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RULES AND REGULATIONS

Title 22--EDUCATION

STATE BOARD OF EDUCATION

[22 PA. CODE CH. 14]

Disciplinary Placements

[39 Pa.B. 17]

[Saturday, January 3, 2009]

The State Board of Education (Board) has amended § 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 predeprivation 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 (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 predeprivation 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 or others. Both the version of § 14.143 finally promulgated at 31 Pa.B. 3021, 3029 (June 9, 2001) and the more recent version finally promulgated at 38 Pa.B. 3575, 3586 and 3587 (June 28, 2008), 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 in 34 CFR 300.520(a)(2)(i) and (ii) (relating to authority of school personnel), and specifically provided that an LEA may place the child for up to 45 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 in 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 that 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 this Commonwealth. 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 in 34 CFR 300.530(g)(1)--(3), which would be consistent with the *PARC* Consent Decree, this amendment to § 14.143(b) will make subsection 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--300.535 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 predeprivation 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 since § 14.143 was promulgated.

Sunset Date

In accordance with its policy and practice regarding regulations, the Board will review the effectiveness of these regulation 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 (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(j.1) of the Regulatory Review Act (71 P. S. § 745.5a(j.1)), the final-omitted regulation was deemed approved by the Committees when the General Assembly adjourned sine die. Under section 5.1(e) of the Regulatory Review Act, on December 18, 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 sections 204(3) of the CDL, because the Board has, for good cause, found that the procedures specified in sections 201 and 202 of the CDL are, in this circumstance, 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

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 39 Pa.B. 104 (January 3, 2009).)

Fiscal Note: 6-315. No fiscal impact; (8) recommends adoption.

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.

(a) Notwithstanding the requirements incorporated by reference in 34 CFR 300.530(b) and 300.536 (relating to authority of school personnel; and change of placement because of disciplinary removals), a disciplinary exclusion of a student with a disability for more than 15 cumulative school days in a school year will be considered a pattern so as to be deemed a change in educational placement.

(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(g)(1)--(3) (relating to authority of school personnel).

[Pa.B. Doc. No. 09-7. Filed for public inspection January 2, 2009, 9:00 a.m.]

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