts of the application are true under 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities), as contrasted with 18 Pa.C.S. § 4903 (relating to false swearing) regarding verified statements under oath. IRRC also requested that the Board specify under what circumstances the Board would require an applicant for renewal to provide documentation of completion of continuing education. In considering IRRC’s request, the Board determined that the provision is unnecessary and has deleted it.

Because § 13.401(a) (relating to credit hour requirements) requires each funeral director to complete 6 hours of continuing education in each biennial period, IRRC requested clarification of what constitutes a credit hour.

The Board has amended § 13.1 to include a definition of “hour of continuing education” as “60 minutes of actual instruction in an approved course of continuing education.” Proposed § 13.401(b) would have required a funeral director seeking to renew an active license or to reactivate an inactive license to successfully complete all previously required continuing education. IRRC also questioned whether the Board had statutory authority to require compliance with the continuing education requirement for prior biennial periods under section 10(b)(5) of the Funeral Director Law (act) (63 P. S. § 479.10(b)(5)) which requires a licensee seeking to reinstate an inactive or lapsed license to “show proof of compliance with the continuing education requirement for the preceding biennium.” The Board concurs with IRRC’s comment and, accordingly, has revised this proposed requirement, now in § 13.231(d), to require documentation of completed continuing education only for the immediately preceding biennium.

Additionally, because proposed § 13.401(b) addressed only renewal or reactivation of an expired license, those provisions have been deleted. The Board has placed in § 13.231(c) and (d) the prohibition on renewing or reactivating a license, respectively, unless the required amount of continuing education has been completed. Also, the provision of proposed § 13.401(b) that would have permitted a licensee, to reactivate a lapsed license, to have completed during the current biennium the continuing education required for the preceding biennium has been moved to § 13.231(d). In place of the proposed language, § 13.401(b) will require continuing education to be completed during the biennium for which it is required, unless otherwise authorized, and will prohibit a licensee from counting the same continuing education for more than one biennium.

Each licensee will certify on the renewal application that the licensee has completed the required continuing education, subject to audit by the Board. The Board has added § 13.402(c) (relating to reporting completion of continuing education) to acknowledge the auditing process. Under § 13.402(a), completion of a course of continuing education will generally be proved by a continuing education record from the course provider. IRRC suggested that the Board indicate how long a licensee should retain the continuing education record. Because an audit might not begin early in a renewal period and might take longer than a single renewal period, the Board recommends that a licensee retain a continuing education record for two full renewal periods subsequent to the period in which the licensee attended the course. Because the Board does not wish to subject to disciplinary action for failing to keep a record, a licensee who has completed the required continuing education and is able to demonstrate compliance, the Board has not amended the regulation to set forth a binding standard. IRRC also inquired as to what documentation would satisfy the requirement of § 13.402(b) to “otherwise demonstrate completion of course of continuing education” in the absence of a continuing education record. This provision was intended to acknowledge that a continuing education record from the provider at the time of the course is not the sole means to do so. Without limiting a licensee’s ability to do so and without limiting the Board’s authority to determine credibility, the Board anticipates that completion could be demonstrated by a continuing education record subsequently prepared by the provider, documentation from the course itself or corroborated testimony of attendance at the course.

Proposed § 13.403(a) (relating to credit for approved continuing education) provided that continuing education credit will be granted only for courses that have been approved in advance. IRRC inquired how licensees would know whether the Board has approved a course for continuing education credit. The Board intends to identify approved providers in its newsletter. Additionally, the Department of State (Department) website at License PA provides license verification and approved providers of continuing education will be included, along with funeral directors and funeral establishments. Additionally, IRRC questioned whether the proposed § 13.403(b) prohibition of approval of courses "for which continuing education is precluded by section 10 of the act," because section 10 of the act precludes credit only for office management. In response, the Board has revised § 13.403(b) to permit credit for any course whose subject matter is identified in section 5 of the act (63 P. S. § 479.5) as appropriate for examination and any course in applicable law or the provision of professional services, but to prohibit credit for any course in office management or marketing.

IRRC also inquired as to how licensees will be notified that approval of a provider or course has been withdrawn. The Board provides notice of Board actions affecting its licensees through its newsletter and notice on the Department's website. Notice that provider status has been withdrawn will be given to licensees in the same manner.

Finally, IRRC suggested, relative to the continuing education record requirement of § 13.405(b) (relating to provider responsibilities), that the Board consider requiring providers of continuing education to provide the continuing education record directly to the Board. While the Board agrees with IRRC that this would streamline the process for licensees, the Board, as do all boards within the Bureau that require continuing education, will audit a portion of licensees. Accordingly, there is no value to Board receipt of these records at this time.

As a result of considering IRRC's comments, the Board considered its proposed means of approving providers. The Board has concluded that it cannot, consistent with the requirement of section 10(b)(6) of the act that all courses, locations, instructors and providers "shall be approved by the Board," rely upon continuing education provider approval by another agency or jurisdiction. Therefore, the Board has revised § 13.404(b) (relating to approval of continuing education courses or providers) to delete the status of "deemed approval" of providers. The Board will review applications for provider and course approvals. Approved provider status is subject to renewal and course approval will be only for courses identified on the application for approval. Accordingly, the Board has revised § 13.12 to delete the fees based upon approval from another jurisdiction, to delete any reference to courses or providers not approved in another jurisdiction and to delete the fee for renewal of course approval.

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* and will first require continuing education during the 2006-2008 biennium.

Statutory Authority

The final-form rulemaking is authorized under sections 10(b) and 16(a) of the act (63 P. S. §§ 479.10(b) and 479.16(a)).

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on September 13, 2003, the Board submitted a copy of the notice of proposed rulemaking, published at 33 Pa.B. 4569, to IRRC and the Chairpersons of 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 Department has considered all comments 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 October 18, 2005, the final-form rulemaking was approved by the HPLC. On November 2, 2005, the final-form rulemaking was deemed approved by the SCP/PLC. Under section 5.1(e) of the Regulatory Review Act, IRRC met on November 3, 2005, and approved the final-form rulemaking.

Additional Information

Persons who require additional information about the final-form rulemaking should submit inquiries to Michelle T. Smey, Administrator, State Board of Funeral Directors, P. O. Box 2649, Harrisburg, PA 17105-2649, (717) 783-3397, st-funeral@state.pa.us.

Findings

The Board finds that:

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

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

(3) The amendments to this final-form rulemaking do not enlarge the scope of proposed rulemaking published at 33 Pa.B. 4569.

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

Order

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

(a) The regulations of the Board, 49 Pa. Code Chapter 13, are amended by amending §§ 13.1, 13.12 and 13.231 and by adding §§ 13.401—13.406 to read as set forth in Annex A.

(b) The Board shall submit 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*.

JANICE H. MANNAL, FD,
Chairperson

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 35 Pa.B. 6390 (November 19, 2005).)

Fiscal Note: Fiscal Note 16A-489 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 13. STATE BOARD OF FUNERAL DIRECTORS

GENERAL PROVISIONS

§ 13.1. Definitions.

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

Act—The Funeral Director Law (63 P.S. §§ 479.1—479.20) which regulates the licensure of persons and of corporations engaged in the preparation and disposition of the bodies of deceased persons.

Board—The State Board of Funeral Directors of the Department of State of the Commonwealth.

Bureau—The Bureau of Professional and Occupational Affairs of the Department of State of the Commonwealth.

Commissioner—The Commissioner of Professional and Occupational Affairs of the Department of State of the Commonwealth.

Funeral establishment—A place or premise approved by the Board wherein a licensed funeral director conducts the professional practice of funeral directing, including the preparation, care and funeral services for the human dead.

Hour of continuing education—Sixty minutes of actual instruction in an approved course of continuing education.

Licensed funeral director—An individual who has met the educational requirements and passed the examinations required by the act.

Limited license—A license issued by the Board that authorizes a person licensed to practice funeral directing in a reciprocal state to practice funeral directing in this Commonwealth in accordance with section 9(c) of the act (63 P.S. § 479.9(c)).

Prepaid burial account—An account in which moneys are deposited by the funeral director during the lifetime of an individual in accordance with a contract executed between the parties for funeral merchandise and services to be performed and delivered at a future time.

Prepaid burial contract—A contract executed between a consumer and a licensed funeral director which provides that the funeral director will provide funeral merchandise and render services to the consumer upon the consumer's death or the death of another designated individual and for which the consumer pays to the funeral director moneys at the time of the contract or at a time prior to the rendition of these services.

Preceptor—A licensed funeral director under or with whom a resident intern is registered and operates.

Premises—The property on which the funeral establishment is located which consists of a tract of land not intersected by a public highway or thoroughfare.

Profession—The aggregate of all funeral service licensees and their duties and responsibilities in connection with the funeral as funeral directors licensed under the act.

Reciprocal state—The District of Columbia or a state or territory of the United States of America whose agency that is authorized to license persons to practice the profession of funeral director in that jurisdiction has entered into an agreement with the Board under which persons licensed in that jurisdiction may receive a limited license in this Commonwealth.

Restricted business corporation—A business corporation formed under 15 Pa.C.S. (relating to the Associations Code) and authorized under the act.

Supervisor—A licensed funeral director employed on a full-time basis to supervise the professional activities of a licensed estate, widow, business corporation pre-1935 restricted business corporation, professional corporation or branch place of practice under any of the foregoing, as defined in the act.

LICENSURE

§ 13.12. Fees.

Following is the schedule of fees charged by the Board:

Initial registration for student trainee.....	\$25
Annual registration for student trainee.....	\$15
Initial registration for resident intern.....	\$25
Initial registration for preceptor or change.....	\$25
Initial license for funeral director.....	\$25
Initial license for restricted business corporation, professional corporation, partnership or shared funeral establishment.....	\$150
Initial license for estate or widow, sole proprietorship or branch office.....	\$125
Initial registration for supervisor.....	\$25
Change director or name on existing license without reinspection.....	\$35
Address change with inspection.....	\$125
Reinspection after failure.....	\$85
Certification.....	\$25
Verification of licensure or registration.....	\$15
Biennial renewal.....	\$185
Application for limited license.....	\$35
Biennial renewal of limited license.....	\$35
Application for continuing education course.....	\$100
Application for continuing education provider.....	\$100
Renewal of registration of continuing education provider.....	\$50

LICENSE RENEWAL

§ 13.231. Biennial registration; unregistered status and inactive status; failure to renew.

(a) A licensee shall register each biennial period to retain the right to practice. Initial registration shall

automatically occur when a license is issued. Registration for a biennial period expires on the first day of February of every even numbered year. Unless excused by the Board for good cause under section 10(b)(4) of the act (63 P. S. § 479.10(b)(4)), the Board will not grant an application for renewal of a funeral director license unless the licensee has certified that the licensee has completed the amount of continuing education required by § 13.401 (relating to credit hour requirements).

(b) Applications for biennial registration shall be made on forms provided by the Board. The form shall be received by the Board with the required registration fee by the expiration of the previous biennial registration period.

(c) Biennial registration forms and other forms and literature distributed by the Board will be mailed to the licensee at the last mailing address on file with the Board. If a licensee changes the mailing address, the licensee shall notify the Board within 15 days thereafter. Failure of the Board to send or of the licensee to receive a biennial registration application does not relieve the licensee of the biennial registration responsibility.

(d) A licensee whose licensure status has lapsed by failing to register biennially with the Board may apply to the Board for reactivation of licensure status by satisfying the requirements of paragraph (1) on forms prescribed by the Board. An application for reactivation of an inactive or lapsed funeral director license must also include the documentation required by § 13.402 (relating to reporting completion of continuing education) for the immediately preceding biennium, which may be completed during the current biennium. Unless excused by the Board for good cause under section 10(b)(4) of the act, the Board will not reactivate any funeral director license until the required continuing education for the preceding biennium has been successfully completed.

(1) A licensee applying for reactivation of licensure status is required to pay the current registration fee and submit a notarized affidavit setting forth the period of time in which the licensee did not practice in this Commonwealth.

(2) A licensee who seeks to reactivate his licensure status will not be assessed a late renewal fee for the preceding biennial registration periods in which the licensee did not engage in practice in this Commonwealth. A licensee whose licensure status has lapsed due to the failure to register biennially with the Board, is prohibited from practicing as a funeral director in this Commonwealth unless the licensure status is reactivated. If a licensee engages in practice in this Commonwealth during a period in which the licensees' registration is not renewed, the licensee is required to pay a late fee of \$5 for each month or part of a month beyond the date specified for renewal as provided in section 225 of the Bureau of Professional and Occupational Affairs Fee Act (63 P. S. § 1401-225), in addition to the prescribed biennial renewal fee. The payment of a late fee does not preclude the Board from taking disciplinary action against a licensee for practicing as a funeral director in this Commonwealth without a current license.

CONTINUING EDUCATION

§ 13.401. Credit hour requirements.

(a) During each biennial renewal period, a licensed funeral director shall complete 6 hours of continuing education. This provision does not require a funeral

director to complete continuing education during the renewal period in which the funeral director is first issued a license.

(b) Except as permitted in § 13.231(d) (relating to biennial registration; unregistered status and inactive status; failure to renew) or as directed by the Board, continuing education may satisfy the requirement of subsection (a) only for the biennium during which it was completed. No hour of continuing education may be used to satisfy the requirement of subsection (a) for more than 1 biennium.

(c) The requirement of subsection (a) will take effect, beginning with the biennial renewal period of February 1, 2006—January 31, 2008.

§ 13.402. Reporting completion of continuing education.

(a) In general, proof of completion of a course of continuing education must consist of a certified continuing education record, as defined in § 13.405(b) (relating to provider responsibilities).

(b) A licensed funeral director for whom the Board has not been provided certified continuing education records sufficient to comply with § 13.401 (relating to credit hour requirements) shall otherwise demonstrate completion of courses of continuing education.

(c) The Board will audit licensees to verify compliance with continuing education requirements.

§ 13.403. Credit for approved continuing education.

(a) Credit for continuing education will be granted only for courses that have been approved in advance by the Board.

(b) Unless limited by this section, continuing education credit may be earned in a course on any subject matter identified in section 5 of the act (63 P.S. § 479.5) as appropriate for examination. Continuing education credit may be earned in a course in applicable law or the provision of professional services. Continuing education credit may not be earned in any course in office management or marketing.

§ 13.404. Approval of continuing education courses or providers.

(a) Anyone, to include any college, university, school, association, professional society and organization, seeking approval to offer continuing education shall apply for approval on forms provided by the Board and fully provide the information required by those application forms for the Board to fulfill its duties under this section. The application must include payment of the fee required under § 13.12 (relating to fees).

(b) Approval as a continuing education provider shall be renewed biennially.

(c) An approved provider shall apply for approval of each course of continuing education. A single application may include multiple presentations of the course and various locations.

(d) The Board may deny approval of a provider or course of continuing education where the applicant has previously failed or is not currently able to comply with § 13.405 (relating to provider responsibilities) or the course does not qualify under § 13.403 (relating to credit for approved continuing education). The Board may approve in part and deny in part an application for approval

of a provider or course. The Board may deny an application for provider or course approval that does not comply with the act or this chapter.

(e) The Board may terminate its prior approval of a provider or course of continuing education when the applicant made one or more false or misleading material statements on the application. The Board may also terminate in part or in whole its prior approval of a provider or course when it is later determined that the Board has grounds to deny approval in accordance with this section.

§ 13.405. Provider responsibilities.

(a) For each course of continuing education, the provider shall:

(1) Disclose in advance to prospective attendees the objectives, content, teaching method and number of hours of continuing education credit.

(2) Open each course to all licensees.

(3) Provide adequate physical facilities for the number of anticipated participants and the teaching methods to be used.

(4) Provide accurate instructional materials.

(5) Employ qualified instructors who are knowledgeable in the subject matter.

(6) Evaluate the program through the use of questionnaires of the participants and instructors.

(7) Issue a certified continuing education record to each participant.

(8) Retain attendance records, written outlines, and a summary of evaluations for 5 years.

(b) Each continuing education record must include:

(1) The name of the participant.

(2) The date or dates of the course.

(3) The name of the course.

(4) The provider's name.

(5) The number of hours of continuing education credit.

§ 13.406. Demonstration of embalming techniques.

(a) With prior approval of the Board, embalming of human remains to demonstrate techniques during a program of continuing education will not be considered to be the practice of funeral directing at an establishment not authorized by the Board.

(b) Only a licensed funeral director may demonstrate embalming techniques at a program of continuing education in this Commonwealth.

[Pa.B. Doc. No. 05-2200. Filed for public inspection December 2, 2005, 9:00 a.m.]

STATE BOARD OF NURSING

[49 PA. CODE CH. 21]

Approval of Diploma Programs in Transition to Degree-Granting Status

The State Board of Nursing (Board) amends § 21.51 (relating to establishment) governing the establishment of approved programs of nursing for professional nurses (registered nurses (RNs)) to read as set forth in Annex A.

Notice of proposed rulemaking was published at 34 Pa.B. 851 (February 14, 2004). Publication was followed by a 30-day public comment period. The Board received seven comments from the public. On March 16, 2004, the House Professional Licensure Committee (HPLC) submitted comments. The Senate Consumer Protection and Professional Licensure Committee (SCP/PLC) made no comments. On April 14, 2004, the Independent Regulatory Review Commission (IRRC) submitted comments to the proposed rulemaking.

Statutory Authority

Under section 2.1(k) of the Professional Nursing Law (act) (63 P.S. § 212.1(k)), the Board is authorized to establish rules and regulations for the practice of professional nursing and the administration of the act. Section 6.1 of the act (63 P.S. § 216.1) requires the Board to establish standards for the operation and approval of nursing education programs. Section 5 of the act of June 28, 2002 (P.L. 651, No. 99) amended section 6 of the act (63 P.S. § 216) to include "programs in transition from approved diploma to degree granting programs" in the category of programs of professional nursing that may be approved by the Board.

Summary of Comments and Responses to Proposed Rulemaking

Public Comments

The Lancaster Institute for Health Education commented that the Board's proposed rulemaking was "realistic and reasonable" and would allow the Board to "continue to protect the quality of educational curricula within our Commonwealth."

The Pennsylvania Osteopathic Medical Association (POMA) commented that there were two osteopathic medicine colleges in this Commonwealth that could qualify to develop a nursing program. The POMA suggested that the Board allow hospital programs accredited by the American Osteopathic Association's Healthcare Facilities Accreditation Program (HFAP), in addition to the Joint Commission on Accreditation of Healthcare Organizations, an independent organization, to develop nursing education programs. No osteopathic hospitals in this Commonwealth conduct a diploma nursing education program. This final-form rulemaking relates to the transition of an existing hospital-based nursing education program to a degree-granting nursing education program. Adding a new hospital accreditation organization, which would only serve to make it possible for an osteopathic hospital to open a diploma nursing education program, exceeds the scope of the proposed rulemaking. The Board will invite the POMA to provide additional information related to HFAP and separately consider whether HFAP accredited hospitals should be permitted to open a diploma nursing education program.

Mount Aloysius College (College) commented that "[t]here are substantive questions about the hospital-based program's capacity to provide the comprehensive education that is the hallmark of the associate or bachelor's degree in nursing." The College recommended "that diploma programs seek creative ways in which to partner over the long term with degree-granting institutions in order to afford their students the advantages that accrue to affiliation with such institutions."

The Pennsylvania Medical Society expressed its support for the proposed rulemaking.

The Hospital and Healthsystem Association of Pennsylvania (HAP) noted that it fully supports the proposed

rulemaking as written. HAP did suggest additional details be provided, outside of the rulemaking, such as whether the Board would send the Department of Education (Department) a statement that a diploma program wishing to transition to a degree-granting program had been on full approval status for 3 years prior to the transition. HAP suggested that the Board and the Department consider hosting an educational program to provide these details. The Board has a checklist of requirements for program approval, which is provided to persons who contact the Board for information. The checklist will instruct interested parties how to obtain verification of full approval status.

Carol Gisselquist, Higher Education Specialist with the Department, wrote to clarify the role of the Department and noted that regional accreditation is different than the certificate of authority to operate granted by the Department. Carol Gisselquist noted that the rulemaking appeared to incorrectly identify the Department as the agency that granted accreditation. The Board revised the final-form rulemaking to correctly identify the role of the Department and the accrediting body.

The Accrediting Council for Independent Colleges and Schools (ACICS) commented that it should be considered an accrediting body for purposes of the rulemaking. The United States Department of Education recognizes the Middle States Association of Colleges and Schools (Middle States) as the regional accrediting body for institutions of higher learning in this Commonwealth. The United States Department of Education recognizes ACICS as an accrediting body for independent colleges and schools training in business careers. Currently, all colleges and universities in this Commonwealth with Board-approved schools of nursing are accredited by Middle States. The Board does not believe that ACICS accreditation is comparable to Middle States accreditation and declines to make the proposed amendment.

HPLC Comments

The HPLC submitted two comments. First, the HPLC sought clarification under subsection (a)(2)(iv) and asked what would happen to a nursing education program if the program did not obtain full approval from the Department and has been in existence more than 6 years. The question is similar to one raised by IRRC.

Second, the HPLC asked whether the Board intended to make an exception for programs in transition to the rule that a nursing education program be developed under the leadership of an RN. The Board did not intend this and believes the renumbered, redrafted final-form rulemaking addresses this issue.

IRRC Comments

First, IRRC commented that the phrase "under the leadership of a registered nurse" already existed in §§ 21.71(b) and 21.74(b) (relating to faculty and staff requirements for baccalaureate and associate degree programs; and faculty and staff requirements for diploma programs), and suggested that the phrase may be duplicative. The phrase is already part of existing § 21.51(a). It has not been added by the proposed rulemaking. This provision has been in existence since the regulation was part of the Board's Handbook for Schools of Nursing from 1952. The provision remained in existence through two regulatory amendments, published at October 23, 1976 (6 Pa.B. 2677) and September 17, 1983 (13 Pa.B. 2829). Throughout this time, the phrase has not caused any confusion among universities, colleges or hospitals as to

the requirements for establishment of an approved nursing education program. The Board therefore declines to remove the phrase.

Second, IRRC noted that a commentator had suggested that HFAP be added as an approval body for hospitals. As previously discussed, the Board will further examine this issue, which is distinct from the purposes of this final-form rulemaking.

Third, IRRC suggested that subsection (a)(1)(iii) be amended to require a diploma program contemplating transition to a degree-granting program to have 3 years of full approval status before the program applies to the Board to start the transition process. The Board agrees that subsection (a)(1)(iii) is unclear as drafted because the date of transition is unspecified. To clarify this subsection, the Board has added language to indicate that a program must have been on full approval status for at least 3 years prior to the admission of students to the degree-granting program. In addition, the Board has amended subsection (a)(2)(i) to list the other Board regulations with which a program in transition must comply. A program in transition must comply with § 21.51(b). The amendment to this section will clarify that an intent to transition begins with a feasibility study, a process already familiar to all nursing education programs.

Fourth, IRRC submitted two comments on subsection (a)(2)(ii) and (iii) regarding transition requirements. IRRC questioned whether the requirement that a program in transition submit an annual report was duplicative because that requirement exists in § 21.124 (relating to records to be filed with Board). The annual report submitted by nursing education programs under § 21.124 is a brief demographical report of enrollment and graduation dates. The report envisioned by the Board under subsection (a)(2)(ii) is a report on the progress of the transition. The Board has amended subsection (a)(2)(ii), which has been renumbered § 21.51(g)(1), to make this clarification. IRRC also commented that subsection (a)(2)(iii) states that the program in transition will be subject to a site review, but does not identify what entity will perform the review. The reviewer is identified in § 21.51(e) as a nursing education advisor to the Board. The Board's amendment of subsection (a)(2)(i) to include compliance with § 21.51(e) will clarify the identity of the reviewer.

Fifth, both the HPLC and IRRC commented on subsection (a)(2)(iv) regarding the time period for transition. The HPLC queried whether it was necessary to use 6 years as a time limit, and expressed concern that retaining the 6-year time frame could force the Board to close an educational program that was on the verge of receiving full accreditation. IRRC asked what would happen after 6 years if the program does not obtain full approval from the Department and asked the Board to clarify the consequences of not meeting the 6-year time limit. In addition, IRRC noted that the preamble to the proposed rulemaking indicated that it may take up to 6 years for a college or university to obtain full regional accreditation.

The proposed rulemaking confused the certificate of authority to operate issued by the Department and regional accreditation by a United States Department of Education-approved body, as noted in Carol Gisselquist's comments, previously addressed. Thus, the question is what will happen to a nursing education program that fails to obtain full regional accreditation (§ 21.51(g)(3)).

The Board has removed the 6-year time limit for obtaining full regional accreditation. A program that

submits annual progress reports evidencing satisfactory progress toward full accreditation under § 21.51(g)(1) may remain on initial approval status longer than 6 years. A program that fails to progress will be placed on provisional approval status under § 21.33(c) (relating to types of approval).

Sixth, IRRC submitted comments on subsections (a)—(e), existing regulations regarding nursing education programs, procedures and requirements. IRRC expressed three concerns. First, IRRC noted that subsection (a)(1) should not be an exception to § 21.51. The Board agrees, and has amended the language. Second, IRRC noted that subsection (a)(1) is lengthy and complex and might be better renumbered. The Board agrees and has renumbered the final-form rulemaking for simplicity. Third, IRRC noted that it is unclear whether existing requirements in subsections (b)—(e) will apply to programs in transition. The Board's renumbering and inclusion of specific regulatory references in what had been subsection (a)(2)(i) addresses this concern.

Seventh, IRRC noted that the Board uses both the terms "nursing program" and "nursing education program" in § 21.51. The final-form rulemaking has been amended to use only the term "nursing education program."

Eighth, IRRC noted that the term "wishing" was not standard regulatory language. The wording has been amended.

Ninth, IRRC requested that any references to types of approval status reference the appropriate section of the Board's regulations explaining that status. Thus, full approval status would reference § 21.33(b) and initial approval status would reference § 21.33(a). The Board has made these amendments.

Tenth, IRRC noted that subsection (a)(2)(i) may be unnecessary if a program in transition is considered another type of approved program. The Board believes its renumbering of the regulation addresses this concern.

Additional Amendments

The Board has made several amendments in the final-form rulemaking which delete obsolete requirements from § 21.51. Specifically, the Board deleted references to the regional health planning agency, which has not existed for many years. Second, the Board increased the number of copies of the feasibility study required from 15 to 18 to provide adequate copies for the Board members and staff to review.

Fiscal Impact and Paperwork Requirements

The final-form rulemaking will have no adverse fiscal impact on the Commonwealth or its political subdivisions. Programs in transition will be required to follow the same rules regarding the program proposal and feasibility study as new nursing education programs and will be charged the same fee for service as new programs. This fee is being promulgated in a separate rulemaking package regarding fees. The final-form rulemaking will not impose significant paperwork requirements upon programs in addition to those for new programs or upon the Board, and none upon any political subdivisions. The private sector will not incur additional costs in submitting information to the Board.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on February 14, 2004, the Board submitted a copy of the notice of proposed rulemaking, published

at 34 Pa.B. 851, to IRRC and the Chairpersons of 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 Department has considered all comments 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 October 18, 2005, the final-form rulemaking was approved by the HPLC. On November 2, 2005, the final-form rulemaking was deemed approved by the SCP/PLC. Under section 5.1(e) of the Regulatory Review Act, IRRC met on November 3, 2005, and approved the final-form rulemaking.

Additional Information

Additional information may be obtained by writing to Ann Steffanic, Board Administrator, State Board of Nursing, P. O. Box 2649, Harrisburg, PA 17105-2649.

Findings

The Board finds that:

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

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

(3) This final-form rulemaking is necessary and appropriate for the regulation of diploma nursing education programs in transition to degree-granting nursing education programs in this Commonwealth.

(4) This final-form rulemaking does not enlarge the original purpose of the proposed rulemaking at 34 Pa.B. 851.

Order

The Board orders that:

(a) The regulations of the Board, 49 Pa. Code Chapter 21, are amended by amending § 21.51 to read as set forth in Annex A.

(b) The Board shall submit a copy of this order and Annex A to the Office of the 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) This order shall take effect upon publication in the *Pennsylvania Bulletin*.

JANET HUNTER SHIELDS, MSN, CRNP, CS,
Chairperson

(*Editor's Note:* For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 35 Pa.B. 6390 (November 19, 2005).)

Fiscal Note: Fiscal Note 16A-5118 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 21. STATE BOARD OF NURSING****Subchapter A. REGISTERED NURSES****APPROVED PROGRAMS OF NURSING****§ 21.51. Establishment.**

(a) A nursing education program shall be developed under the leadership of a registered nurse as follows:

(1) A nursing education program may be developed under the authority of a regionally accredited university or college and will be known as a degree-granting nursing education program.

(2) A nursing education program may be developed under the authority of a hospital approved by the Joint Commission on Accreditation of Hospitals and will be known as a diploma nursing education program.

(3) A Board-approved diploma nursing education program may transition to a degree-granting nursing education program under the authority of a university or college pursuing regional accreditation and will be known as a program in transition.

(b) A nursing education program may be developed only if there is an adequate faculty and adequate clinical facilities and the philosophy of the parent institution encompasses dual programs of education.

(c) Prior to establishment or transition, a nursing education program shall:

(1) Complete a feasibility study which includes:

(i) Sufficient statistical data to support the need for a program within the community and to assure availability of an adequate supply and flow of interested candidates.

(ii) Identification of available clinical recourses for program implementation based on the projected enrollment and faculty. In viewing the clinical resources, the study must speak to other nursing education programs that share the teaching facilities identified in the study.

(iii) Letters of intent from the cooperating agencies indicating positive commitment to the nursing education program and the availability of sufficient clinical resources to meet the educational requirements of the program.

(iv) Actual cost of the program including faculty needed, clinical teaching resources, education supplies, office supplies, and the like, and sufficient evidence of stable financial support.

(2) Submit 18 copies of the feasibility study to the Board for approval.

(3) Employ the nurse administrator of the educational unit at least 12 months prior to the intended admission

date of students. Board approval of the nurse administrator's credentials shall be obtained prior to the appointment. For a program in transition, the nurse administrator may serve as administrator of both the degree-granting and diploma nursing education program during the transition period.

(4) Submit 18 copies of the tentative planned education program to the Board. For degree-granting and diploma nursing education programs, the submission shall be made at least 8 months prior to the intended admission date of students. For a program in transition, the submission shall be made at least 3 months prior to the intended admission date of students.

(5) Employ the teaching faculty at least 1 semester before the initiation of their teaching responsibilities.

(d) Change of ownership shall be processed as the establishment of a new program.

(e) The planned educational program must include:

(1) Organization and administrative policies of the controlling institution.

(2) Administrative structure and functions of the nursing school.

(3) Educational preparation and nursing experience of faculty members employed.

(4) Statement of the philosophy, purposes and objectives of the program.

(5) Proposed curriculum design based on sound educational concepts and including detailed course descriptions and identification of clinical practice.

(6) Admission policies.

(7) Educational standards.

(8) Copy of proposed budget projected for a minimum of 5 years.

(9) Copies of written agreements with cooperating agencies and facilities to be used in the program.

(f) A program in transition shall submit the following to the Board with the program's feasibility study:

(1) A copy of the certificate of authority to operate a degree-granting institution from the Department of Education.

(2) Documentation of the university or college's pursuit of regional accreditation.

(3) Documentation that the diploma program has maintained full approval status under § 21.33 (relating to types of approval) for at least 3 years prior to the intended date for admission of students.

(g) A program in transition shall:

(1) Submit an annual report detailing the progress of the transition to the Board. If requested by the Board's educational advisor, a program in transition shall appear before the Board to respond to questions or concerns that arise from the annual progress report.

(2) Be subject to a site review by the Board's education advisor after the first class has been awarded degrees and the results of the licensing examination taken by the first class are available.

(3) Continue on initial approval under § 21.33(a) until the university or college has obtained full regional accreditation.

(h) Following the review of the program and before final Board action is taken to grant permission to recruit

students, an initial faculty and nursing education program survey will be made by a nursing educational advisor of the Board.

[Pa.B. Doc. No. 05-2201. Filed for public inspection December 2, 2005, 9:00 a.m.]

STATE BOARD OF PHARMACY
[49 PA. CODE CH. 27]
Biennial Renewal Fees

The State Board of Pharmacy (Board) amends § 27.91 (relating to schedule of fees). The final-form rulemaking increases the biennial license renewal fee for pharmacists from \$120 to \$150 and increases the biennial renewal fee for a pharmacy permit from \$75 to \$100.

A. *Effective Date*

The final-form rulemaking will be effective upon publication in the *Pennsylvania Bulletin*. The new fees will take effect for the pharmacist biennial period beginning October 1, 2006, and the pharmacy permit biennial period beginning September 1, 2007.

B. *Statutory Authority*

The final-form rulemaking is authorized under section 8.2(a) of the Pharmacy Act (act) (63 P. S. §§ 390-8.2(a)). In addition, section 8.2(b) of the act requires the Board to increase fees by regulation in an amount adequate to meet the minimum enforcement efforts required by the act.

C. *Summary of Comments and Responses on Proposed Rulemaking*

Publication of proposed rulemaking at 35 Pa.B. 1219 (February 12, 2005) was followed by a 30-day public comment period during which the Board received no public comments. The Independent Regulatory Review Commission (IRRC) had no objections, comments or recommendations to offer on this final-form rulemaking. The House Professional Licensure Committee (HPLC) and the Senate Consumer Protection and Professional Licensure Committee (SCP/PLC) did not comment. The Board subsequently voted to adopt the final-form rulemaking at its April 20, 2005, meeting.

D. *Purpose and Description*

Section 8.2(a) of the act requires the Board to set fees by regulation in accordance with projected biennial revenues and expenditures. A detailed analysis of the fiscal operation of the Board and projections of future revenues and expenses was set forth in the notice of proposed rulemaking.

E. *Fiscal Impact and Paperwork Requirements*

The final-form rulemaking will increase the biennial renewal fee for pharmacists and pharmacies. A pharmacist will pay an additional \$30 for biennial renewal. A pharmacy will pay an additional \$25 for biennial renewal. The final-form rulemaking should have no other fiscal impact on the private sector, the general public or political subdivisions. The final-form rulemaking will require the Board to alter some of its forms to reflect the new biennial renewal fees. However, the final-form rulemaking should not create additional paperwork for the private sector.

F. *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on February 2, 2005, the Board submitted a copy of the notice of proposed rulemaking, published at 35 Pa.B. 1219, to the IRRC and the Chairpersons of 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 Department has considered all comments 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 October 18, 2005, the final-form rulemaking was approved by the HPLC. On November 2, 2005, the final-form rulemaking was deemed approved by the SCP/PLC. The final-form rulemaking was deemed approved by IRRC under section 5(g) of the Regulatory Review Act, effective November 2, 2005.

G. *Additional Information*

Individuals who need information about the final-form rulemaking should contact Melanie Zimmerman, R.Ph., Executive Secretary, State Board of Pharmacy, P. O. Box 2649, Harrisburg, PA 17105-2649.

H. *Findings*

The Board finds that:

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

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

(3) This final-form rulemaking is necessary and appropriate for the administration of the act.

I. *Order*

The Board orders that:

(a) The regulations of the Board, 49 Pa. Code Chapter 27, are amended by amending § 27.91 to read as set forth at 35 Pa.B. 1219.

(b) The Board shall submit this order and 35 Pa.B. 1219 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 35 Pa.B. 1219 and deposit them with the Legislative Reference Bureau as required by law.

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

MICHAEL J. ROMANO, R.Ph.,
Chairperson

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 35 Pa.B. 6390 (November 19, 2005).)

Fiscal Note: Fiscal Note 16A-5414 remains valid for the final adoption of the subject regulation.

[Pa.B. Doc. No. 05-2202. Filed for public inspection December 2, 2005, 9:00 a.m.]

STATE REAL ESTATE COMMISSION
[49 PA. CODE CH. 35]
Biennial Renewal Fee Increases

The State Real Estate Commission (Commission) amends § 35.203 (relating to fees). The final-form rule-making increases the following renewal fees:

- Biennial renewal for brokers, cemetery brokers, branch offices, rental listing referral agents, brokers of record and partners or offices for a partnership association or corporation from \$84 to \$126.
- Biennial renewal for cemetery companies, associate brokers, salespersons, cemetery associate brokers, cemetery salespersons or campground membership salespersons from \$64 to \$96.
- Annual renewal of registration of promotional property from \$75 to \$113.
- Annual renewal of approval of real estate education providers from \$250 to \$375 plus an increase from \$10 to \$15 for each satellite location, course or instructor.

Statutory Authority

The final-form rulemaking is authorized under section 407 of the Real Estate Licensing and Registration Act (RELRA) (63 P. S. § 455.407). It requires the Commission to increase fees by regulation to meet or exceed projected expenditures if the revenues raised by fees, fines and civil penalties are not sufficient to meet Commission expenditures.

Response to Comments

Notice of proposed rulemaking was published at 35 Pa.B. 2411 (April 23, 2005). Publication was followed by a 30-day public comment period during which the Board received two public comments: one from the Pennsylvania Association of Realtors (PAR) in support of the proposed rulemaking and one from the Realtors Association of Greater Pittsburgh (RAMP) in opposition to the proposed rulemaking. Following the close of the public comment period, the Board received a comment from the House Professional Licensure Committee (HPLC). The Independent Regulatory Review Commission (IRRC) advised that it had no comments, questions or recommendations to the proposed rulemaking. The Board did not receive any comments from the Senate Consumer Protection and Professional Licensure Committee (SCP/PLC). The following is in response to the comment submitted by the HPLC and RAMP.

The HPLC commented that the Annex delivered to the Committee was missing a comma. However, prior to its publication in the *Pennsylvania Bulletin*, the Legislative Reference Bureau inserted a comma. RAMP voiced its opposition to the fee increases on the grounds that the increases "will generate significantly more money than what may be needed" by the Commission. RAMP recommended that the Commission "tighten" its budget.

The Commission is required by law to support its operations from the revenue it generates from fees, fines and civil penalties. In accordance with section 407(a) of the RELRA, if the revenue raised by fees, fines and civil penalties is not sufficient to meet expenditures over a 2-year period, the Commission must increase its revenue. The Commission's current license renewal fees were established by regulation at 24 Pa.B. 2613 (May 20, 1994).

According to a presentation made to the Commission by the Bureau of Finance and Operations (BFO) at its

January 25-26, 2005, meeting, without the increase, the Commission would experience a projected deficit of \$30,802.97 in Fiscal Year (FY) 2004-2005 and continuing thereafter. The BFO recommended that the Commission raise fees 50% to meet or exceed projected expenditures in compliance with section 407(a) of the RELRA. Under the fee structure without amendment, the BFO estimated that at the close of FY 2004-2005, the Commission's expenses would exceed its revenues by \$30,522.66. By FY 2010-2011, the BFO anticipated that the deficit would increase to \$4,670,802.97.

Although the Commission continues to look at ways to streamline procedures to cut costs, the fee increases are still necessary to maintain a positive balance in the Commission account. Additionally, the fees are comparable to the renewal fees charged in surrounding states and therefore will not cause a competitive disadvantage to the Commonwealth. Accordingly, the Commission has not revised the final-form rulemaking.

Fiscal Impact

The final-form rulemaking will increase the renewal fees for brokers, cemetery brokers, branch offices, rental listing referral agents, brokers of record and partners or officers of a partnership association or corporation, cemetery companies, associate brokers, salespersons, cemetery associate brokers, cemetery salespersons, campground membership salespersons, promotional property registration, approval of real estate education providers, satellite locations, courses and instructors. The final-form rulemaking has no other fiscal impact on the private sector, the general public or political subdivisions.

Sunset Date

The RELRA requires that the Commission monitor its revenue and expenses on a fiscal year and biennial basis. Therefore, no sunset date has been assigned.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on April 23, 2005, the Commission submitted a copy of the notice of proposed rulemaking, published at 35 Pa.B. 2411, to IRRC and the Chairpersons of 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 Department has considered all comments 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 October 18, 2005, the final-form rulemaking was approved by the HPLC. On November 2, 2005, the final-form rulemaking was deemed approved by the SCP/PLC. The final-form rulemaking was deemed approved by IRRC under section 5(g) of the Regulatory Review Act, effective November 2, 2005.

Public Comment

Further information may be obtained by contacting Debi Misheck, Administrator, State Real Estate Commission, at P. O. Box 2649, Harrisburg, PA 17105-2649, (717) 783-3658.

Findings

The Commission finds that:

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

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

Order

The Commission, acting under authorizing statute, orders that:

(a) The regulations of the Commission, 49 Pa. Code Chapter 35, are amended by amending § 35.203 to read as set forth at 35 Pa.B. 2411.

(b) The Chairperson of the Commission shall certify this order and 35 Pa.B. 2411 and deposit them with the Legislative Reference Bureau as required by law.

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

BEVERLY BROOKS,
Chairperson

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 35 Pa.B. 6398 (November 19, 2005).)

Fiscal Note: Fiscal Note 16A-5612 remains valid for the final adoption of the subject regulation.

[Pa.B. Doc. No. 05-2203. Filed for public inspection December 2, 2005, 9:00 a.m.]

Title 58—RECREATION

FISH AND BOAT COMMISSION

[58 PA. CODE CHS. 51 AND 63]

Boat and Fishing Guide Operations

The Fish and Boat Commission (Commission) amends Chapters 51 and 63 (relating to administrative provisions; and general fishing regulations). The Commission is publishing this final-form rulemaking under the authority of 30 Pa.C.S. (relating to the Fish and Boat Code) (code). The final-form rulemaking relates to charter boat/fishing guide operations.

A. Effective Date

The final-form rulemaking will go into effect on January 1, 2006.

B. Contact Person

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

C. Statutory Authority

The new regulations in Chapter 51, Subchapter L (relating to charter boat/fishing guide operations) are published under the statutory authority of section 2907.3(d) of the code (relating to fishing guide and charter boat permits, regulations). The rescission of

§ 63.41 is published under the statutory authority of section 2102 of the code (relating to rules and regulations).

D. Purpose and Background

Under the act of November 29, 2004 (P. L. 1286, No. 159) (Act 159), persons operating charter boat or fishing guide operations on the waters of this Commonwealth are required to obtain a charter boat/fishing guide permit from the Commission. Act 159 went into effect on January 1, 2005. However, the Commission decided to defer implementation of the permit requirement pending the promulgation of rules and regulations for the new program.

The Executive Director established a workgroup consisting of Commission staff and 21 charter boat/fishing guides from across this Commonwealth and assigned them the task of developing draft regulations. The workgroup formally met in January and March 2005 to discuss issues pertaining to this new program. With tremendous input from the charter boat/fishing guides, proposed regulations were drafted. The draft regulations addressed the majority, if not all, of the concerns raised by the workgroup.

E. Summary of Changes

The Commission has adopted new regulations to implement the charter boat/fishing guide permitting program. These regulations define key terms and address the permit itself, including the application, the duration, renewals, suspension or revocation and display requirements. The final-form rulemaking also includes a requirement that when a boat is involved, the operator demonstrate proficiency in boating safety by possessing a boating safety education certificate acceptable to the Commission. The final-form rulemaking further includes provisions pertaining to insurance, CPR and first aid, fishing licenses and permits and compliance with laws and regulations.

Under section 2907.3 of the code, holders of charter boat/fishing guide permits may be designated as special issuing agents for the purpose of selling to their customers One-Day Fishing Licenses, Three-Day Tourist Fishing Licenses, Seven-Day Tourist Fishing Licenses and applicable permits. The final-form rulemaking allows for interested permit holders to become special issuing agents by completing and submitting an application along with a bond or other security in a form acceptable to the Commission in an amount equal to the value of the licenses, stamps and permits being requested. The one-time, nonrefundable application fee required of other issuing agents is waived, and the reporting requirements are less stringent.

The Commission adopted the proposed regulations as set forth in the notice of proposed rulemaking with one exception. On final-form rulemaking, the Commission added a requirement that all applicants for charter boat/fishing guide permits must be 16 years of age or older. The Commission amended § 51.122 to read as set forth in Annex A.

Last, the Commission rescinded § 63.41 that relates to the Commission's current voluntary recognition program. Under this program, fishing guide operators paid a \$50 annual fee for which they received official recognition of their businesses. This official recognition, among other things, entitled guides to advertise that they were officially recognized by the Commission and gave them certain privileges with regard to the field dressing of fish. Because the mandatory permitting program will be in

place on January 1, 2006, the voluntary program is no longer needed. Thus, the Commission deleted § 63.41 as set forth in the notice of proposed rulemaking.

F. Paperwork

The final-form rulemaking will increase paperwork and will create new paperwork requirements in that all persons wishing to operate charter boat or fishing guide operations on the waters of this Commonwealth will have to first apply for and obtain an annual permit from the Commission. The Commission estimates that there are approximately 250 charter boat/fishing guide operations in this Commonwealth. Under the voluntary program, the Commission officially recognized approximately 70 guides this year.

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. Under section 2715(a.1) of the code (relating to license, permit and issuing agent fees), the fee for a resident charter boat/fishing guide permit is \$100 and the fee for a nonresident charter boat/fishing guide permit is \$400.

H. Public Involvement

A notice of proposed rulemaking was published at 35 Pa.B. 3416 (June 18, 2005). The Commission received a total of 14 public comments primarily from charter boat captains. One comment was received prior to the formal public comment period, ten during and three after. The majority of the public comments raised two issues—namely, increasing the number of rods that may be lawfully used by charter boat customers from two to three and allowing charter boat captains to remove the skin from the fillets of fish caught by their customers. The Commission also received several comments regarding permit fees, which are established by statute, not by the regulations. 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.

(2) A public comment period was provided, and the comments that were 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 51 and 63, are amended by amending §§ 51.121 and 51.123—51.130 and by deleting § 63.41 to read as set forth at 35 Pa.B. 3416 and by amending § 51.122 to read as set forth in Annex A.

(b) The Executive Director will submit this order, 35 Pa.B. 3416 and Annex A to the Office of Attorney General for approval as to legality as required by law.

(c) The Executive Director shall certify this order, 35 Pa.B. 3416 and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(d) This order shall take effect on January 1, 2006.

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

Fiscal Note: Fiscal Note 48A-173 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 58. RECREATION

PART II. FISH AND BOAT COMMISSION

Subpart A. GENERAL PROVISIONS

CHAPTER 51. ADMINISTRATIVE PROVISIONS

Subchapter L. CHARTER BOAT/FISHING GUIDE OPERATIONS

§ 51.122. Permits.

(a) *Application.* A person desiring to be a charter boat operator or a fishing guide on the waters of this Commonwealth shall first apply for a permit on the form provided by the Commission. The applicant shall submit the completed form to the Commission along with the fee specified in section 2715 of the code (relating to license, permit and issuing agent fees). The applicant shall be 16 years of age or older.

(b) *Duration.* Charter boat/fishing guide permits are valid for a calendar year and expire on December 31 of the year for which it was issued.

(c) *Renewal.* A holder of a charter boat/fishing guide permit shall apply to the Commission for renewal of the permit by completing the renewal application form provided by the Commission and by submitting it along with the appropriate fee to the Commission.

(d) *Suspension or revocation of permit.* The Commission may suspend or revoke a charter boat/fishing guide permit for noncompliance with the terms and conditions of this chapter or when the charter boat operator or fishing guide is convicted or acknowledges guilt of a violation of the code or this chapter. Suspension or revocation procedures must comply with Chapter 51, Subchapter C (relating to suspension, denial or revocation of licenses, permits, registrations or privileges).

(e) *Prima facie evidence.* Advertising by any means, including, but not limited to, websites, business cards, brochures, newspapers, periodicals or billboards, that a person provides fishing guide or charter boat services shall be prima facie evidence of a commercial enterprise.

[Pa.B. Doc. No. 05-2204. Filed for public inspection December 2, 2005, 9:00 a.m.]

GAME COMMISSION

[58 PA. CODE CH. 133]

Wildlife Classification

To effectively manage the wildlife resources of this Commonwealth, the Game Commission (Commission), at its October 4, 2005, meeting, adopted an amendment to § 133.21 (relating to classification of birds) to update the Pennsylvania list of native endangered and threatened

species with current recommendations provided by scientific technical committees of the Pennsylvania Biological Survey.

The final-form rulemaking will have no adverse impact on the wildlife resources of this Commonwealth.

The authority for the final rulemaking is 34 Pa.C.S. (relating to Game and Wildlife Code) (code).

Notice of proposed rulemaking was published at 35 Pa.B. 4831 (August 27, 2005).

1. *Purpose and Authority*

To effectively protect and manage the wildlife resources of this Commonwealth, section 2167 of the code (relating to endangered or threatened species) empowers the Commission to make changes to the Pennsylvania list of native endangered and threatened species. Chapter 133 (relating to wildlife classification) lists native birds and mammals determined by the Commission to be endangered or threatened. This chapter was last amended in February 1999. Commission staff has met with and received recommendations from the scientific technical committees of the Pennsylvania Biological Survey on species classification changes. No classification changes were proposed for mammals. However, the Ornithological Technical Committee recommended several changes to the list of threatened and endangered birds that were supported by extensive documentation. The amendments to § 133.21 represent two additions to the endangered species list (blackpoll warbler and black-crowned night-heron), three changes from threatened to endangered (dickcissel, sedge wren and yellow-bellied flycatcher) and one change from endangered to threatened (bald eagle).

Section 2167(a) of the code states that "The commission may, by regulation, add or remove any wild bird or wild animal native to this Commonwealth to or from the Pennsylvania native list of endangered or threatened species." Section 322(c)(8) of the code (relating to powers and duties of commission) specifically empowers the Commission to "Add to or change the classification of any wild bird or wild animal." Section 2102(a) of the code (relating to regulations) provides that "The commission shall promulgate such regulations as it deems necessary and appropriate concerning game or wildlife and hunting or furtaking in this Commonwealth, including regulations relating to the protection, preservation and management of game or wildlife and game or wildlife habitat . . . in this Commonwealth." The amendment to § 133.21 was adopted under this authority.

2. *Regulatory Requirements*

The final-form rulemaking updates this Commonwealth's list of native endangered and threatened species in § 133.21 with current recommendations provided by scientific technical committees of the Pennsylvania Biological Survey.

3. *Persons Affected*

Persons wishing to hunt, trap or otherwise affect certain wildlife (or their habitat) within this Commonwealth may be impacted by the final-form rulemaking.

4. *Comment and Response Summary*

There were no official comments received regarding this final-form rulemaking.

5. *Cost and Paperwork Requirements*

The final-form rulemaking should not result in additional cost or paperwork.

6. *Effective Date*

The final-form rulemaking will be effective upon publication in the *Pennsylvania Bulletin* and will remain in effect until changed by the Commission.

7. *Contact Person*

For further information regarding the final-form rulemaking, contact Michael A. Dubaich, Director, Bureau of Law Enforcement, 2001 Elmerton Avenue, Harrisburg, PA 17110-9797, (717) 783-6526.

Findings

The Commission finds that:

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

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

Order

The Commission, acting under authorizing statute, orders that:

(a) The regulations of the Commission, 58 Pa. Code Chapter 133, are amended by amending § 133.21 to read as set forth at 35 Pa.B. 4831.

(b) The Executive Director of the Commission shall certify this order and 35 Pa.B. 4831 and deposit them with the Legislative Reference Bureau as required by law.

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

VERNON R. ROSS,
Executive Director

Fiscal Note: Fiscal Note 48-215 remains valid for the final adoption of the subject regulation.

[Pa.B. Doc. No. 05-2205. Filed for public inspection December 2, 2005, 9:00 a.m.]

GAME COMMISSION
[58 PA. CODE CH. 137]
Wildlife

To effectively manage the wildlife resources of this Commonwealth, the Game Commission (Commission), at its October 4, 2005, meeting, adopted § 137.34 (relating to Chronic Wasting Disease and emergency authority of Director).

The final-form rulemaking will have no adverse impact on the wildlife resources of this Commonwealth.

The authority for the final rulemaking is 34 Pa.C.S. (relating to Game and Wildlife Code) (code).

Notice of proposed rulemaking was published at 35 Pa.B. 4829 (August 27, 2005).

1. *Purpose and Authority*

In light of the recent outbreaks of Chronic Wasting Disease (CWD) only short distances from this Commonwealth's borders in the states of New York and West Virginia, the Commission has been aggressively developing an updated CWD response plan to help prevent the entry of CWD into this Commonwealth or slow and

restrict the spread of CWD if an outbreak occurs within this Commonwealth. As an important step to preventing or slowing the spread of CWD in this Commonwealth, the Commission has added § 137.34 to give the Director emergency authority to remove protection on cervids, order the disposal of cervids or their parts in designated areas, prohibit the removal of the carcasses or certain parts of cervids from designated areas, prohibit the possession or transportation of live cervids from designated areas, prohibit the importation of cervids parts from endemic states or nations and also prohibit the feeding of cervids if the spread of CWD poses a threat to human safety, farm animals, pets or other wildlife within or adjacent to this Commonwealth. This expanded authority is necessary to more effectively respond to potential outbreaks of CWD, a transmissible disease.

Section 103(a) of the code (relating to ownership, jurisdiction and control of game and wildlife) states that "The ownership, jurisdiction over and control of game or wildlife is vested in the commission as an independent agency of the Commonwealth in its sovereign capacity to be controlled regulated and disposed of in accordance with this chapter." Section 322(c)(2) of the code (relating to powers and duties of commission) specifically empowers the Commission to "Remove protection, declare an open season or increase, reduce or close a season." Section 322(c)(9) of the code specifically empowers the Commission to "Prohibit the possession, importation, exportation or release of any species of birds or animals which may be considered dangerous or injurious to the general public or to the wildlife of this Commonwealth." Section 2102(a) of the code (relating to regulations) provides that "The commission shall promulgate such regulations as it deems necessary and appropriate concerning game or wildlife and hunting or furtaking in this Commonwealth, including regulations relating to the protection, preservation and management of game or wildlife . . . in this Commonwealth." The addition of § 137.34 was adopted under this authority.

2. Regulatory Requirements

The final-form rulemaking adds § 137.34 to give the Director emergency authority to remove protection on cervids, order the disposal of cervids or their parts in designated areas, prohibit the removal of the carcasses or parts of cervids from designated areas, prohibit the possession or transportation of live cervids from designated areas, prohibit the importation of cervids parts from endemic states or nations and also prohibit the feeding of cervids if the spread of CWD poses a threat to human safety, farm animals, pets or other wildlife within or adjacent to this Commonwealth.

3. Persons Affected

Persons wishing to hunt or trap, possess or transport live cervids, remove the carcasses or parts of cervids, import cervids parts or feed cervids in designated areas within this Commonwealth when the spread of CWD poses a threat to human safety, farm animals, pets or other wildlife within or adjacent to this Commonwealth may be affected by the final-form rulemaking.

4. Comment and Response Summary

The Commission received only one written comment regarding the final-form rulemaking. This single comment was in support of the Commission's effort to create emergency regulatory authority to protect this Commonwealth from CWD.

5. Cost and Paperwork Requirements

The final-form rulemaking should not result in additional cost or paperwork.

6. Effective Date

The final-form rulemaking will be effective upon publication in the *Pennsylvania Bulletin* and will remain in effect until changed by the Commission.

7. Contact Person

For further information regarding the final-form rulemaking, contact Michael A. Dubaich, Director, Bureau of Law Enforcement, 2001 Elmerton Avenue, Harrisburg, PA 17110-9797, (717) 783-6526.

Findings

The Commission finds that:

(1) Public notice of intention to adopt the administrative regulation adopted by this order has been given under sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202) and the regulations thereunder, 1 Pa. Code §§ 7.1 and 7.2.

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

Order

The Commission, acting under authorizing statute, orders that:

(a) The regulations of the Commission, 58 Pa. Code Chapter 137, are amended by adding § 137.34 to read as set forth in Annex A.

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

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

VERNON R. ROSS,
Executive Director

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

Annex A

TITLE 58. RECREATION

PART III. GAME COMMISSION

CHAPTER 137. WILDLIFE

§ 137.34. Chronic Wasting Disease and emergency authority of Director.

(a) The Director has emergency authority to remove protection on cervids, prohibit any new permits to possess live cervids in containment areas, and order the disposal of certain cervids or their parts in containment areas, if the Director determines the spread of Chronic Wasting Disease (CWD) poses a threat to human safety, farm animals, pets or other cervids within or adjacent to this Commonwealth in accordance with the CWD response plan.

(1) If the Director removes the protection on cervids in containment areas, except for animals or their parts submitted for laboratory analysis, it is unlawful to:

(i) Remove any cervid carcasses or certain parts from the containment areas.

(ii) Possess or transport any live cervids contrary to 3 Pa.C.S. Chapter 23, Subchapter C (relating to detection, containment or eradication of certain diseases) within the containment areas.

(2) Nothing in this subsection prevents removal of dried or cured skins of cervids from the areas where the protection has been removed, only if removal poses no threat to other areas of this Commonwealth.

(b) The Director has emergency authority to control the spread of CWD by banning the importation of certain cervid parts from other states or nations.

(c) The Director has emergency authority to ban the feeding of cervids within the containment area to prevent the congregation or habituation to an area by cervids that could spread CWD.

[Pa.B. Doc. No. 05-2206. Filed for public inspection December 2, 2005, 9:00 a.m.]

GAME COMMISSION
[58 PA. CODE CH. 141]
Hunting and Trapping

To effectively manage the wildlife resources of this Commonwealth, the Game Commission (Commission), at its October 4, 2005, meeting, adopted an amendment to § 141.22 (relating to small game) and added § 141.67 (relating to furbearer hunting) to remove regulatory language regarding furbearer hunting from Subchapter B (relating to small game) and relocating this language to the more appropriate Subchapter D (relating to furbearers) and also expand this language to permit the use of shot up to #4 buckshot for furbearer hunting with shotguns.

The final-form rulemaking will have no adverse impact on the wildlife resources of this Commonwealth.

The authority for the final rulemaking is 34 Pa.C.S. (relating to Game and Wildlife Code) (code).

Notice of proposed rulemaking was published at 35 Pa.B. 4829 (August 27, 2005).

1. Purpose and Authority

Formerly, § 141.22 limited the use of shot size for furbearer hunting to shot size no larger than BB lead, size BB Bismuth/tin or size T steel. A number of predator hunters requested that the Commission expand this limiting language to permit the use of shot size no larger than #4 buckshot for furbearer hunting to increase their effectiveness and efficiency while hunting furbearers with shotguns. After consideration of relevant safety and furbearer management issues/concerns, the Commission determined that it is appropriate to accommodate the request of the predator hunters. However, the Commission has also determined that the regulatory language regarding furbearer hunting in § 141.22 would be more appropriately located in another section. The Commission is therefore deleting and relocating this regulatory language, as amended, from § 141.22 to § 141.67 in the reclassified "Furbearers" subchapter.

Section 2102(d) of the code (relating to regulations) authorizes the Commission to "promulgate regulations stipulating . . . the type of firearms and ammunition and

other devices which may be used, the manner in which and the location where the devices may be used, the species the devices may be used for and the season when the devices may be used." Section 2102(a) of the code provides that "The commission shall promulgate such regulations as it deems necessary and appropriate concerning game or wildlife and hunting or furtaking in this Commonwealth, including regulations relating to . . . the ways, manner, methods and means of hunting or furtaking, and the health and safety of persons who hunt or take wildlife or may be in the vicinity of persons who hunt or take game or wildlife in this Commonwealth." The amendment to § 141.22 and the addition of § 141.67 were adopted under this authority.

2. Regulatory Requirements

The final-form rulemaking amends § 141.22 by deleting and relocating the regulatory language regarding furbearer hunting to § 141.67 and also expanding this language to permit the use of shot size up to #4 buckshot for furbearer hunting with shotguns.

3. Persons Affected

Persons wishing to hunt furbearers within this Commonwealth with a shotgun will be affected by the final-form rulemaking.

4. Comment and Response Summary

The Commission received only two written comments pertaining to the final-form rulemaking. Both comments were in support of the Commission's effort to permit the use of #4 buckshot for furbearer hunting with shotguns.

5. Cost and Paperwork Requirements

The final-form rulemaking should not result in additional cost or paperwork.

6. Effective Date

The final-form rulemaking will be effective upon publication in the *Pennsylvania Bulletin* and will remain in effect until changed by the Commission.

7. Contact Person

For further information regarding the final-form rulemaking, contact Michael A. Dubaich, Director, Bureau of Law Enforcement, 2001 Elmerton Avenue, Harrisburg, PA 17110-9797, (717) 783-6526.

Findings

The Commission finds that:

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

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

Order

The Commission, acting under authorizing statute, orders that:

(a) The regulations of the Commission, 58 Pa. Code Chapter 141, are amended by amending § 141.22 and by adding § 141.67 to read as set forth at 35 Pa.B. 4829.

(b) The Executive Director of the Commission shall certify this order and 35 Pa.B. 4829 and deposit them with the Legislative Reference Bureau as required by law.

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

VERNON R. ROSS,
Executive Director

Fiscal Note: Fiscal Note 48-214 remains valid for the final adoption of the subject regulations.

[Pa.B. Doc. No. 05-2207. Filed for public inspection December 2, 2005, 9:00 a.m.]
