



**INDEPENDENT REGULATORY REVIEW COMMISSION
COMMONWEALTH OF PENNSYLVANIA
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December 3, 1998

Peter H. Garland, Ph.D., Executive Director
State Board of Education
333 Market Street, 1st Floor
Harrisburg, PA 17126

Re: IRRC Regulation #6-266 (#1986)
State Board of Education
Gifted Education; Special Education Services and Programs

Dear Mr. Garland:

Enclosed are our Comments on your proposed regulation #6-266. They are also available on our website at <http://www.irrc.state.pa.us>.

The Comments list our objections and suggestions for your consideration when you prepare the final version of this regulation. We have also specified the regulatory criteria which have not been met. These Comments are not a formal approval or disapproval of the proposed version of this regulation.

If you want to meet with us to discuss these Comments, please contact Mary Lou Harris at 772-1284 or Kimberly Trammel de Bien at 783-6834.

Sincerely,

A handwritten signature in black ink that reads "Robert E. Nyce".

Robert E. Nyce
Executive Director

REN:wbg

Enclosure

cc: William Penn
Eugene W. Hickok, Jr.
Office of General Counsel
Office of Attorney General
Pete Tartline

COMMENTS OF THE INDEPENDENT REGULATORY REVIEW COMMISSION

ON

STATE BOARD OF EDUCATION REGULATION NO. 6-266

GIFTED EDUCATION; SPECIAL EDUCATION SERVICES AND PROGRAMS

DECEMBER 3, 1998

We have reviewed this proposed regulation from the State Board of Education (Board) and submit for your consideration the following objections and recommendations. Subsections 5.1(h) and 5.1(i) of the Regulatory Review Act (71 P.S. § 745.5a(h) and (i)) specify the criteria the Commission must employ to determine whether a regulation is in the public interest. In applying these criteria, our Comments address issues that relate to statutory authority, reasonableness and clarity. We recommend that these Comments be carefully considered as you prepare the final-form regulation.

During our review of this proposal, we identified several significant issues which are either not specifically included in the regulation or only partially addressed. The first six issues fall into these categories. Subsequent objections and recommendations are addressed in the sectional analysis.

1. Monitoring and Compliance - Clarity

The proposal does not identify specific monitoring responsibilities of the Department of Education (Department). Section 16.71(c) states that the Department will assure that this section is implemented. However, without identifiable monitoring provisions on the part of the Department, it will be difficult to determine whether districts are complying with the provisions of Chapter 16.

Discussions with the Board, as well as input from the Department and the Board at House and Senate Education hearings and information meetings, indicate that a cyclic review of district programs is currently conducted. Gifted programs would be included in the cycle. Additionally, target monitoring is done on a complaint-driven basis and random audits are done as well. However, the Board's proposal does not include any reference to monitoring practices, nor does it indicate how it will enforce compliance with this proposal.

In its comments, the House Education Committee states that the issue of ongoing monitoring of programs is critical. We agree. We recommend the Board add a section to its final-form regulation which outlines monitoring methods and frequency. The new section should also clearly identify how parents can submit complaints and how complaints will be processed and addressed.

2. Class Size/Class Load - Reasonableness and Clarity

Section 16.41(c)(3) limits the total number of gifted students on an individual gifted teacher's caseload to a maximum of 75 students. Section 16.41 does not address the maximum class size or maximum teacher class load

The House Committee noted the benefit in giving districts flexibility in determining class size, but expressed concern with "...the absence of any maximum class size criteria. Such an omission creates the possibility of overly large class sizes." The Senate Education Committee (Senate Committee) recommended the Board "[C]larify the caseload as it relates to individual class size and teacher's total class load." We agree that clarification is necessary.

3. Implementation Deadline - Reasonableness and Clarity

The proposal contains provisions for development of a Gifted Individualized Education Program (GIEP), a written plan describing the education to be provided to a gifted student. Section 16.32(g)(1) says the GIEP shall be developed within 30 calendar days after issuance of a Gifted Multidisciplinary Team (GMDT) report. Subsection (g)(2) states the GIEP of each student shall be implemented in accordance with Section 16.62(5).

Section 16.62(5) gives parents a specific number of days to respond to a notice of recommended assignment. Neither section states a deadline or number of days for the GEIP to go into effect.

We recommend the Board add a specific time period within which the GIEP must be implemented. This could be done by amending Section 16.32(g)(1) to read:

The GIEP of each student shall be implemented [in accordance with] within ___ school days after the response dates in Section 16.62(5)(relating to consent) are satisfied.

4. Graduation Plan - Reasonableness and Clarity

The provisions for development of the GIEP found in Section 16.32 do not address the need for a graduation plan for gifted students. We question how a GIEP can be complete without addressing the student's goals to meet graduation.

We understand the majority of students who qualify as "gifted students" are mastering classwork several years above their age appropriate grade level. We recommend the Board incorporate a requirement for graduation plans for gifted students beginning in ninth grade, and allow for such a graduation plan earlier at the recommendation of the GMDT.

5. Enrolled Students Versus Students Residing in the District - Statutory Authority and Clarity

Section 16.4(a) (Strategic Plans) requires that "each school district's strategic plan developed under Chapter 5 (relating to curriculum) shall include procedures *"for the education of all gifted students who are residents of the district..."* We are not aware of any statutory requirement for school districts to provide gifted education to students who do not attend public

schools. We question whether the Board intended to include gifted students who are residents of the district, but are not attending public schools.

The Pennsylvania School Boards Association does not agree with the policy of requiring school districts to provide gifted education to students who have elected non-public education or home schooling. The House Education Committee (House Committee) noted its concern as well.

We agree with the House Committee that clarifying language should be added to the final-form regulation clearly indicating that a school district is only obligated to provide gifted education to students “enrolled in” its public schools. The final-form should also clearly indicate that districts are not precluded from extending services to students not enrolled in their schools if they choose to do so.

6. Procedural Safeguards - Reasonableness and Clarity

Although the Board has generally modeled Sections 16.61 to 16.65 after Sections 14.61 to 14.65, there are several important differences between the *procedural safeguard* provisions in the two chapters.

The Board did not include a prehearing conference provision, similar to 14.63. Instead, provisions similar to 14.63(a) and (b) have been added to 16.62, relating to consent. The Board did not give an explanation for this change. Because a prehearing conference is likely to obviate the time and expense consumed by the hearing procedure, we recommend the following:

- Incorporate a prehearing conference provision similar to Section 14.63.
- Delete paragraphs (a) and (b) from 16.62 and place them in the prehearing conference provision.
- Add a reference in Section 16.61 to the prehearing conference provision similar to 14.61(d)(4).

Chapter 14

References to Chapter 5. - Clarity

There are two incorrect references to Chapter 5 which is being replaced by Chapter 4. They appear in existing Sections 14.6 and 14.38 and should be corrected in the final-form regulation.

Section 14.72. Applicability of Existing Regulations. - Clarity

Section 14.72 of the existing regulation incorrectly refers to Chapter 13 instead of Chapter 14. This should be corrected in the final-form regulation.

Chapter 16

Chapter 16. Gifted Education. - Clarity

The Board should consider changing the title of Chapter 16 from “Gifted Education” to “Special Education for Gifted Students.” This would alleviate many of the negative perceptions related to removing the gifted education provisions from the special education provisions in Chapters 14 and 342.

Section 16.1. Definitions. - Clarity

“Chapter 5”

This section defines Chapter 5, which is being replaced by Chapter 4. There are three other references in the proposed Chapter 16 including Section 16.1 under the definition of “Gifted students” and Sections 16.4(a) and 16.22(b). We suggest that the Board correct these references to Chapter 5 in the final-form regulation.

“Educational Placement”

The definition of “educational placement” refers to the “overall educational environment in which gifted education is provided.” This definition is vague and it should be rephrased for clarity.

“Gifted Education”

Under Subparagraph (i) the Board should refer to the defined term of “instructional setting” rather than “classroom.”

“Mentally Gifted”

This definition contains regulatory requirements that should be moved to the main text of the regulation. Further, the definition refers to “multiple criteria defined by the Department.” We understand that the “multiple criteria” used to define “mentally gifted” are contained in a guidance document. However, the Board should specify what the “multiple criteria defined by the Department” are in the regulation. Any criteria used to determine whether a student is mentally gifted are critical and should be subject to the regulatory review process.

“Regular Education Environment”

The last sentence of this definition is substantive and should be deleted from the text of the definition.

Section 16.2. Purpose. - Clarity

The last sentence of Subsection (a) states that “achieving this purpose will require mutual efforts by the Commonwealth, school districts, other agencies and parents,” and all of Subsection (b) contain nonregulatory language that is more appropriate for the Preamble. The Board should review Section 16.2 and eliminate nonregulatory language in the final-form regulation.

Section 16.3. Experimental Programs. - Clarity

Subsection (a) refers to “school entities.” This term was replaced in Chapter 4 by the term “school districts.” This should be corrected in the final-form regulation.

Subsection (a)(3) requires an application for the approval of an experimental program to “demonstrate that it has met other criteria established by the Secretary.” The reference to “other criteria” is vague. We suggest that the final-form regulation list the specific criteria the Secretary will use when evaluating an experimental program.

Subsection (c) allows the Secretary to terminate an experimental program for noncompliance. What type of notice is provided to the school district when a program is terminated and can the termination be appealed? This should be clarified in the final-form regulation.

Section 16.7. Special Education. - Clarity

Section 16.7(a) states that “nothing in this chapter is intended to reduce the protections afforded to students who are eligible for special education.” The Board should clarify in Section 16.7 that when a student is deemed to be eligible for both special education and gifted education, the needs established under the student’s gifted status must be fully addressed even though Chapters 14 and 342 take precedence.

Section 16.22. Gifted Multidisciplinary Evaluation. - Clarity

Subsection (b) states that a referral will be made when a student is suspected of being gifted. It is not clear who is making the referral and to whom or what. The Board needs to clarify that it may be the student’s teacher or parent who initiates a referral and that the referral is to be made to the school administration.

Subsection (h) should refer to “gifted” rather than “exceptional” because “gifted” is a defined term.

Section 16.22(h)(3)(iv) provides that IQ tests or similar evaluation materials shall be “administered by certified professional employes or certified school psychologists.” “Certified professional employe” is not a defined term. Also, administration of tests by anyone other than a certified school psychologist is inconsistent with the definition of “mentally gifted” in Section 16.1. We therefore recommend the words “certified professional employes or” be deleted from the final-form regulation.

Section 16.31. General. - Clarity

Subsection (d) states that a student will continue to receive gifted education “unless a GIEP team determines that the student no longer needs gifted education.” The Board should add a cross-reference to Section 16.23 relating to “Gifted multidisciplinary reevaluation” in Subsection (d) to clarify that a reevaluation must take place before there can be any change in educational placement.

Section 16.32. GIEP. - Clarity

Subsection (b) states that a student’s placement “shall be made by the GIEP team based upon a review of the student’s GIEP and instructional activities **which have been successful.**” In reality, the review will also consider those instructional activities that may have been

unsuccessful. Therefore, we suggest that the Board delete the phrase “which have been successful” from the regulation.

Subsection (c)(2) provides that a student 16 years of age or older may be included as part of the GIEP team. We question why the numerical age should be a factor since there are considerable variances in levels of maturity. For this reason, we suggest that the Board consider allowing any student, who has parental consent, to participate.

Subsections (c)(1) – (c)(5) contain the qualifications for inclusion on the GIEP team. We question why a gifted teacher is not specifically included.

Subsection (d) provides the procedures for school districts to follow when notifying parents of the opportunity to participate. It would clarify this section to provide a cross-reference to Section 16.61 relating to “Notice” which clearly details the school district’s obligation.

Subsection (d)(vi) provides for notification of the parent “early enough to ensure” that the parent can attend. This language is vague. We suggest a specific time period be established, such as “10 school days.” This addition would be consistent with Section 16.61(a).

Section 16.33. Support Services. - Clarity

The Board should clarify in Subsection (b) that it is the “GIEP team” and not the GIEP that will determine the criteria.

Section 16.63. Impartial Due Process Hearing. – Clarity

Under Subsection (j), the Board should specify five “calendar” days.

The Pennsylvania School Boards Association commented that paragraph (k), which authorizes a party to compel the attendance of witnesses or the production of documents, is powerless without issuance of a subpoena. We agree, but note that Public School Code must be amended to provide for the authority to issue and enforce subpoenas.

Paragraph (m) provides that the decision of the hearing officer may be appealed to a panel of three appellate hearing officers. To avoid confusion, paragraph (n)(3) should be incorporated, similar to 14.64(n)(3), providing for the Secretary to contract for panels of appellate hearing officers. Paragraph (n)(3) would then have to be moved to (n)(4).

Paragraph (o)(3) should be added, similar to 14.64(o)(3), providing that the appellate panel must issue a decision within 30 calendar days after a request for review and must provide the parties with a copy of the decision.

Section 16.64. Mediation. - Reasonableness and Clarity

Subsection (a) lists and defines eight terms.

“Joint Session”

The second sentence in this definition is substantive and it should be a separate subsection, perhaps between Sections 16.64(c) and (d).

“Parties”

The last sentence is substantive, rather than definitional and should be removed from the final-form version of the regulation.

“Private Session”

The last sentence of this definition is substantive and should be removed from the text of the definition.

Subsections (b) and (g) appear to conflict. Subsection (b) states that the mediation agreement “shall also be incorporated into the GIEP, **if appropriate.**” However, Subsection (g) provides that the mediation agreement “shall be incorporated into the student’s GIEP.” We suggest that the Board resolve this inconsistency.

Subsection (i) provides that the GIEP team is to convene in 20 school days following the mediation agreement. This is essentially four school weeks. This is a lengthy time period. We suggest that the Board reduce this requirement to a more reasonable time period, such as 10 school days.

Chapter 342

Section 342.1. Definitions. - Reasonableness

In Subsection (c), we believe that the definition of “eligible young child” that the Board is proposing to delete should be retained under Chapter 342. It would suffice for the Board to delete the phrase “except mentally gifted.”

IRRC Regulation #6-266 (#1986)
State Board of Education
Gifted Education; Special Education Services & Programs

Peter H. Garland, Executive Director

Susan Berkow

Date: 12/3/98