

# PROPOSED RULEMAKING

## DELAWARE RIVER BASIN COMMISSION

### Interim Action Concerning Operation of the New York City Delaware Basin Reservoirs Pending Rulemaking to Implement a Flexible Flow Management Program; Notice of Public Hearing on Interim Action; Advance Notice of Proposed Rulemaking

#### *Summary*

The Delaware River Basin Commission (Commission) will hold a public hearing to receive comments on an interim New York City Delaware River Basin reservoir operations plan. An interim operations plan is proposed to be implemented pending unanimous agreement on a revised Flexible Flow Management Program (FFMP) proposal by the Parties to the United States Supreme Court Decree of 1954—the states of Delaware, New Jersey, and New York, the Commonwealth of Pennsylvania and the City of New York—and completion by the Commission of a rulemaking process on the FFMP proposal.

#### *Dates*

The public hearing will take place on Wednesday, September 26, 2007, during the Commission's regular business meeting, beginning at 1:30 p.m. at the Commission's office building, located at 25 State Police Drive, West Trenton, NJ. Directions are available on the Commission's website, [www.drbc.net](http://www.drbc.net). Please do not rely upon MapQuest or other Internet mapping services for driving directions, as they may not provide accurate directions to the Commission. Written comments will be accepted through the close of the public hearing; however, earlier submittals would be appreciated. Written comments may be submitted by email to [paula.schmitt@drbc.state.nj.us](mailto:paula.schmitt@drbc.state.nj.us); by United States mail to Commission Secretary, DRBC, P. O. Box 7360, West Trenton, NJ 08628-0360 or by fax to (609) 883-9522. In all cases, the commentator's name, affiliation and address should be provided in the comment document, and "FFMP" should appear in the subject line. Persons wishing to testify are asked to register in advance with the Commission Secretary at (609) 883-9500, Ext. 203.

#### *Previously Submitted Comments*

Written comments submitted to the Commission during the prior comment period or presented orally or in writing at its prior scheduled hearings on the form of the FFMP that was posted on the Commission's website in February 2007 will be included in the administrative record for this action and need not be resubmitted.

#### *Supplementary Information*

The Decree Parties have considered the broad range of public comments received on an initial FFMP proposal published in February 2007. With the administrative support of the Commission staff and the Delaware River Master, the Parties continue to work towards a consensus proposal that incorporates changes made in response to those comments. The Parties' efforts are now focused on completing negotiations by early September 2007. To be implemented by the Commission, the relevant portions of any revised FFMP proposal developed by the Parties

must be promulgated as a rule or adjudicated in a docket by incorporating them into: (a) amendments to the Commission's Water Code; (b) one or more Commission dockets (similar to permits) or docket revisions; or (c) a combination of Water Code amendments and dockets. The Commission's Comprehensive Plan may also require revision.

Insufficient time remains to complete a full notice and comment rulemaking process before the Commission's next public meeting and hearing on September 26, 2007. Thus, if the Parties reach consensus on a revised FFMP on or before September 26, the Commission will consider approving an interim New York City Delaware River Basin reservoir operations plan on September 26 to be implemented pending completion of a rulemaking process on the revised FFMP. The interim action could consist of: (1) extending the current fisheries management program (Revision 7 of Docket D-77-20 CP); (2) reinstating a previous flow regime; or (3) implementing in whole or in part the consensus FFMP as proposed on an interim basis.

If the Commission acts to extend the current fisheries management program or to reinstate a previous flow regime, the program will be considered in combination with a spill mitigation program such as Revision 9 of Docket D-77-20 CP, which is currently in effect, and a program designed to ameliorate the potential effects on the tailwaters fishery of the Lake Wallenpaupack drought operating plan adopted by Resolution No. 2002-33. Any interim operations program that the Commission selects would be implemented simultaneously with a full notice and comment rulemaking process on rules to implement any FFMP proposal unanimously consented to by the Decree Parties. An interim program approved by the Commission and the Decree Parties would continue in effect until any expiration date contained in the program adopted or unless and until replaced by another program that has been approved by the Commission and the Decree Parties following notice and a public hearing.

In the event consensus is not reached on the FFMP on or before the Commission's meeting on September 26, the Commission will consider options 1 and 2 listed previously. In accordance with Section 3.3 of the Delaware River Basin Compact, 75 Statutes at Large 688, any program of the Commission that affects the diversions, compensating releases, rights, conditions, and obligations of the 1954 Supreme Court Decree in the matter of *New Jersey v. New York*, 347 U.S. 995, 74 S.Ct. 842 also requires the unanimous consent of the Decree Parties.

The current reservoir releases program, established by Resolution No. 2004-3, and the current spill mitigation program, established by Resolution No. 2006-18, both were due to expire on May 31, 2007. In light of ongoing efforts by the Decree Parties to develop a revised consensus FFMP proposal, the Commission extended both programs through September 30, 2007, by Resolution No. 2007-7 on May 10, 2007.

A notice concerning the original FFMP proposal of the Decree Parties appeared at 37 Pa.B. 785 (February 17, 2007) and in 72 FR 6509 (February 12, 2007). Subsequently, an advance notice concerning rulemaking to implement a revised FFMP proposal was published at 37 Pa.B. 3098 (July 7, 2007). That notice advised that the text of the proposed rule changes would be posted on the Commission's website on or before July 16, 2007, and

those public hearings would be held on August 14, 2007. Because the Decree Parties did not reach consensus on the revised proposal, the August 14 hearings were cancelled.

Resolutions and docket approvals relating to operation of the New York City Delaware Basin Reservoirs are available on the Commission's website at [www.drbc.net](http://www.drbc.net) or upon request from the Delaware River Basin Commission, P. O. Box 7360, West Trenton, NJ 08628-0360.

#### *Further Information and Contact*

For further information, contact Pamela M. Bush, Commission Secretary and Assistant General Counsel, DRBC, at (609) 883-9500, Ext. 203.

PAMELA M. BUSH,  
*Secretary*

[Pa.B. Doc. No. 07-1653. Filed for public inspection September 7, 2007, 9:00 a.m.]

## STATE BOARD OF EDUCATION

[22 PA. CODE CH. 16]

### Special Education for Gifted Students

The State Board of Education (Board) proposes to amend Chapter 16 (relating to special education for gifted students) to read as set forth in Annex A. The Board is acting under the authority of sections 1372 and 2603-B of the Public School Code of 1949 (24 P. S. §§ 13-1372 and 26-2603-B).

#### *Purpose*

Chapter 16 sets forth requirements for gifted education programs and services in public schools in this Commonwealth. It addresses the screening and evaluation process, gifted individualized education program (GIEP), educational placement and procedural safeguards for students identified as gifted. As provided in section 1749-A of the Public School Code of 1949 (24 P. S. § 17-1749-A), the regulations do not apply to charter schools and cyber charter schools.

#### *Requirements of the Proposed Rulemaking*

Proposed amendments to § 16.4 (relating to strategic plans) add a requirement that the gifted education portion of each school district's strategic plan address the process for identifying children who are gifted and in need of specially designed instruction. It also is to outline the gifted special education programs offered by the school district.

Proposed amendments to § 16.6 (relating to general supervision) add a requirement that the Department of Education (Department) conduct onsite monitoring of school entities to ensure compliance with this chapter. The proposed rulemaking also directs the Secretary to outline the process and schedule for monitoring in a Basic Education Circular, which is available on the Department's website.

Proposed amendments to § 16.7 (relating to special education) add a requirement that a single Individualized Education Program be developed for students who are both gifted and have a disability under Chapter 14 (relating to special education services and programs).

Proposed amendments to § 16.21 (relating to general) add language that outlines the types of awareness activities that school districts are to conduct each year to inform parents about gifted education. The proposed rulemaking also adds language that deficits in memory or processing speed cannot be the sole basis for determining that a student is ineligible for gifted education services.

Proposed amendments to § 16.22 (relating to gifted multidisciplinary evaluation) require that school districts have readily available an evaluation request form that professional staff and administrators can provide to parents who request evaluations of their children. This section requires the parent be provided the evaluation request form within 5 days of the request. The proposed rulemaking adds a requirement that the gifted multidisciplinary team include, in its written report, its recommendations for each student's educational programming. This proposed rulemaking also amends the number of days in which the initial student evaluation must be completed from 45 school days to 60 school days after the school receives written parental consent for the evaluation, an order of a court or hearing officer. This aligns the time frame with the requirements of Chapter 14 so that school districts have just one standard to follow.

Proposed § 16.23(d) (relating to gifted multidisciplinary reevaluation) provides that the reevaluation be completed and presented to parents no later than 60 school days after the school district receives written permission to reevaluate.

Proposed amendments to § 16.31 (relating to general) include several revisions that update references to other applicable regulations. It also amends the section to "grandfather" students already receiving gifted education services at the time the regulation becomes effective.

Proposed amendments to § 16.32 (relating to GIEP) require present education levels to be included in both the initial and all revisions to the GIEP. The proposed rulemaking adds a requirement that a teacher of the gifted be included on the GIEP team. The proposed rulemaking also requires that the GIEP be based on the gifted multidisciplinary team's written report. New language is also added to require the school to notify teachers of their responsibilities to each of their students who are identified as gifted as provided in the students' GIEPs.

Proposed amendments to § 16.41 (relating to general) revise the total number of gifted students on an individual gifted teacher's caseload from 75 to 60. The proposed rulemaking revises the total number of gifted students on an individual teacher's class roster from 20 to 25. These changes reflect feedback provided from schools regarding the current caseload and class roster limitations.

Proposed amendments to § 16.63 (relating to impartial due process hearing) align this chapter with the proposed amendments to Chapter 14 by adding requirements that due process hearings, appeal panel proceedings and hearing officers adhere to 1 Pa. Code Part II (relating to General Rules of Administrative Practice and Procedure). See 37 Pa.B. 2961 (June 30, 2007). The proposed rulemaking also requires the Department to provide an annual report to the Board as to the activities of the due process hearings and appeal panel proceedings and to also report activities taken by the Department to strengthen the due process hearings and appeal panel proceedings.

*Affected Parties*

The proposed rulemaking affects the students and professional employees of the public schools, except those in charter schools and cyber-charter schools, in this Commonwealth.

*Cost and Paperwork Estimates*

The proposed rulemaking will not result in significant added costs or savings to the Department or school entities since it updates existing requirements. The Department will incur additional costs estimated at an initial cost of approximately \$21,000 per year to conduct compliance monitoring as provided in § 16.6. The Department already collects information about due process hearings and appeal panel proceedings so costs associated with providing an annual report the Board, as provided in § 16.63(q) are negligible.

*Effective Date*

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

*Sunset Date*

The Board will review the effectiveness of Chapter 16 every 4 years in accordance with the Board's policy and practice respecting all regulations promulgated by the Board. Thus, no sunset date is necessary.

*Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on August 23, 2007, the Board submitted a copy of this proposed rulemaking and a copy of a Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House and Senate Committees on Education. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, IRRC may convey any comments, recommendations or objections to the proposed rulemaking within 30 days of the close of the public comment period. The comments, recommendations or objections must specify the regulatory review criteria which have not been met. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the rulemaking, by the Board, the General Assembly and the Governor of comments, recommendations or objections raised.

*Public Comments and Contact Person*

Interested persons are invited to submit written comments, suggestions or objections regarding this proposed rulemaking to Jim Buckheit, Executive Director, State Board of Education, 333 Market Street, Harrisburg, PA 17126-0333, jrbuckheit@state.pa.us within 30 days following publication in the *Pennsylvania Bulletin*.

Persons with disabilities needing an alternative means of providing public comment may make arrangements by calling Jim Buckheit at (717) 787-3787 or TDD (717) 783-8445.

JIM BUCKHEIT,  
*Executive Director*

**Fiscal Note:** 6-307. (1) General Fund; (2) Implementing Year 2006-07 is \$0; (3) 1st Succeeding Year 2007-08 is \$21,000; 2nd Succeeding Year 2008-09 is \$21,000; 3rd Succeeding Year 2009-10 is \$21,000; 4th Succeeding Year 2010-11 is \$21,000; 5th Succeeding Year 2011-12 is \$21,000; (4) 2005-06 Program—\$26,210,000; 2004-05 Program—\$25,060,000; 2003-04 Program—\$24,720,000; (7) General Government Operations; (8) recommends adoption.

**Annex A**

**TITLE 22. EDUCATION**

**PART I. STATE BOARD OF EDUCATION**

**Subchapter A. MISCELLANEOUS PROVISIONS**

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

**GENERAL PROVISIONS**

**§ 16.4. Strategic plans.**

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

(b) Each school district shall [ **provide, as the Department may require, reports of students, personnel and program elements, including the costs of the elements, which are relevant to the delivery of gifted education.** ] **address the following in its gifted education plan:**

(1) **The process for identifying children who are gifted and in need of specially designed instruction.**

(2) **The gifted special education programs offered.**

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

**§ 16.6. General supervision.**

\* \* \* \* \*

(d) **The Department will conduct onsite monitoring of school entities to ensure school entity implementation of this chapter. The Secretary will outline the process and schedule for this monitoring in a Basic Education Circular (BEC).**

**§ 16.7. Special education.**

(a) Nothing in this chapter is intended to reduce the protections afforded to students who are eligible for special education as provided for under [ **Chapters** ] **Chapter 14 [ and 342 ]** (relating to special education services and programs) and **sections 601—619** of the Individuals with Disabilities Education Act (20 U.S.C.A. §§ 1400—[ **1485** ] **1419**).

(b) If a student is determined to be both gifted and eligible for special education, the procedures in [ **Chapters** ] **Chapter 14 [ and 342 ]** shall take precedence. For these students identified with dual exceptionalities, the needs established under gifted status in this chapter shall be fully addressed in the procedures required in [ **Chapters** ] **Chapter 14 [ and 342 ]**.

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

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

SCREENING AND EVALUATION PROCESS

§ 16.21. General.

\* \* \* \* \*

(b) Each school district shall conduct awareness activities to inform the public of gifted education services and programs and the manner by which to request these services and programs. These awareness activities shall be designed to reach parents of students enrolled in the public schools and the parents of school age children not enrolled in the public schools. Awareness activities shall be conducted annually and include, but not be limited to, providing information in local newspapers, other media, student handbooks and on the school district website.

\* \* \* \* \*

(d) Each school district shall establish procedures to determine whether a student is mentally gifted. This term includes a person who has an IQ of 130 or higher and when multiple criteria as set forth in this chapter and in Department Guidelines indicate gifted ability. Determination of gifted ability will not be based on IQ score alone. Deficits in memory or processing speed, as indicated by testing, cannot be the sole basis upon which a student is determined to be ineligible for gifted special education. A person with an IQ score lower than 130 may be admitted to gifted programs when other educational criteria in the profile of the person strongly indicate gifted ability. Determination of mentally gifted [ shall ] must include an assessment by a certified school psychologist.

(e) Multiple criteria indicating gifted ability include:

\* \* \* \* \*

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

\* \* \* \* \*

§ 16.22. Gifted multidisciplinary evaluation.

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

\* \* \* \* \*

(c) Parents who suspect that their child is gifted may request a gifted multidisciplinary evaluation of their child at any time, with a limit of one request per school term. The request [ shall ] must be in writing. [ If a parental request is made orally to school personnel, the personnel shall inform the parents that the request shall be made in writing and shall provide the parents with a form for that purpose. ] The school district shall have readily available for this purpose an evaluation request form and if a request is made orally to any professional employee or administrator of the school district, that individual shall provide a copy of the evaluation request form to the parents within 5 school days of the oral request.

\* \* \* \* \*

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

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

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

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

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

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

The initial evaluation shall be completed and a copy of the evaluation report presented to the parents no later than 60 school days after the school district receives written parental consent for evaluation or receives an order of a court or hearing officer to conduct a multidisciplinary evaluation.

§ 16.23. Gifted multidisciplinary reevaluation.

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

\* \* \* \* \*

(d) The initial evaluation shall be completed and a copy of the evaluation report presented to the parents no later than 60 school days after the school district receives written parental consent for evaluation or receives an order of a court or hearing officer to conduct a multidisciplinary evaluation.

GIEP

§ 16.31. General.

\* \* \* \* \*

(c) [ Every student receiving gifted education provided for in an IEP developed prior to Decem-

ber 9, 2000, shall continue to receive the gifted education under that IEP until the student's GIEP is developed. For a student also eligible under Chapters 14 and 342 (relating to special education services and programs), the student will continue to receive gifted education under that IEP until revised.

(d) Every student receiving gifted education prior to [ December 9, 2000, ] \_\_\_\_\_ (Editor's Note: The blank refers to the effective date of adoption of this proposed rulemaking.), shall continue to receive gifted education until the student meets one of the following conditions [ exists ]:

\* \* \* \* \*

§ 16.32. GIEP.

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

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

[ (c) ] (b) \* \* \*

\* \* \* \* \*

(6) A teacher of the gifted.

[ (d) ] (c) \* \* \*

\* \* \* \* \*

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

\* \* \* \* \*

[ (f) ] (e) \* \* \*

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

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

\* \* \* \* \*

(3) GIEP team meetings shall be convened at least annually, or more frequently if conditions warrant [ , as well as following an evaluation or reevaluation. A GIEP team meeting shall also be convened at the request of a GIEP team member, the parent, the student or the school district ].

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

EDUCATIONAL PLACEMENT

§ 16.41. General.

\* \* \* \* \*

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

\* \* \* \* \*

(3) Limit the total number of gifted students which can be on an individual gifted teacher's caseload to a maximum of [ 75 ] 60 students.

(4) Limit the total number of gifted students which can be on an individual gifted teacher's class roster to a maximum of [ 20 ] 25 students.

\* \* \* \* \*

PROCEDURAL SAFEGUARDS

§ 16.63. Impartial due process hearing.

\* \* \* \* \*

(p) Impartial due process hearings, appeal panel proceedings and the hearing officers who conduct the hearings and proceedings shall be subject to 1 Pa. Code Part II (relating to General Rules of Administrative Practice and Procedure).

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

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

[Pa.B. Doc. No. 07-1654. Filed for public inspection September 7, 2007, 9:00 a.m.]