

Regulatory Analysis Form

RECEIVED
This space for use by IRRC

(1) Agency

State Board of Education

2008 OCT 27 PM 3:12

INDEPENDENT REGULATORY
REVIEW COMMISSION

(2) I.D. Number (Governor's Office Use)

006-315

IRRC Number: 2730

(3) Short Title

Disciplinary Placements

(4) PA Code Cite

22 PA Code Chapter 14

(5) Agency Contacts & Telephone Numbers

Primary Contact: Jim Buckheit, (717) 787-3787

Secondary Contact: Deborah Wynn (717) 787-3787

(6) Type of Rulemaking (check one)

- Proposed Rulemaking
 Final Order Adopting Regulation
 Final Order, Proposed Rulemaking Omitted

(7) Is a 120-Day Emergency Certification Attached?

- No
 Yes: By the Attorney General
 Yes: By the Governor

(8) Briefly explain the regulation in clear and nontechnical language.

The regulation amends section 14.143 (relating to disciplinary placements) to correct the reference to federal regulations relevant to the Consent Degree resolving Pennsylvania Association of Retarded Citizens v. Com. Of Pennsylvania (PARC), C.A. No. 71-42 (E.D.Pa.), as described in Attorney General Official Opinion No. 35, 1973 Pa. AG LEXIS 35 (April 23, 1973). This provision requires that certain protections attached to student with mental retardation limiting the circumstances under which they may be excluded from their educational placements without pre-deprivation due process protections.

(9) State the statutory authority for the regulation and any relevant state or federal court decisions.

The Board acts under the authority provided in sections 1372 and 2603-B of the Public School Code of 1949.

Regulatory Analysis Form

(10) Is the regulation mandated by any federal or state law or court order, or federal regulation? If yes, cite the specific law, case or regulation, and any deadlines for action.

Yes, the Consent Decree resolving Pennsylvania Association of Retarded Citizens v. Com. Of Pennsylvania (PARC), C.A. No. 71-42 (E.D.Pa.), as described in Attorney General Official Opinion No. 35, 1973 Pa. AG LEXIS 35 (April 23, 1973).

(11) Explain the compelling public interest that justifies the regulation. What is the problem it addresses?

It corrects the overly broad reference to federal regulation which are adopted by reference in Chapter 14.

(12) State the public health, safety, environmental or general welfare risks associated with nonregulation.

None

(13) Describe who will benefit from the regulation. (Quantify the benefits as completely as possible and approximate the number of people who will benefit.)

Students with mental retardation enrolled in the public school.

Regulatory Analysis Form

(14) Describe who will be adversely affected by the regulation. (Quantify the adverse effects as completely as possible and approximate the number of people who will be adversely affected.)

None

(15) List the persons, groups or entities that will be required to comply with the regulation. (Approximate the number of people who will be required to comply.)

School districts, intermediate units and vocational-technical schools.

(16) Describe the communications with and input from the public in the development and drafting of the regulation. List the persons and/or groups who were involved, if applicable.

The sole purpose of the regulation is to align Chapter 14 with the PARC Consent Decree. Therefore outreach to the public is unnecessary.

(17) Provide a specific estimate of the costs and/or savings to the regulated community associated with compliance, including any legal, accounting or consulting procedures which may be required.

None

Regulatory Analysis Form

(18) Provide a specific estimate of the costs and/or savings to local governments associated with compliance, including any legal, accounting or consulting procedures which may be required.

None

(19) Provide a specific estimate of the costs and/or savings to state government associated with the implementation of the regulation, including any legal, accounting, or consulting procedures which may be required.

None

Regulatory Analysis Form

(20) In the table below, provide an estimate of the fiscal savings and costs associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years.

	Current FY Year	FY +1 Year	FY +2 Year	FY +3 Year	FY +4 Year	FY +5 Year
SAVINGS:	\$	\$	\$	\$	\$	\$
Regulated Community						
Local Government						
State Government						
Total Savings	0	0	0	0	0	0
COSTS:						
Regulated Community						
Local Government						
State Government						
Total Costs	0	0	0	0	0	0
REVENUE LOSSES:						
Regulated Community						
Local Government						
State Government						
Total Revenue Losses	0	0	0	0	0	0

(20a) Explain how the cost estimates listed above were derived.

N.A.

Regulatory Analysis Form

(20b) Provide the past three year expenditure history for programs affected by the regulation.

Program	FY -3	FY -2	FY -1	Current FY
\$929 million	\$953 million	\$980 million	\$1.010 billion	\$1.026 billion

(21) Using the cost-benefit information provided above, explain how the benefits of the regulation outweigh the adverse effects and costs.

The revision to the regulation aligns it with the PARC Consent Decree, which has been in force since 1971. Therefore the regulation will not require additional expenditures by the Commonwealth.

(22) Describe the nonregulatory alternatives considered and the costs associated with those alternatives. Provide the reasons for their dismissal.

Alternative regulatory schemes are not an option due to the PARC Consent Decree.

(23) Describe alternative regulatory schemes considered and the costs associated with those schemes. Provide the reasons for their dismissal.

Alternative regulatory schemes are not an option due to the PARC Consent Decree.

Regulatory Analysis Form

(24) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulation.

Yes. The PARC Consent Decree requires that students with mental retardation may only be removed from their educational placement, except in limited circumstances, without pre-deprivation due process protections.

(25) How does this regulation compare with those of other states? Will the regulation put Pennsylvania at a competitive disadvantage with other states?

Since this regulation is aligned with the PARC Consent Decree the policy only applies to Pennsylvania. However, the PARC Consent Decree does not place Pennsylvania at a competitive disadvantage with other states.

(26) Will the regulation affect existing or proposed regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

No

(27) Will any public hearings or informational meetings be scheduled? Please provide the dates, times, and locations, if available.

No. Since this regulation corrects a production error and returns the regulatory language to long-standing state policy, public hearings are unnecessary. Information about the regulation will be transmitted via email to school administrators and in writing to advocacy organizations.

Regulatory Analysis Form

(28) Will the regulation change existing reporting, record keeping, or other paperwork requirements? Describe the changes and attach copies of forms or reports which will be required as a result of implementation, if available.

The regulation maintains long-standing state policy relating to the PARC Consent Decree. It does not change existing reporting, record keeping or other paperwork requirements.

(29) Please list any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, elderly, small businesses, and farmers.

The provision deals solely with students with mental retardation who are removed as a measure of discipline from their educational placement as per the PARC Consent Decree.

(30) What is the anticipated effective date of the regulation; the date by which compliance with the regulation will be required; and the date by which any required permits, licenses or other approvals must be obtained?

The regulation will be effective upon publication in the Pennsylvania.

(31) Provide the schedule for continual review of the regulation.

It is the stated policy of the State Board of Education to review this regulation every four years.

RECEIVED

2008 OCT 27 PM 3:12

FACE SHEET
FOR FILING DOCUMENTS
WITH THE LEGISLATIVE REFERENCE BUREAU
(Pursuant to Commonwealth Documents Law)

INDEPENDENT REGULATORY
REVIEW COMMISSION

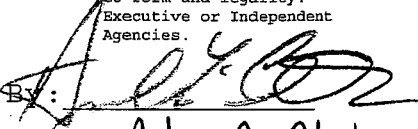
Copy below is hereby approved as to
Form and legality. Attorney General

Copy below is hereby certified to be a true and correct
copy of a document issued, prescribed or promulgated by:

Copy below is approved as
to form and legality.
Executive or Independent
Agencies.

By: _____
(Deputy Attorney General)

State Board of Education
(Agency)

By: 
Andrew C. Clark

DOCUMENT/FISCAL NOTE NO. #006-315

OCT 20 2008

DATE OF APPROVAL

DATE OF ADOPTION: September 18, 2008

DATE OF APPROVAL

BY: Jim Burkhat

Deputy General Counsel
(~~Chief Counsel~~),
(~~Independent Agency~~)
(Strike inapplicable title)

TITLE: (EXECUTIVE DIRECTOR, CHAIRMAN OR SECRETARY)

() Check if applicable
Copy not approved.

() Check if applicable.
No Attorney General approval
Or objection within 30 days
After submission.

FINAL-OMITTED REGULATION
COMMONWEALTH OF PENNSYLVANIA

22 PA. CODE, CH. 14
DISCIPLINARY PLACEMENTS

PREAMBLE

Title 22—EDUCATION

STATE BOARD OF EDUCATION

[22 PA. CODE CH. 14]

Disciplinary Placements

The State Board of Education (Board) amends § 14.143 (relating to disciplinary placements) to read as set forth in Annex A.

Public notice of the intention to adopt this final-omitted form rulemaking under the procedures specified in sections 201 and 202 of the Act of July 31, 1968 (P.L. 769, No. 240) (CDL) (45 P.S. §§ 1201 and 1202), has been omitted as authorized under section 204(3) of the CDL (45 P.S. § 1204(3)), because the Board finds that these procedures are, under the circumstances, unnecessary. Public comment is unnecessary because the Consent Decree resolving the litigation captioned *Pennsylvania Association of Retarded Citizens v. Com. of Pennsylvania (PARC)*, C.A. No. 71-42 (E.D. Pa.), as more fully articulated in Attorney General Official Opinion No. 35, 1973 Pa. AG LEXIS 35 (April 23, 1973), requires that certain protections attach to students with mental retardation limiting the circumstances under which they may be excluded from their educational placements without pre-deprivation due process protections.

Persons affected by this amendment have been given actual notice of the Board's intention to amend § 14.143 in advance of final-omitted form rulemaking under section 204(2) of the CDL. Specifically, all local educational agencies (LEAs) will receive electronic notice by means of PENN LINK transmission. Organizations representing students with disabilities and their parents will be notified in writing.

Statutory Authority

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

Background

Section 14.143(b) addresses the requirements originally established by the Consent Decree issued in *PARC*. Entered initially on October 7, 1971, and amended February 14, 1972, the *PARC* Consent Decree establishes that any disciplinary removal of a student with mental retardation is a change in educational placement requiring pre-deprivation due process protections unless extraordinary circumstances are present – specifically, a student cannot be removed unless the student with mental retardation presents a danger to himself/herself or others. Both the version of § 14.143 finally promulgated on June 9, 2001, *see* 31 *Pa. Bull.* 3021, 3029,

and the more recent version finally promulgated June 28, 2008, *see* 38 Pa. Bull. 3575, 3586-87, reference certain circumstances under which LEAs would have the authority to suspend students with mental retardation for disciplinary reasons. The 1999 federal regulation adopted by reference in the 2001 version of § 14.143 describing these circumstances were found at 34 CFR 300.520(a)(2)(i) and (ii) (relating to authority of school personnel), and it specifically provided that an LEA may place the child for up to forty-five days in an interim alternative educational setting – even if the parents disagree – when a child carries a weapon to school or knowingly possesses or uses drugs or sells or solicits the sale of a controlled substance on school premises. In the 2004 federal regulations, the section that contains these “special circumstances” is found at 34 CFR 300.530(g)(1)-(3) (relating to special circumstances) and permits an LEA to place a child in an interim educational setting for up to 45 school days for weapon and drugs infractions (as identified in the 2001 version of § 14.143), as well as for the infliction of a serious bodily injury – even if the parents disagree.

The conflict with the *PARC Consent Decree* in the current configuration of § 14.143(b) arises from the citation to the federal regulations that were incorporated into § 14.143. Rather than properly referencing specifically 34 CFR 300.530(g)(1)-(3), which describes the special circumstances that were adopted by reference in the 2001 version of § 14.143 and are consistent with the *PARC Consent Decree*, the version of § 14.143(b) finally promulgated on June 28, 2008, references “34 CFR 300.530-300.535 (relating to authority of school personnel; determination of setting; appeal; placement during appeals; protections for children not determined eligible for special education and related services; referral to and action by law enforcement; and judicial authorities).” This broad, six-section citation to and purported incorporation of federal regulations encompasses the whole *Discipline Procedures* part of the federal regulations, not just the special circumstances section. That clearly was not the Board’s intent, and the citation was a production error.

This all-inclusive reference to federal regulations governing discipline procedures would suggest that all of the federal disciplinary procedures apply to students with mental retardation – thus allowing local educational agencies to apply the same disciplinary rules to the *PARC*-protected students as apply to all children with disabilities eligible under the IDEA. However, application of all of these procedures would be inconsistent with the *PARC Consent Decree*, which is binding throughout the Commonwealth of Pennsylvania. The Board emphatically did not intend to render § 14.143 incompatible with the *PARC Consent Decree*. Thus, it is clear that the reference in § 14.143(b) to the entire federal regulatory framework governing discipline procedures was clearly a mistake in the production of the regulation and did not accurately reflect the Board’s intent.

Since it has at no time indicated the intention to depart from the requirements and limitations of the *PARC Consent Decree* in amending § 14.143, the Board through this final-omitted rulemaking amends § 14.143(b) governing the procedures for the disciplinary exclusion of students with mental retardation to correct the error and to make it facially compatible with the *PARC Consent Decree*. Consistent with the intention of the Board to incorporate by reference only the limited exceptions to the disciplinary exclusion of students with mental retardation found at 34 CFR 300.530(g)(1)-(3), which would be consistent with the *PARC*

Consent Decree, this amendment to § 14.143(b) will make § 14.143(b) consistent with both its predecessor version adopted in 2001 and the provisions of the *PARC* Consent Decree.

A summary of substantive changes is provided as follows:

§ 14.143 Disciplinary placements

The reference to 34 CFR 300.530-535 (relating to authority of school personnel; determination of setting; appeal; placement during appeals; protections for children not determined eligible for special education and related services; referral to an action by law enforcement; and judicial authorities) is deleted. Reference to 34 CFR 300.530(g)(1)-(3) is added in replacement of the deleted language. This change makes the regulation consistent with the clear intent of the Board to maintain § 14.143(b) in harmony with the *PARC* Consent Decree, as was the previous version of § 14.143(b).

The revised language clarifies that any disciplinary exclusion from school of a student with mental retardation requires pre-deprivation due process protections except in the special circumstances articulated in 34 CFR 300.530(g)(1)-(3). These special circumstances exist if the student (1) carries a weapon to or possesses a weapon at school, on school premises or to or at a school function under the jurisdiction of an SEA or an LEA; (2) knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA; or (3) has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA.

Fiscal Impact and Paperwork Requirements

The amendment will have no fiscal impact on the Commonwealth or its political subdivisions because the change will simply continue the requirements that were contained since 2001 in § 14.143(b) relating to disciplinary placements and the exclusion of students with mental retardation.

Effective Date

The final-omitted rulemaking will become effective upon publication in the *Pennsylvania Bulletin*. However, based on the *PARC* Consent Decree, the substance of the final-omitted rulemaking is binding now and has been at all since § 14.143 was promulgated.

Sunset Date

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

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on October 27, 2008, a copy of the final-omitted regulation was submitted to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House and Senate Committees on Education for review and comment. A copy of the final-omitted regulation was submitted on the same date to the Attorney General for review and comment under the Commonwealth Attorneys Act (71 P.S. §§ 732-101—732-506).

Under section 5.1(d) of the Regulatory Review Act, the final-omitted regulation was deemed approved by the House and Senate Committees on _____, 2008. Under section 5.1 (e) of the Regulatory Review Act, on _____, 2008, IRRC met and approved the final-omitted regulation.

Contact Person

The official responsible for information on this 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 amend its regulation as adopted by this order under the procedures specified in sections 201 and 202 of the CDL has been omitted under the authority contained in section 204(3) of the CDL, because the Board has, for good cause, found that the procedures specified in section 201 and 202 of the CDL are, in this circumstances, unnecessary because of the Commonwealth's obligations articulated in the *PARC* Consent Decree, as more fully articulated in Attorney General Official Opinion 39 (April 23, 1973).

(2) The amendment of the regulation of the Board in the manner provided in this order is necessary and appropriate for administration of the Pennsylvania Code and the Commonwealth's obligations established by the *PARC* Consent Decree.

Order

The Board, acting under authorizing statute, orders that:

(a) The regulations of the Board, 22 Pa. Code Chapter 14, are amended by amending § 14.143 to read as set forth in Annex A.

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

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

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

Jim Buckheit,
Executive Director

Annex A

TITLE 22. EDUCATION

PART I. STATE BOARD OF EDUCATION

Subpart A. MISCELLANEOUS PROVISIONS

CHAPTER 14. SPECIAL EDUCATION AND PROGRAMS

EDUCATIONAL PLACEMENT

§ 14.143. Disciplinary placements.

(b) A removal from school is a change of placement for a student who is identified with mental retardation, except if the student's actions are consistent with **[34 CFR 300.530—300.535 (relating to authority of school personnel; determination of setting; appeal; placement during appeals; protections for children not determined eligible for special education and related services; referral to and action by law enforcement; and judicial authorities)]** 34 CFR 300.530(g)(1)-(3) (relating to authority of school personnel).



**Commonwealth of Pennsylvania
STATE BOARD OF EDUCATION**

October 27, 2008

Mr. Kim Kaufman
Executive Director
Independent Regulatory Review Commission
14th Floor, 333 Market Street
Harrisburg, PA 17126

Dear Mr. Kaufman:

Enclosed is a copy of final omitted regulation approved by the State Board of Education (22 Pa. Code, Chapter 14 – Disciplinary Placements #006-315) for review and action by the Commission pursuant to section 5.1(c) of the Regulatory Review Act.

The State Board of Education will provide the Commission with any assistance it requires to facilitate a thorough review of this final-form regulation.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink that reads "Jim Buckheit".

Jim Buckheit
Executive Director

Enclosure

cc: Secretary Zahorchak
Gregory Dunlap, Esq.
Teresa Colarusso

TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO THE
REGULATORY REVIEW ACT

RECEIVED

I.D. NUMBER: 6-315
SUBJECT: DISCIPLINARY PLACEMENTS
AGENCY: STATE BOARD OF EDUCATION

2008 OCT 27 PM 3:12

INDEPENDENT REGULATORY
REVIEW COMMISSION

TYPE OF REGULATION

- Proposed Regulation
Final Regulation
X Final Regulation with Notice of Proposed Rulemaking Omitted
120-day Emergency Certification of the Attorney General
120-day Emergency Certification of the Governor
Delivery of Tolled Regulation
a. With Revisions b. Without Revisions

FILING OF REGULATION

DATE	SIGNATURE	DESIGNATION
10/27	<i>Shryers</i>	HOUSE COMMITTEE ON EDUCATION
10/27	<i>Milton K. Reed</i>	MAJORITY CHAIRMAN <u>James R. Roebuck Jr.</u>
10-27	<i>A. Rybarczyk</i>	SENATE COMMITTEE ON EDUCATION
10/27	<i>M. Armstrong</i>	MAJORITY CHAIRMAN <u>Office of Sen. James J. Rhoades</u>
10/27	<i>St. Helvert</i>	INDEPENDENT REGULATORY REVIEW COMMISSION
10-27-08	<i>M. Mummert</i>	ATTORNEY GENERAL (for Final Omitted only)
		LEGISLATIVE REFERENCE BUREAU (for Proposed only)