

RULE MAKING ACTIVITIES

Each rule making is identified by an I.D. No., which consists of 13 characters. For example, the I.D. No. AAM-01-96-00001-E indicates the following:

- AAM -the abbreviation to identify the adopting agency
01 -the *State Register* issue number
96 -the year
00001 -the Department of State number, assigned upon receipt of notice
E -Emergency Rule Making—permanent action not intended (This character could also be: A for Adoption; P for Proposed Rule Making; RP for Revised Rule Making; EP for a combined Emergency and Proposed Rule Making; EA for an Emergency Rule Making that is permanent and does not expire 90 days after filing; or C for first Continuation.)

Italics contained in text denote new material. Brackets indicate material to be deleted.

Department of Civil Service

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Jurisdictional Classification

I.D. No. CVS-52-03-00004-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: Amendment of Appendix(es) 1 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional classification.

Purpose: To classify positions in the exempt class in the Department of Public Service.

Text of proposed rule: Amend Appendix(es) 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Department of Public Service, by adding thereto the positions of Chief of Utility Security and Utility Security Specialist.

Text of proposed rule and any required statements and analyses may be obtained from: Shirley LaPlante, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6210, e-mail: sjl@cs.state.ny.us

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

The proposed rule is subject to consolidated statements and analyses printed in the issue of February 12, 2003 under the notice of proposed rule making I.D. No. CVS-06-03-00005-P.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Jurisdictional Classification

I.D. No. CVS-52-03-00005-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: Amendment of Appendix(es) 1 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional classification.

Purpose: To classify a position in the exempt class in the State University of New York.

Text of proposed rule: Amend Appendix(es) 1 of the Rules for the Classified Service, listing positions in the exempt class, in the State University of New York under the subheading "Central Administration," by increasing the number of positions of Secretary from 5 to 6.

Text of proposed rule and any required statements and analyses may be obtained from: Shirley LaPlante, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6210, e-mail: sjl@cs.state.ny.us

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Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

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PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Jurisdictional Classification

I.D. No. CVS-52-04-00006-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: Amendment of Appendix(es) 1 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional classification.

Purpose: To classify positions in the exempt class in the Department of Audit and Control.

Text of proposed rule: Amend Appendix(es) 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Department of Audit and Control, by adding thereto the positions of Member, Retirement Systems Medical Board (6).

Text of proposed rule and any required statements and analyses may be obtained from: Shirley LaPlante, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6210, e-mail: sjl@cs.state.ny.us

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

The proposed rule is subject to consolidated statements and analyses printed in the issue of February 12, 2003 under the notice of proposed rule making I.D. No. CVS-06-03-00005-P.

**PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED**

Jurisdictional Classification

I.D. No. CVS-52-03-00007-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: Amendment of Appendix(es) 1 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional classification.

Purpose: To delete a position from and classify a position in the exempt class in the Executive Department.

Text of proposed rule: Amend Appendix(es) 1 of the Rules for the Classified Service, listing positions in the exempt class in the Executive Department under the subheading "Office of the Governor," by decreasing the number of positions of Confidential Assistant from 24 to 23 and, in the Executive Department under the subheading "Division of the Budget," by increasing the number of positions of Confidential Assistant from 3 to 4.

Text of proposed rule and any required statements and analyses may be obtained from: Shirley LaPlante, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6210, e-mail: sjl@cs.state.ny.us

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

The proposed rule is subject to consolidated statements and analyses printed in the issue of February 12, 2003 under the notice of proposed rule making I.D. No. CVS-06-03-00005-P.

**PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED**

Jurisdictional Classification

I.D. No. CVS-52-03-00008-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: Amendment of Appendix(es) 2 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional classification.

Purpose: To classify a position in the non-competitive class in the Department of Agriculture and Markets.

Text of proposed rule: Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Agriculture and Markets, by adding thereto the position of Assistant Director, Animal Industry (1).

Text of proposed rule and any required statements and analyses may be obtained from: Shirley LaPlante, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6210, e-mail: sjl@cs.state.ny.us

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

The proposed rule is subject to consolidated statements and analyses printed in the issue of February 12, 2003 under the notice of proposed rule making I.D. No. CVS-06-03-00005-P.

**PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED**

Jurisdictional Classification

I.D. No. CVS-52-03-00009-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: Amendment of Appendix(es) 2 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional classification.

Purpose: To classify a position in the non-competitive class in the Department of Family Assistance.

Text of proposed rule: Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Family Assistance under the subheading "Office of Children and Family Service," by increasing the number of positions of Secretary 2 from 5 to 6.

Text of proposed rule and any required statements and analyses may be obtained from: Shirley LaPlante, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6210, e-mail: sjl@cs.state.ny.us

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

The proposed rule is subject to consolidated statements and analyses printed in the issue of February 12, 2003 under the notice of proposed rule making I.D. No. CVS-06-03-00005-P.

**PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED**

Jurisdictional Classification

I.D. No. CVS-52-03-00010-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: Amendment of Appendix(es) 2 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional classification.

Purpose: To classify a position in the non-competitive class in the Department of Family Assistance.

Text of proposed rule: Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class in the Department of Family Assistance under the subheading "Office of Children and Family Services," by increasing the number of positions of Associate Counsel from 1 to 2.

Text of proposed rule and any required statements and analyses may be obtained from: Shirley LaPlante, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6210, e-mail: sjl@cs.state.ny.us

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

The proposed rule is subject to consolidated statements and analyses printed in the issue of February 12, 2003 under the notice of proposed rule making I.D. No. CVS-06-03-00005-P.

**PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED**

Jurisdictional Classification

I.D. No. CVS-52-04-00011-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: Amendment of Appendix(es) 2 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional classification.

Purpose: To classify a position in the non-competitive class in the Department of Mental Hygiene.

Text of proposed rule: Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class in the Department of Mental Hygiene under the subheading "Office of Mental Health," by adding thereto the position of Advocacy Specialist 4 (1).

Text of proposed rule and any required statements and analyses may be obtained from: Shirley LaPlante, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6210, e-mail: sjl@cs.state.ny.us

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

The proposed rule is subject to consolidated statements and analyses printed in the issue of February 12, 2003 under the notice of proposed rule making I.D. No. CVS-06-03-00005-P.

**PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED**

Jurisdictional Classification

I.D. No. CVS-52-03-00012-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: Amendment of Appendix(es) 2 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional classification.

Purpose: To classify a position in the non-competitive class in the Executive Department.

Text of proposed rule: Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Executive Department under the subheading "Commission on Quality of Care for the Mentally Disabled," by increasing the number of positions of Mental Hygiene Facility Review Specialist 1 from 24 to 25.

Text of proposed rule and any required statements and analyses may be obtained from: Shirley LaPlante, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6210, e-mail: sjl@cs.state.ny.us

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

The proposed rule is subject to consolidated statements and analyses printed in the issue of February 12, 2003 under the notice of proposed rule making I.D. No. CVS-06-03-00005-P.

**PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED**

Jurisdictional Classification

I.D. No. CVS-52-03-00013-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: Amendment of Appendix(es) 2 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional classification.

Purpose: To classify a position in the non-competitive class in the State University of New York.

Text of proposed rule: Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the State University of New York by adding thereto the subheading "State University Maritime College," and the position of Secretary 2 (1).

Text of proposed rule and any required statements and analyses may be obtained from: Shirley LaPlante, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6210, e-mail: sjl@cs.state.ny.us

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

The proposed rule is subject to consolidated statements and analyses printed in the issue of February 12, 2003 under the notice of proposed rule making I.D. No. CVS-06-03-00005-P.

**PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED**

Jurisdictional Classification

I.D. No. CVS-52-03-00014-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: Amendment of Appendix(es) 2 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional classification.

Purpose: To classify positions in the non-competitive class in the Department of Family Assistance.

Text of proposed rule: Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Family Assistance under the subheading "Office of Temporary and Disability Assistance," by adding thereto the positions of Immigrant Community Specialist 1 (1) and Immigrant Community Specialist 2 (4).

Text of proposed rule and any required statements and analyses may be obtained from: Shirley LaPlante, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6210, e-mail: sjl@cs.state.ny.us

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

The proposed rule is subject to consolidated statements and analyses printed in the issue of February 12, 2003 under the notice of proposed rule making I.D. No. CVS-06-03-00005-P.

**PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED**

Jurisdictional Classification

I.D. No. CVS-52-03-00015-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: Amendment of Appendix(es) 1 and 2 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional classification.

Purpose: To classify a position in the exempt class and delete positions from and classify positions in the non-competitive class in the Executive Department.

Text of proposed rule: Amend Appendix(es) 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Executive Department by adding thereto the subheading "Office of Cyber Security and Critical Infrastructure Coordination," and the position of Counsel; and

Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Executive Department under the subheading "Office for Technology," by deleting therefrom the positions of Director Cyber Security and Critical Infrastructure Coordination (1) and Senior Administrative Assistant (1) and, in the Executive Department by adding thereto the subheading "Office of Cyber Security and Critical Infrastructure Coordination," and the positions of Director Cyber Security and Critical Infrastructure Coordination (1) and Senior Administrative Assistant (1).

Text of proposed rule and any required statements and analyses may be obtained from: Shirley LaPlante, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6210, e-mail: sjl@cs.state.ny.us

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

The proposed rule is subject to consolidated statements and analyses printed in the issue of February 12, 2003 under the notice of proposed rule making I.D. No. CVS-06-03-00005-P.

**PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED**

Jurisdictional Classification

I.D. No. CVS-52-03-00016-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: Amendment of Appendix(es) 1 and 2 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional classification.

Purpose: To classify a position in the exempt class and delete a position from the non-competitive class in the Department of Public Service.

Text of proposed rule: Amend Appendix(es) 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Department of Public Service, by adding thereto the position of Confidential Aide; and

Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Public Service, by deleting therefrom the position of ϕ Keyboard Specialist 3 (1).

Text of proposed rule and any required statements and analyses may be obtained from: Shirley LaPlante, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6210, e-mail: sjl@cs.state.ny.us

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

The proposed rule is subject to consolidated statements and analyses printed in the issue of February 12, 2003 under the notice of proposed rule making I.D. No. CVS-06-03-00005-P.

4. The regulation fails to address use of such an order where the subject is double-celled.

Response:

1. The commissioner has broad authority under Correction Law §§ 112 and 137 to provide measures for safety and security. Deprivation orders have long been successfully used as management tools for the maintenance of order and discipline in special housing units. Neither the law nor DOCS's regulations limit the scope of a deprivation order to those services specifically identified in Part 304, "Services." In fact, Section 305.2(a) extends the scope of deprivation orders to "a specific item, privilege or service. . ." and has been the basis for the issuance of numerous in-cell water deprivation orders in response to safety, security and health threats such as flooding. The addition of subdivision (f) does not create a new type of deprivation order. To the contrary, it establishes a standard minimum schedule to ensure that adequate water for drinking, hygiene and sanitary purposes is available.

2. The Department has taken care to narrowly tailor this regulation, but does not consider it necessary or feasible to define all circumstances under which a water deprivation order may be permitted. The written deprivation order is subject to daily review by facility executive staff, must state the reasons for the deprivation, and must be given to the inmate. The requirement that the order must be supported by written reasons and is subject to daily executive review provides adequate control over this mechanism.

3. In accordance with section 304.4(b), a qualified medical practitioner visits the special housing unit in each 24-hour period to examine into the state of health of the inmates confined therein. The water deprivation protocol as set forth in the new subdivision (f) merely structures the inmates access to in-cell (running) water. It ensures adequate access to drinking water and hygiene functions. In addition, the deprivation only applies to in-cell (running) water. An inmate subject to such a deprivation is generally permitted to keep a cup for drinking water, is provided with whatever beverages are served with each meal, and at the direction of medical staff may receive additional fluid during the issuance of medication if medically indicated.

4. An inmate placed on water deprivation who is housed in a double-cell with an inmate who is not subject to such an order must be moved to a different cell in order to implement the order.

**Department of Correctional
Services**

NOTICE OF ADOPTION

Deprivation Order

I.D. No. COR-40-03-00003-A

Filing No. 1397

Filing date: Dec. 12, 2003

Effective date: Dec. 31, 2003

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Addition of section 305.2(f) to Title 7 NYCRR.

Statutory authority: Correction Law, section 112

Subject: Deprivation order.

Purpose: To create a procedure for distribution of water to inmates in special housing for health and safety reasons.

Text or summary was published in the notice of proposed rule making, I.D. No. COR-40-03-00003-P, Issue of October 8, 2003.

Final rule as compared with last published rule: No changes.

Text of rule and any required statements and analyses may be obtained from: Anthony J. Annucci, Deputy Commissioner and Counsel, Department of Correctional Services, Bldg. 2, State Campus, Albany, NY 12226-2050, (518) 457-4951

Assessment of Public Comment

Comment:

1. There is no authorization in law for a deprivation order cutting off cell water. DOCS' regulations only permit the suspension of the individual personal hygiene services detailed in section 304.5.

2. The regulation is not narrowly tailored and fails to include specific standards for application of water deprivation.

3. The regulation does not consider potential health consequences; at minimum there should be reporting requirements and health screening.

**PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED**

Discipline and Confinement of Inmates

I.D. No. COR-52-03-00020-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: Amendment of sections 251-2.2 and 254.7(a)(5); repeal of section 254.6; and addition of new section 254.6 and Part 310 to Title 7 NYCRR.

Statutory authority: Correction Law, sections 70, 112, 138 and 401

Subject: Discipline and confinement of inmates whose mental state or intellectual capacity may be at issue.

Purpose: To establish standards whereby an inmate's mental state and intellectual capacity shall be considered during disciplinary proceedings; amend disciplinary procedures for inmates whose mental state and intellectual capacity is at issue; and provide, in conjunction with OMH staff, for case management of such inmates when confined in special housing units.

Text of proposed rule: Section 251-2.2 is amended as follows:

(a) The review officer shall receive at least once daily, all misbehavior reports issued at the facility.

(b) *Except as provided in subdivision (d) below*, [T]he review officer shall review such reports and considering the seriousness of the alleged violation of the standards of inmate behavior, refer such reports to the appropriate disciplinary body for action as follows:

(1) Where the violation, if substantiated, would warrant only a penalty of loss of recreation for up to and including 13 days and including the loss of privileges, for a period up to and including 13 days, other than correspondence and visitation privileges, the report shall be referred to the violation officer.

(2) Where the violation, if substantiated, would warrant only a penalty of loss of privileges up to and including 30 days, and including confinement to a cell or room (keeplock) for a period up to and including 30 days, the misbehavior report shall be forwarded to the disciplinary hearing officer for appropriate action.

(3) Where the violation, if substantiated, would warrant imposition of a penalty beyond that which may be imposed at a disciplinary hearing, the misbehavior report shall be forwarded to the superintendent for designation of a hearing officer to conduct a superintendent's hearing.

(c) The review officer may dismiss any misbehavior report which fails to state a valid charge, or may return it to be rewritten.

(d) *The review officer shall refer any report that includes a charge that an inmate has engaged in an act of self-harm in violation of rule 123.10 (item 270.2(B)(23)(i) of this Title) to the deputy superintendent for security, who shall fulfill the function of the review officer and have the authority to dismiss the charge or charges if he or she believes, due to the inmate's mental state or for any other reason, that proceeding to a hearing would serve no useful purpose.*

(e)[(d)] The review officer shall review the status of each inmate keptlocked pursuant to a misbehavior report under review, and may order the release of an inmate who is no longer a threat to the safety and security of the facility or to himself.

(f)[(e)] The review officer shall not act as a hearing officer in any proceeding arising from a misbehavior report[s] which he or she has reviewed.

Section 254.6 is hereby repealed and a new section 254.6 adopted as follows:

§ 254.6 Method of determination.

(a) *Generally. Upon receipt of a misbehavior report from the review officer, the hearing officer shall commence the Superintendent's hearing as follows:*

(1) *The misbehavior report shall be served on the inmate at least 24 hours before the Superintendent's hearing. If the inmate is confined and requests an assistant, the hearing may not start until 24 hours after the assistant's initial meeting with the inmate.*

(2) *The inmate shall be present at the hearing unless he or she refuses to attend, or is excluded for reasons of institutional safety or correctional goals. The entire hearing must be electronically recorded.*

(3) *The inmate when present may reply orally to the charge and/or evidence and shall be allowed to submit relevant documentary evidence or written statements on his or her behalf.*

(4) *When applicable, the information identified in subparagraphs (b)(1)(i)(iv)(v) and (b)(2)(i)(ii) of this section, derived from the department's electronic databases, shall automatically appear on a computer generated hearing record sheet that shall be provided to the hearing officer for use at the hearing.*

(b) *Mental state or intellectual capacity. When an inmate's mental state or intellectual capacity is at issue, a hearing officer shall consider evidence regarding the inmate's mental condition or intellectual capacity at the time of the incident and at the time of the hearing in accordance with this section.*

(1) *For the purposes of this section, an inmate's mental state shall be deemed at issue when:*

(i) *the inmate is classified as level 1 by the Office of Mental Health (OMH), as indicated on the hearing record sheet;*

(ii) *the inmate is charged with engaging in an act of self-harm in violation of rule 123.10 (item 270.2(B)(23)(i) of this Title), as indicated on the misbehavior report;*

(iii) *the incident occurred while the inmate was being transported to or from the Central New York Psychiatric Center (CNYPC), as alleged in the misbehavior report;*

(iv) *the inmate was an inpatient at the CNYPC within nine months prior to the incident, as indicated on the hearing record sheet;*

(v) *the incident occurred while the inmate was assigned to an OMH satellite unit or intermediate care program, as indicated on the hearing record sheet;*

(vi) *the incident occurred while the inmate was being escorted to or from an OMH satellite unit or intermediate care program, as alleged in the misbehavior report;*

(vii) *the hearing was delayed or adjourned, after an extension of time was obtained in accordance with section 251-5.1 of this Title, because the inmate became an inpatient at the CNYPC or was assigned to the OMH satellite unit; or*

(viii) *it appears to the hearing officer, based on the inmate's testimony, demeanor, the circumstances of the alleged offense or any other reason, that the inmate may have been mentally impaired at the time of the incident or may be mentally impaired at the time of the hearing.*

(2) *For the purposes of this section an inmate's intellectual capacity shall be deemed at issue when:*

(i) *the incident occurred while the inmate was assigned to the Special Needs Unit (SNU) at Wende, Arthurkill or Sullivan Correctional Facilities, as indicated on the hearing record sheet;*

(ii) *the inmate has not scored above a sixty-nine (69) on any intelligence testing instrument administered to the inmate by the department and has not scored above a 3.0 grade level in any reading comprehension testing instrument administered to the inmate by the department, as indicated on the hearing record sheet; or*

(iii) *it appears to the hearing officer, based on the inmate's testimony, demeanor, the circumstances of the alleged offense or any other reason, that the inmate may have been intellectually impaired at the time of the incident or may be intellectually impaired at the time of the hearing.*

(c) *When an inmate's mental state or intellectual capacity is at issue, pursuant to subdivision (b) above, the hearing officer shall:*

(1) *ask the inmate whether he or she understands the disciplinary charge, the purpose of the hearing and the role of the participants in the hearing;*

(2) *inquire of other witnesses to the incident, as may be called in accordance with section 254.5 of this Part, concerning any observations that they may have regarding the inmate's mental condition or intellectual capacity at the time of the incident; and*

(3) *where an inmate's mental state is at issue, out of the presence of the inmate and on a confidential tape, interview an OMH clinician as may be available concerning the inmate's mental condition at the time of the incident and the time of hearing; or*

(4) *where an inmate's intellectual capacity is at issue, out of the presence of the inmate and on a confidential tape, interview a correction counselor or teacher as may be available concerning the inmate's intellectual capacity at the time of the incident and the time of the hearing.*

(d) *If it is determined that the inmate is unable to participate in the hearing process because the inmate does not understand the disciplinary charge, the purpose of the hearing and the role of the participants in the hearing, the hearing shall be adjourned until such time as the inmate is able to participate in the hearing process and, if necessary, a request for a time extension shall be made in accordance with section 251-5.1 of this Title.*

(e) *If it is determined that the inmate is able to participate in the hearing process but is in need of assistance, the hearing shall be adjourned and the inmate shall be offered an assistant in accordance with section 251-4.1 of this Title. Pursuant to section 251-4.2 of this Title, the assistant may be required by the hearing officer to be present at the hearing.*

(f) *If it is determined that the inmate is capable of proceeding with the hearing and a finding of guilt is subsequently made with regard to one or more of the charges, the hearing officer shall consider the inmate's mental condition or intellectual capacity at the time of the incident, if at issue in accordance with paragraphs (b)(1) or (2) above, respectively, in determining the appropriate penalty to be imposed under section 254.7 of this Part. In addition, if in light of the inmate's mental condition or intellectual capacity, the hearing officer believes that a penalty with regard to one or more of the charges would serve no useful purpose, the hearing officer may dismiss the charge or charges altogether. The written statement of the disposition of the charges, if any, shall, in accordance with section 254.7(a)(5) of this Part, reflect how the inmate's mental condition or intellectual capacity was considered.*

(g) *A copy of a written statement of the disposition of the charges issued in accordance with subdivision (f) above shall, if the disposition includes confinement to SHU and the inmate is housed in a correctional facility designated by OMH as level 1 or 2, be provided to the OMH unit at the facility for use in connection with any mental health assessments. In a correctional facility designated by OMH as level 1, the inmate's status shall also be the subject of the next scheduled meeting of the facility's Special Housing Unit Case Management Committee in accordance with Part 310 of this Title.*

Paragraph (5) of subdivision (a) of section 254.7 is amended as follows:

(5) *As soon as possible, but no later than 24 hours after the conclusion of the hearing, the inmate shall be given a written statement of the disposition of the charges. This statement shall set forth the evidence relied upon by the hearing officer in reaching his or her decision [and also set forth], the reasons for any penalty imposed and, if applicable, pursuant to section 254.6(b) of this Title, reflect how the inmate's mental condition or intellectual capacity was considered.*

A new Part 310 is added as follows:

PART 310

SPECIAL HOUSING UNIT CASE MANAGEMENT COMMITTEE

(Statutory authority: Correction Law, §§ 112, 138, 401)

§ 310.1 Establishment of the Special Housing Unit Case Management Committee

(a) There shall be in each correctional facility designated as level 1 by the Office of Mental Health (OMH), a committee to be known as the special housing unit case management committee.

(b) Such committee shall be co-chaired by the first deputy superintendent or deputy superintendent for security or designee and the unit chief or clinical director of the OMH mental health satellite unit or designee.

(c) Each co-chairperson shall select at least two individuals to sit as additional committee members from among the following staff within the facility: facility health services director or designee; deputy superintendent for security (if not a chairperson); OMH clinical staff assigned to the SHU; SHU sergeant; ICP counselor; correction officers assigned to the SHU; SHU guidance counselor, and other OMH or department staff within the facility as may be deemed appropriate. If the OMH co-chairperson is not a clinician, at least one of the additional individuals selected to sit on the committee shall be an OMH clinician. A committee member or other staff will be designated to take summary notes of the committee meetings.

§ 310.2 Role of the Special Housing Unit Case Management Committee

The purposes of the special housing unit case management committee are to review, monitor and coordinate the behavior and treatment plan for those inmates assigned to SHU in a correctional facility designated as level 1 by OMH who are on the OMH mental health caseload and other SHU inmates based upon a recent request to the committee from OMH or department staff, and to initially review the status of all inmates newly assigned to SHU in a correctional facility designated as level 1 by OMH following a superintendent's hearing in which the inmate's mental state or intellectual capacity was deemed to be at issue in accordance with subdivision (b) of section 254.6 of this Title.

§ 310.3 Procedure of the Special Housing Unit Case Management Committee

(a) The committee shall meet at least once every two weeks. A minimum of four committee members to include staff representation from OMH and department shall be present at each meeting. At least one of the committee members present at each meeting shall be an OMH clinician.

(b) The agenda for each meeting shall include an initial review of the status of any inmate newly assigned to SHU at the facility following a superintendent's hearing in which the inmate's mental state or intellectual capacity was deemed to be at issue, a review of the status of any SHU inmate based upon a recent request to the committee from OMH or department staff, and a review of the status of SHU inmates on the OMH mental health caseload.

(c) During the review of an inmate's status:

(1) security staff will present the inmate's disciplinary and criminal history, including an assessment of the inmate's propensity for acts of violence and security risk;

(2) OMH clinical staff will present the inmate's mental health diagnoses, including behaviors and treatment needs associated with such a diagnoses, psychiatric medications, including the purpose of the medication, side effects and medication compliance, acts of self-harm and psychiatric history, including psychiatric hospitalizations, during and prior to the inmate's current assignment to the SHU; and

(3) guidance staff, if on the committee, will present the inmate's programming history and general custodial adjustment during and prior to the inmate's current assignment to the SHU. If no guidance staff are on the committee, other participating staff will present this information.

(d) After reviewing the inmate's status, the committee may do one or more of the following:

(1) recommend to the superintendent the temporary or permanent restoration of one or more privileges, the suspension or reduction of confinement time, or a housing reassignment;

(2) recommend to the OMH unit chief that the inmate's psychiatric medications be reevaluated or that the inmate be examined by two physicians employed by OMH for possible commitment to the Central New York Psychiatric Center.

Note: Nothing in this paragraph shall be deemed to, in any way, limit the ability of department staff to, at any time, refer an inmate to OMH for evaluation and appropriate mental health care and treatment or for OMH to, at any time, evaluate an inmate and provide appropriate mental health care in the absence of such a referral.

(e) The review of a SHU inmate's status by the special housing unit case management committee and any recommendations to the superintendent or OMH unit chief shall be reflected in the inmate's guidance folder.

Text of proposed rule and any required statements and analyses may be obtained from: Anthony J. Annucci, Deputy Commissioner and Counsel, Department of Correctional Services, Bldg. 2, State Campus, Albany, NY 12226-2050, (518) 457-4951

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement

Statutory Authority:

Section 112 of the Correction Law grants to the commissioner of correction the superintendence, management and control of the correctional facilities in the department and of the inmates confined therein, and of all matters relating to the government, discipline, policing, contracts and fiscal concerns thereof. The section also assigns to the commissioner of correction the power to make rules and regulations for the employees of the department and the duties to be performed by them.

Section 137 of the Correction Law grants to the commissioner the authority to provide for such measures as he may deem necessary or appropriate for the safety, security and control of correctional facilities and the maintenance of order therein and permits an inmate to be confined in a cell apart from the accommodations provided for inmates who are participating in programs for such period as may be necessary for the maintenance of order or discipline.

Legislative Objective:

By vesting the commissioner with this rulemaking authority, the legislature intended the commissioner to establish standards whereby an inmate's mental state and intellectual capacity shall, where at issue, be considered during disciplinary proceedings, and to provide, in conjunction with OMH staff, for the case management of certain inmates when confined in special housing units.

Needs and Benefits:

In 1990, the New York Court of Appeals held that in the context of a prison disciplinary proceeding in which the prisoner's mental health is at issue, a hearing officer is required to consider evidence regarding the prisoner's mental condition. See, *Matter of Huggins v. Coughlin*, 76 N.Y.2d 904, 905, 561 N.Y.S.2d 910, 563 N.E.2d 281 (1990). Shortly thereafter, the department and the Office of Mental Health addressed this matter through internal procedures. This proposed rule making represents and effort to ensure greater uniformity in the method of determining when and how an inmate's mental condition is to be considered in the prison disciplinary process.

At section 251-2.2, new subdivision (d) establishes that the deputy superintendent for security shall serve as the review officer, a function normally filled by a lieutenant, in any case wherein a disciplinary report alleges an act of self-harm. This is to ensure that when self-harm is alleged in a disciplinary report, the charge comes to the attention of the deputy superintendent for security prior to any hearing and provides an opportunity for the report to be dismissed, when deemed appropriate, at an early stage.

New section 254.6 incorporates the text of repealed section 254.6 within the new subdivision (a). The balance of this section sets forth procedures for hearing officers who must determine whether the inmate's mental state or intellectual capacity is at issue; whether the inmate is capable of participating in the hearing or is in need of assistance; and what, if any, penalty should be imposed in the case of an inmate whose mental condition or intellectual capacity was found to be at issue. In addition, this section requires the hearing officer to include a statement explaining how the inmate's mental state or intellectual capacity was considered both for the record and for use by staff of the office of mental health or the special housing unit case management committee.

New Part 310 establishes the special housing unit case management committee in each facility designated "level 1" by the office of mental health. This committee, comprised of facility and office of mental health staff, shall be responsible for reviewing, monitoring and coordinating the behavior and treatment plans for certain inmates confined in special housing.

Costs:

a. To State government: None.

b. To local governments: None. The proposed amendment does not apply to local governments.

c. Costs to private regulated parties: None. The proposed amendment does not apply to private regulated parties.

d. Costs to the regulating agency for implementation and continued administration of the rule:

(i) Initial expenses: None are expected. The inmate disciplinary system is already in existence, OMH and department staff are already present.

(ii) Annual cost: None.

Paperwork:

a. New reporting or application forms: None.

b. Additions to existing reporting or application forms: None.

c. New or additional recordkeeping that will be required of the regulated party to comply with the rule or prove compliance with the rule: The special housing unit case management committees, established by new Part 310, will maintain summary notes of their reviews and recommendations.

Local Government Mandates:

There are no new mandates imposed upon local governments by this proposal. The proposed amendment does not apply to local governments.

Duplication:

This proposed amendment does not duplicate any existing State or Federal requirement.

Alternatives:

The department considered not proposing the amendment but rejected that alternative in an effort to achieve greater uniformity in determining when and how an inmate's mental condition is to be considered in the inmate disciplinary process, and in an effort to enhance oversight of inmates in special housing units whose mental state may be of concern.

Federal Standards:

There are no minimum standards of the Federal government for this or a similar subject area.

Compliance Schedule:

The Department of Correctional Services is expected to achieve compliance with the proposed rule immediately upon adoption.

Regulatory Flexibility Analysis

A regulatory flexibility analysis is not required for this proposal since it will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on small businesses or local governments. This merely establishes standards whereby an inmate's mental state and intellectual capacity shall be considered during disciplinary proceedings and confinement in special housing units.

Rural Area Flexibility Analysis

A rural area flexibility analysis is not required for this proposal since it will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on rural areas. This merely establishes standards whereby an inmate's mental state and intellectual capacity shall be considered during disciplinary proceedings and confinement in special housing units.

Job Impact Statement

A job impact statement is not submitted because this proposed rule will have no adverse impact on jobs or employment opportunities. This merely establishes standards whereby an inmate's mental state and intellectual capacity shall be considered during disciplinary proceedings and confinement in special housing units.

Statutory authority: Education Law, sections 207 (not subdivided); 305(1), (2) and (7), 3004(1); and 3006(1)(b)

Finding of necessity for emergency rule: Preservation of general welfare.

Specific reasons underlying the finding of necessity: The proposed amendment would establish requirements for the individual evaluation of candidates for classroom teacher certificates. Significantly, approximately 40 percent of new classroom teachers certified in New York State each year have been certified through the State Education Department's evaluation of the individual candidate's education and experience rather than completion of a traditional teaching program. Despite strenuous teacher recruitment efforts and the enactment of a number of Regents initiatives creating alternative pathways for teacher certification, a persistent shortage of certified teachers remains in certain geographic and subject matter areas, including but not limited to math, science, bilingual and special education.

The current provisions of the Commissioner's regulations permitting the individual evaluation of candidates for first level teacher certificates will expire on February 1, 2004. This action is, therefore, critical to facilitate the Department's continuing ability to certify a sufficient number of properly qualified candidates to fill vacant teaching positions in the State's public schools.

Candidates seeking certification through individual evaluation rather than through a college recommended teacher education program would have to meet articulated educational, assessment, and other prescribed requirements. These standards will ensure that candidates for initial certification through individual evaluation will enter the classroom with the essential competencies necessary to provide quality instruction to students.

The recommended action is proposed as an emergency measure because such action is necessary for the preservation of the general welfare to ensure that there is a sufficient supply of teachers to meet the staffing needs of the State's public schools in order to avoid disruptions in essential educational programs in the upcoming school semester. Candidates who are potential teacher candidates need to immediately know the requirements for individual evaluation so that they may seek to meet them as early as the start of the winter semester of the 2003-2004 school year. Likewise, the State Education Department must immediately know the standards to be applied for the individual evaluation of candidates for teacher certificates in order to have sufficient time to make critical procedural and computer program changes necessary to process such applications in a timely fashion for the upcoming school semester.

It is anticipated that the proposed amendment will be presented to the Board of Regents for adoption as a permanent rule at its February 2004 meeting, which is the first scheduled meeting after the expiration of the 30-day public comment period mandated for revised rule makings by the State Administrative Procedure Act.

Subject: Individual evaluation requirements and other requirements for certification in the classroom teaching service.

Purpose: To establish requirements for classroom teaching certification through the individual evaluation of candidates who have not completed registered teacher education programs, streamline examination requirements for candidates who already hold classroom teaching certification, establish coursework requirements for extensions and annotations of certificates, and remove unnecessary certification requirements. These new requirements will apply to candidates who apply for certification in a classroom title after Feb. 1, 2004.

Substance of emergency/revised rule: The State Education Department proposes to amend Commissioner's regulations, sections 80-3.3, 80-4.3, and 80-4.4, and to add a new section 80-3.7. The following is a summary of the proposed rule making.

Section 80-3.3(a) is amended to delete requirements for candidates who have not applied for the initial certificate within two years of completing his or her teacher education program.

Section 80-3.3(a)(3) authorizes the satisfaction of education requirements for certification in the classroom teaching service through equivalent study as determined by individual evaluation in accordance with the requirements of section 80-3.7. It also establishes time limits for the availability of this option.

Section 80-3.3(a)(4) is added, as follows:

(4) A candidate seeking certification to teach a specific career and technical subject requiring Federal or State licensure and/or registration to legally perform that service shall hold such valid Federal or State licensure and/or registration. A candidate seeking certification to teach practical nursing shall hold a valid license and registration in New York State as a registered professional nurse.

Education Department

NOTICE OF EMERGENCY ADOPTION AND REVISED RULE MAKING NO HEARING(S) SCHEDULED

Classroom Teaching Certification

I.D. No. EDU-37-03-00008-ERP

Filing No. 1405

Filing date: Dec. 16, 2003

Effective date: Dec. 16, 2003

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Emergency action taken: Amendment of sections 80-3.3, 80-4.3 and 80-4.4 and addition of section 80-3.7 to Title 8 NYCRR.

Section 80-3.3(b)(1) concerns education requirements for the initial certificate in all titles in the classroom teaching service, excluding specific career and technical subjects. Subparagraph (i) is amended to require candidates to hold a baccalaureate degree from specified institutions and permit candidates to meet the education requirement for the initial certificate through completion of study that is equivalent to a registered teacher education program. Subparagraphs (iii) and (iv), concerning education requirements for candidates who have completed study at certain institutions of higher education and education requirements for candidates who already hold certification, respectively, are deleted.

Section 80-3.3(b)(2) is amended to establish an examination requirement for the initial certificate in all titles in the classroom teaching service, excluding specific career and technical subjects, for candidates that already hold teaching certification.

Section 80-3.3(c)(1)(i) concerns education requirements under Option A for the initial certificate in a specific career and technical subject. Clauses (c) and (d), concerning education requirements for candidates who have completed study at certain institutions of higher education and education requirements for candidates who already hold certification, respectively, are deleted.

Section 80-3.3(c)(1)(ii) is amended to establish an examination requirement under Option A for the initial certificate in a specific career and technical subject, applicable to candidates who already hold teaching certification.

Section 80-3.3(c)(2)(i) concerns education requirements under Option B for the initial certificate in a specific career and technical subject. Clauses (c) and (d), concerning education requirements for candidates who have completed study at certain institutions of higher education and education requirements for candidates already holding certification, respectively, are deleted.

Section 80-3.3(c)(2)(ii) is amended to require a candidate for the initial certificate under Option B in a specific career and technical subject to pass the communication and quantitative skills test, and establishes an examination requirement under this option for candidates already holding certification.

Section 80-3.7 is added. This section prescribes requirements for meeting the education requirements for classroom teaching certificates through individual evaluation. The opening paragraph provides that this option for meeting education requirements shall only be available for candidates who apply for a certificate in childhood education by February 1, 2007 and for candidates who apply for any other certificate in the classroom teaching service by February 1, 2009, and who upon application qualify for such certificate. The candidate must have achieved a 2.5 cumulative grade point average or its equivalent in the program or programs leading to any degree used to meet the requirements for a certificate under this section. In addition, a candidate must have achieved at least a C or its equivalent in any undergraduate level course and at least a B- or its equivalent in any graduate level course in order for the semester hours associated with that course to be credited toward meeting the content core or pedagogical core semester hour requirements for a certificate under this section. All other requirements for the certificate, including but not limited to, examination and/or experience requirement, as prescribed in Part 80 must also be met.

Section 80-3.7(a) establishes requirements for the satisfaction of education requirements through individual evaluation for initial certificates in all titles in classroom teaching service, except in specific career and technical subjects.

Paragraph (1) of subdivision (a) requires candidates to meet the general requirements in paragraph (2), and the additional requirements, if any, prescribed in paragraph (3). It also specifies certificate titles in which no additional requirements are prescribed.

Paragraph (2) of subdivision (a) establishes general requirements, as follows:

(i) Degree completion. The candidate shall possess a baccalaureate from a regionally or nationally accredited institution of higher education or from an institution authorized by the Regents to confer degrees and whose programs are registered by the department.

(ii) The candidate shall complete study in child abuse identification and school violence prevention and intervention, as prescribed in section 80-1.4 of this Part.

(iii) General education core in the liberal arts and sciences. The candidate shall complete 30 semester hours of coursework that includes study in each of the following subjects: artistic expression, communication, information retrieval, concepts in history and social sciences, humanities, a language other than English, scientific and mathematical processes, and written analysis and expression, except as otherwise provided in this sub-

paragraph. A candidate who holds one or more provisional certificates, permanent certificates, initial certificates, or professional certificates in a title in the classroom teaching service, other than a title in a specific career and technical subject (grades 7-12), shall not be required to demonstrate completion of the general education core in the liberal arts and sciences, as prescribed in this subparagraph, for an additional initial certificate in the classroom teaching service sought.

(iv) Content core. The candidate shall complete 30 semesters hours of coursework in the subject area of the certificate title, which may include no more than six of the 30 semester hours in a cognate, meaning a related field as determined by the department.

(v) Pedagogical core. The candidate shall complete pedagogical coursework as prescribed in clause (a) of this subparagraph and teaching experience as prescribed in clause (b) of this subparagraph, provided that candidates identified in this subparagraph shall not be required to demonstrate completion of the pedagogical core requirements. A candidate who holds one or more provisional certificates, permanent certificates, initial certificates, or professional certificates in a title in the classroom teaching service, other than a title in a specific career and technical subject (grades 7-12), shall not be required to demonstrate completion of the pedagogical core requirements for an additional initial certificate in the classroom teaching service sought, except for such candidates who are seeking an additional initial certificate in one or more of the following titles: early childhood education, childhood education, generalist in middle childhood education (grades 5-9), English to speakers of other languages (all grades), literacy (birth-grade 6) and literacy (grade 5-12), students with disabilities (birth- grade 2), students with disabilities (grades 1-6), students with disabilities (grades 5-9), students with disabilities (grades 7- 12), deaf and hard of hearing (all grades), blind or visually impaired (all grades), and speech and language disabilities (all grades).

(a) Coursework. The candidate shall compete 18 semester hours of coursework that includes study in each of the following subjects:

(1) human development and learning, including but not limited to the impact of culture, heritage, socioeconomic level and factors in the home, school and community that may affect a student's readiness to learn;

(2) teaching students with disabilities and special health-care needs within the general education classroom, including assistive technology;

(3) teaching literacy skills, three semester hours;

(4) curriculum, instruction, and assessment, including instructional technology; and

(5) foundations of education (historical, philosophical, sociological and/or legal).

(b) Teaching experience. The candidate shall satisfactorily complete 40 school days in a college-supervised student teaching experience or as an employed teacher. For a candidate applying for a first certificate, such experience must be in a school at one or more of the grade levels within the range of grades covered by the certificate and must be in the subject area of the certificate title sought by the candidate. For other candidates, such experience must be in a school offering instruction in any grade, pre-kindergarten through grade 12. For experience as an employed teacher, the candidate shall submit a statement verifying the period of employment from the employing school district administrator in the case of a public school and the appropriate school administrator in the case of a nonpublic school.

Paragraph (3) of subdivision (a) establishes the additional requirements in the following:

(i) Early childhood education, childhood education, and generalist in middle childhood education.

(ii) Specialist in middle childhood education (5-9) and adolescence education (7-12).

(iii) English to speakers of other languages.

(iv) Literacy (birth-grade 6) and literacy (grades 5-12).

(v) Students with disabilities (birth-grade 2).

(vi) Students with disabilities (grades 1-6).

(vii) Students with disabilities (grades 5-9).

(viii) Students with disabilities (grades 7-12).

(ix) Deaf and hard of hearing (all grades).

(x) Blind or visually impaired (all grades).

(xi) Speech and language disabilities (all grades).

(xii) Library media specialist (all grades).

Section 80-3.7(b) establishes requirements for the satisfaction of education requirements through individual evaluation for initial certificates in specific career and technical subjects.

Paragraph (1) provides that a candidate seeking to fulfill the education requirement for an initial certificate through individual evaluation of education requirements shall meet the requirements prescribed in paragraphs (2) or (3) of this subdivision.

Paragraph (2) establishes requirements under Option A, for holders of an associate or higher degree, including degree completion, study in child abuse identification and school violence prevention, a prescribed content core, and a prescribed pedagogical core (coursework and teaching experience).

Paragraph (3) establishes requirements under Option B, for holders of a high school diploma or its equivalent but no college degree. (This option shall not be available in specific family and consumer sciences, business and marketing, and technical subject titles.) Requirements include: high school diploma or its equivalent, study in child abuse identification and school violence prevention, a prescribed content core, and a prescribed pedagogical core (coursework and teaching experience).

For both Options A and B, a candidate who holds one or more provisional certificates, permanent certificates, initial certificates, or professional certificates in a title in the classroom teaching service shall not be required to demonstrate completion of the pedagogical core requirements prescribed in this subparagraph for an additional initial certificate in a specific career and technical subject.

Section 80-3.7(c) establishes requirements for the satisfaction of education requirements through individual evaluation for professional certificates in specific career and technical subjects.

Paragraph (1) provides that candidates seeking to fulfill the education requirement for a professional certificate through individual evaluation of education requirements shall meet the requirements prescribed in paragraphs (2) or (3) of this subdivision.

Paragraph (2) establishes requirements under the Option A track, for candidates who completed the Option A track for the initial certificate, including degree completion, 30 semester hours of prescribed coursework in addition to that required for the initial certificate under Option A.

Paragraph (3) establishes requirements under the Option B track, for individuals who completed the Option B track for the initial certificate. (This option shall not be available in specific family and consumer science, business and marketing, and technical subject titles.) Requirements include completion of 30 semester hours of prescribed coursework in addition to that required for the initial certificate under Option B.

Section 80-4.3 is amended to establish equivalent coursework requirements that a candidate may complete instead of completing a registered program, for the following extensions of certificates: extension in bilingual education, extension to teach a subject in grades 5-6, extension to teach a subject in grades 7-9, extension for gifted education, extension in coordinator of work-based learning programs for career awareness, and extension in coordinator of work-based learning programs for career development.

Section 80-4.4(b) is amended to establish equivalent coursework requirements that a candidate may complete instead of completing a registered program for the annotation of a certificate in severe or multiple disabilities.

This notice is intended to serve as both a notice of emergency adoption and a notice of revised rule making. The notice of proposed rule making was published in the *State Register* on September 17, 2003, I.D. No. EDU-37-03-00008-P. The emergency rule will expire March 14, 2003.

Emergency rule compared with proposed rule: Substantial revisions were made in sections 80-3.3(a)(3), 80-3.7 (opening paragraph), (a)(2)(i), (ii), (v), (3)(i), (iii)-(xii), (b)(2)(i), (iv), (3)(iii), (c)(2)(i), (3), 80-4.3(a)(2)(i), (b)(2), (c)(2), (d)(2)(ii), (e)(2)(ii), (f)(2)(ii) and 80-4.4(b).

Text of rule and any required statements and analyses may be obtained from: Mary Gammon, Legal Assistant, Office of Counsel, Education Department, Albany, NY 12234, (518) 473-8296, e-mail: legal@mail.nysed.gov

Data, views or arguments may be submitted to: Johanna Duncan-Poitier, Deputy Commissioner, Office of Higher Education, Education Department, Rm. 979, Education Bldg. Annex, 879 Washington Ave., Albany, NY 12234, (518) 474-5851, e-mail: hedepcom@mail.nysed.gov

Public comment will be received until: 30 days after publication of this notice.

Revised Regulatory Impact Statement

Since publication of the Notice of Proposed Rule Making in the *State Register* on September 17, 2003, the following revisions were made to the rule:

Section 80-3.3(a)(3) is revised to restructure the paragraph and establish a deadline for the individual evaluation option to create a limited time

period for this option as a means to meet current teacher shortages. The Department will evaluate whether to continue this option.

The opening paragraph of section 80-3.7 is revised to establish a deadline for the individual evaluation option. Minimum grades are established for courses that may be credited toward meeting the content core or pedagogical core requirements for a certificate. The first change is needed to create a limited time period for this option as a means to meet current teacher shortages. The second change is needed to ensure that candidates have baseline competency in pedagogy and the content area of their teaching certificate.

Subdivision (a) of section 80-3.7 concerns education requirements through individual evaluation for initial certificates in all titles in the classroom teaching service, except titles in specific career and technical subjects. The following revisions relate to requirements for such certificates:

Section 80-3.7(a)(2)(i) is revised to clarify the institutions from which a candidate may obtain a baccalaureate to meet the degree completion requirement.

Section 80-3.7(a)(2)(ii) is revised to specify that a candidate who holds one or more provisional certificates, permanent certificates, initial certificates, or professional certificates in a title in the classroom teaching service, other than a title in a specific career and technical subject (grades 7-12), shall not be required to demonstrate completion of the general education core in the liberal arts and sciences for an additional initial certificate in the classroom teaching service sought. The Department believes that such candidates will have received adequate preparation in the liberal arts and sciences through meeting requirements for the certificate held.

Section 80-3.7(a)(2)(v) is revised to provide that a candidate who holds one or more provisional certificates, permanent certificates, initial certificates, or professional certificates in a title in the classroom teaching service, other than a title in a specific career and technical subject (grades 7-12), shall not be required to demonstrate completion of the pedagogical core requirements for an additional initial certificate in the classroom teaching service sought, except for such candidates who are seeking an additional initial certificate in one or more identified titles. The Department believes that the candidate for the certificate titles not identified will have received adequate pedagogical preparation through meeting requirements for the certificate held.

It is revised to increase the requirement in the pedagogical core from 15 to 18 hours to ensure that the candidate has sufficient pedagogical preparation. It is revised to specify the content of pedagogical coursework that must be completed in human development to ensure that candidates are prepared to teach diverse populations. It is revised to require that a candidate who is applying for a first certificate must have teaching experience in a school at one or more of the grades within the range of grades covered by the certificate and must be in the subject area of the certificate title sought by the candidate. This is needed to ensure that candidates seeking their first certificate have appropriate teaching experience for the certificate sought.

Section 80-3.7(a)(3)(i) is revised to require the candidate for a certificate in early childhood education, childhood education, and generalist in middle childhood education certificates to complete, within the content core or the general education core in the liberal arts and sciences, six semester hours in mathematics, six semester hours in science, and six semester hours in social studies. This is needed to ensure that candidates in the generalist titles have a baseline number of hours in fundamental subjects needed to teach elementary school students. Also, the phrase "if required" is added to the end of the first sentence of clause (a) of this subparagraph to reflect that certain certificate holders are not required to complete the general education core in the liberal art and sciences.

Section 80-3.7(a)(3)(iii), requirements for certificates in English to Speakers of Other Languages, is revised to add at the end of the first sentence of clause (a) the phrase "if required" to reflect the fact that certain certificate holders are not required to complete the general education core in the liberal art and sciences.

Section 80-3.7(a)(3)(iv) is revised to specify the content of pedagogical coursework that must be completed in human development for the certificate in literacy (birth-grade 6) and literacy (grades 5-12) to ensure that candidates are prepared to teach diverse populations.

Sections 80-3.7(a)(3)(v) and 80-3.7(a)(3)(vi) is revised to require the candidate for a certificate in students with disabilities (birth-grade 2) and certificates in students with disabilities (grades 1-6), respectively, to complete within the content core or the general education core in the liberal arts and sciences six semester hours in mathematics, six semester hours in science, and six semester hours in social studies. This is needed to ensure that candidates in these titles have a baseline number of hours in funda-

mental subjects needed to teach elementary school students. In addition, these provisions are revised to increase from 9 to 12 semester hours certain pedagogical coursework. This is needed to ensure that candidates have sufficient pedagogical education to prepare students to meet the State Learning Standards. Also, the phrase "if required" is added to the end of the first sentence of clause (a) of both subparagraphs to reflect the fact that certain certificate holders are not required to complete the general education core in the liberal art and sciences.

Section 80-3.7(a)(3)(vii) is revised to require the candidate for a certificate in students with disabilities generalist (grades 5-9) to complete within the content core or the general education core in the liberal arts and sciences six semester hours in mathematics, six semester hours in science, and six semester hours in social studies. This is needed to ensure that candidates have a baseline number of hours in fundamental subjects needed to teach students. In addition, this provision is revised to increase from 9 to 12 semester hours certain pedagogical coursework that a candidate for a certificate in students with disabilities (grades 5-9), both generalist and specialist, must complete. This is needed to ensure that candidates have sufficient pedagogical education to prepare students to meet the State Learning Standards. Also, the phrase "if required" is added to the end of the first sentence of subclauses (1) and (2) of clause (a) of this subparagraph to reflect the fact that certain certificate holders are not required to complete the general education core in the liberal art and sciences.

Section 80-3.7(a)(3)(viii) is revised to increase from 9 to 12 semester hours certain pedagogical coursework that a candidate for a certificate in students with disabilities (grades 7-12) must complete. This is needed to ensure that candidates have sufficient pedagogical education to prepare students to meet the State Learning Standards. Also, the phrase "if required" is added to the end of the first sentence of clause (a) of this subparagraph to reflect that certain certificate holders are not required to complete the general education core in the liberal art and sciences.

Section 80-3.7(a)(3)(ix), requirements for certificates in deaf and hard of hearing (all grades), is revised to add at the end of the first sentence of clause (a) the phrase "if required" to reflect that certain certificate holders are not required to complete the general education core in the liberal art and sciences.

Section 80-3.7(a)(3)(x), requirements for certificates in blind or visually impaired (all grades), is revised to add at the end of the first sentence of clause (a) the phrase "if required" to reflect that certain certificate holders are not required to complete the general education core in the liberal art and sciences.

Section 80-3.7(a)(3)(xii) is revised to specify the content of pedagogical coursework that must be completed in human development for the certificate in library media specialist (all grades) to ensure that school librarians are prepared to teach and provide library services to diverse populations.

Subdivision (b) of section 80-3.7 concerns education requirements through individual evaluation for initial certificates in specific career and technical subjects. The following revisions relate to requirements for such certificates:

Section 80-3.7(b)(2)(i) is revised to clarify the institutions from which a candidate may obtain an associate degree to meet the degree requirement for Option A.

Section 80-3.7(b)(2)(iv), pedagogical core requirements for the Option A route to certification, is revised to specify that a candidate who holds one or more provisional certificates, permanent certificates, initial certificates, or professional certificates in a title in the classroom teaching service shall not be required to demonstrate completion of the pedagogical core requirements for an additional initial certificate in a specific career and technical subject. It is revised to specify pedagogical coursework that must be completed in human development to ensure that candidates are prepared to teach diverse populations. It is revised to require a candidate to have teaching experience in a school at one or more of the grade levels within the range of grades covered by the certificate sought and related to the subject area of the certificate sought. This is needed to ensure that candidates have appropriate teaching experience for the certificate sought.

Section 80-3.7(b)(3)(iii) is revised to clarify that this subparagraph specifies the pedagogical core in the Option B route to certification, which is subject to minimum grade requirements. It is revised to specify that a candidate who holds one or more provisional certificates, permanent certificates, initial certificates, or professional certificates in a title in the classroom teaching service shall not be required to demonstrate completion of the pedagogical core requirements for an additional initial certificate in a specific career and technical subject. It is also revised to require that a candidate must have teaching experience in a school at one or more

of the grade levels within the range of grades covered by the certificate sought and related to the subject area of the certificate sought. This is needed to ensure that candidates have appropriate teaching experience for the certificate sought.

Subdivision (c) of section 80-3.7 concerns education requirements through individual evaluation for professional certificates in specific career and technical subjects. The following revisions relate to requirements for such certificates:

Section 80-3.7(c)(2)(i) is revised to clarify the institutions from which a candidate may obtain an associate degree to meet the degree completion requirement.

Section 80-3.7(c)(3) is revised to clarify that the pedagogical coursework listed constitutes the pedagogical core for Option B, which is subject to minimum grade requirements.

The following provisions relate to extensions and annotations of certificates in the classroom teaching service. Each was revised to establish minimum grades that must be achieved in prescribed coursework equivalent to a registered program. The revisions were needed to ensure that candidates have baseline competency in pedagogy and the content area of the extension or annotation. Such revisions were made in the following provisions:

Section 80-4.3(a)(2)(i), relating to an extension in bilingual education;

Section 80-4.3(b)(2), relating to an extension to teach a subject in grades 5-6;

Section 80-4.3(c)(2), relating to an extension to teach a subject in grades 7-9;

Section 80-4.3(d)(2)(ii), relating to an extension for gifted education;

Section 80-4.3(e)(2)(ii), relating to an extension in coordinator of work-based learning programs for career awareness;

Section 80-4.3(f)(2)(ii), relating to an extension in coordinator of work-based learning programs for career development; and

Section 80-4.4(b), relating to an annotation in severe or multiple disabilities.

The above revisions to the proposed rule do not require any changes to the previously published Regulatory Impact Statement.

Revised Regulatory Flexibility Analysis

Since publication of the Notice of Proposed Rule Making in the *State Register* on September 17, 2003, revisions were made to the proposed rule as set forth in the Statement Concerning the Regulatory Impact Statement file herewith.

The proposed amendment, as revised, establishes requirements for teacher certification for candidates who apply to the State Education Department for certification to teach in the public schools of the State. The amendment, as revised, does not regulate small businesses or local governments. It does not impose any reporting, recordkeeping, or compliance requirements or have any adverse economic impact on small businesses or local governments. Because it is evident from the nature of the proposed amendment, as revised, that it does not affect small businesses or local governments, no further steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses and local governments is not required and one has not been prepared.

Revised Rural Area Flexibility Analysis

Since publication of the Notice of Proposed Rule Making in the *State Register* on September 17, 2003, revisions were made to the proposed rule as set forth in the Statement Concerning the Regulatory Impact Statement file herewith.

The revisions to the proposed rule do not require any changes to the previously published Rural Area Flexibility Analysis.

Revised Job Impact Statement

Since publication of the Notice of Proposed Rule Making in the *State Register* on September 17, 2003, revisions were made to the proposed rule as set forth in the Statement Concerning the Regulatory Impact Statement file herewith.

The purpose of the proposed amendment, as revised, is to establish requirements for classroom teaching certification through the individual evaluation of candidates who have not completed registered teacher education programs, streamline examination requirements for candidates who already hold classroom teaching certification, establish coursework requirements for extensions and annotations of certificates, and remove unnecessary certification requirements.

The proposed amendment, as revised, establishes a necessary route to teacher certification for candidates who have not completed teacher education programs. Historically, approximately 40 percent of the classroom teachers certified in New York State are certified through the Depart-

ment's evaluation of individual candidates education and experience rather than completion of a registered teacher education program. The Department's current authority to conduct such individual evaluations of teacher candidate credentials is scheduled to expire on February 1, 2004. The proposed amendment is, therefore, critical to facilitate the Department's continuing ability to certify a sufficient number of properly qualified candidates to fill vacant teaching positions in the State's public schools and BOCES.

The proposed amendment, as revised, will increase the supply of teachers by increasing the pool of individuals who may qualify for teaching positions in the State's public schools. However, it will have no effect on the number of jobs or the number of employment opportunities available in this field. Because it is evident from the nature of the rule, as revised, that it will have no impact on the number of jobs and number employment opportunities in teaching or any other field, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required, and one has not been prepared.

Assessment of Public Comment

The proposed rule was published in the *State Register* on September 17, 2003. Below is a summary of written comments received by the State Education Department concerning the proposed rule making and the Department's assessment of issues raised by the comments. All comments relate to the requirements for the individual evaluation option for meeting the educational requirements for certification in the classroom teaching service.

COMMENT: A "sunset clause" requiring reevaluation of the regulation in three years should be included. During this period, the Department should develop a data collection system to accurately track teacher supply and demand by geographic region.

RESPONSE: In response, the Department has revised the regulation to provide that the individual evaluation option will sunset in three years for a certificate in childhood education and in five years for all other certificates in the classroom teaching service. During this time period, the Department will assess the need to continue the individual evaluation option, and plans to update its existing data system to provide current data on teacher supply and demand.

COMMENT: Current requirements should be continued if there is insufficient time to make suggested modifications to the proposed regulation.

RESPONSE: In response to comments from the field, the Department has made substantive changes to the regulation where warranted. The regulation must be in place by February 2, 2004 in order to align with the new classroom teacher certification requirements that are in effect on that date.

COMMENT: Requirements should be the same as standards established for teacher preparation programs.

RESPONSE: The individual evaluation option is offered to meet a teacher shortage. While not identical to standards in teacher education programs, the regulation ensures that candidates for initial certification have essential baseline competencies necessary to provide quality instruction to students.

COMMENT: The proposed regulation will have a serious impact on teacher education programs and students, resulting in the hiring of less qualified teachers at high need schools.

RESPONSE: The regulation will continue a long-standing practice of permitting a candidate to meet the education requirement for first level certification through transcript evaluation. The proposed requirements are more rigorous than current requirements, and will not have a detrimental effect on the State's teacher education programs or students.

COMMENT: No college faculty will be responsible to guarantee the coherence or comprehensiveness of a candidate's collection of courses.

RESPONSE: The individual evaluation option cannot encompass the faculty oversight available in a traditional teacher education program, but is intended as a means of addressing teacher shortages through Department review of study completed.

COMMENT: The individual evaluation option does not embody a requirement that candidates demonstrate that they have met clearly prescribed outcome standards.

RESPONSE: Outcomes standards are appropriate for candidate evaluation within an approved teacher education program, but are not feasible standards for an individual evaluation process, implemented to address teacher shortages.

COMMENT: Candidates should be required to obtain a baccalaureate or graduate degree from a regionally accredited institution of higher educa-

tion or from an institution authorized by the Board of Regents to confer degrees.

RESPONSE: In response, the Department revised the regulation to clarify that the baccalaureate degree must be from a regionally accredited institution of higher education or from an institution authorized by the Board of Regents to confer degrees.

COMMENT: Candidates need to demonstrate that they have completed coursework in the content core and/or the general education core in the liberal arts and science that are tied to the New York State Learning Standards.

RESPONSE: From a practical perspective, this would be very difficult to administer and would not be readily understood by candidates. The Department will require candidates to pass the Content Specialty Test (CST) in the subject area. Since the CST is aligned with the learning standards, the Department will have a way to objectively assure the appropriateness of the content of the candidate's coursework.

COMMENT: Candidates should be required to have a 3.0 cumulative grade point average in the program leading to the baccalaureate or graduate degree or a determination that the candidate has the knowledge and skills to teach to the New York State Learning Standards.

RESPONSE: In response, the Department revised the regulation to require the candidate to have achieved a 2.5 cumulative grade point average or its equivalent in programs leading to any degree used to meet the requirements for a certificate, which will provide an adequate assurance of candidate quality.

COMMENT: Academic coursework in the content core and pedagogical core with undergraduate grades lower than C- and graduate grades lower than B- should not be acceptable toward certification.

RESPONSE: In response, the Department revised the regulation to require a candidate to have achieved at least a C or its equivalent in any undergraduate level course and at least a B- or its equivalent in any graduate level course in order for the semester hours associated with that course to be credited toward meeting the content core or pedagogical core semester hour requirements for a certificate.

COMMENT: For students seeking dual certificates that require both "common branch" and specialty certificate areas, like literacy and students with disabilities, the requirements for both certificates should be met.

RESPONSE: The amendment requires the candidate to complete the education requirements for each certificate sought.

COMMENT: Separate requirements and procedures should be instituted for candidates seeking second certificates through individual evaluation.

RESPONSE: The regulation includes separate requirements for candidates seeking second certificates in the classroom teaching service. Examination requirements are different, and in some cases pedagogical core requirements are different. It is unnecessary to develop separate procedures for processing applications for such candidates.

COMMENT: A minimum of one-third of courses in the content core should be upper-division courses to ensure that candidates have a sufficient knowledge base to enable them to become effective teachers.

RESPONSE: The regulation requires the candidate to hold a baccalaureate degree for all certificates in the classroom teaching service, except specific career and technical subjects. This requirement will ensure that the candidate has completed upper-division coursework. The candidate will also have to pass the Content Specialty Test in the subject of the certificate, which will ensure depth and breadth of content knowledge.

COMMENT: A content specialty test should not replace the coursework for a second certificate.

RESPONSE: The content specialty test does not replace the coursework requirements for a second certificate. Candidates for a second certificate must complete prescribed content coursework and pass the Content Specialty Test. In identified certificate titles, such candidates will have to complete the pedagogical core for the additional certificate as well.

COMMENT: Separate requirements are not stated for certificates in literacy (birth-grade 6) and literacy (grades 5- 12), and the regulation does not require sufficient graduate level coursework for these certificates.

RESPONSE: The regulation does provide for a clear distinction between the two developmental levels. Candidates must complete a prescribed practicum at the developmental level of their certificate. At least 12 semester hours must be completed at the graduate level, which is sufficient graduate study for this option.

COMMENT: The regulation omits any requirement that a content core include a major or its equivalent.

RESPONSE: The proposed regulation requires 30 semester hours of coursework in the subject area of the certificate title, which may include no

more than six of the 30 semester hours in a cognate. This requirement is substantially equivalent to the requirement of a major. In addition, the Department has revised the regulation to require in generalist titles for teaching elementary school students that candidates complete six semester hours each in mathematics, science, and social studies. This is to ensure that candidates in these titles have a baseline number of hours in fundamental subjects needed to teach elementary school students.

COMMENT: Student teaching should be aligned to the specific certificate being sought.

RESPONSE: In response, the Department has revised the regulation to require a candidate applying for a first initial certificate, to have this teaching experience at one or more of the grade levels within the range of grades covered by the certificate and in the subject area of the certificate title sought or, in the case of a specific career and technical subject, in a related subject area. The candidate will be required to complete 40 school days of college-supervised student teaching or as an employed teacher.

COMMENT: Individual evaluations should include pedagogical coursework and field experiences related to teaching a diverse student population and working in high-needs schools.

RESPONSE: In response, the Department revised the regulation to require all candidates to complete coursework on the impact of culture, heritage, socioeconomic level and factors in the home, school and community that may affect a student's readiness to learn.

COMMENT: The teaching experience requirement of 40 days is too short and would weaken the pedagogical preparation of candidates. Field experiences prior to student teaching should be required.

RESPONSE: The candidate will be required to complete 40 school days of college-supervised student teaching or as an employed teacher. Forty days of student teaching is also the requirement in college teacher education programs. While this option does not require field experiences, as required in teacher education programs, the Department believes that the pedagogical coursework and the teaching experience requirements will provide adequate pedagogical preparation for this option which is implemented to address teacher shortages.

COMMENT: The pedagogical core for each of the certificate titles should include at least 24 semester hours specific to the teaching certificates being sought.

RESPONSE: In response, the Department revised the proposed amendment by increasing the pedagogical core requirement from 15 to 18 semester hours. For most certificate titles, the candidate must also complete an additional three semester hours in teaching literacy skills, bring the total pedagogical core to 21 semester hours. The regulation prescribes additional pedagogical requirements that are specific to certificate titles.

COMMENT: The proposed regulation should require methods specific pedagogical coursework in each certificate area.

RESPONSE: In almost all certificate areas, this is a requirement. However, the Department has identified several certificate areas where the general pedagogical standards are acceptable.

COMMENT: The regulation does not require sufficient pedagogical study specific to certification in special education or literacy.

RESPONSE: Such candidates must complete the 18 semester-hour general requirement in pedagogy and an additional three semester hours in literacy instruction. In response to this comment, the specific pedagogy in special education has been increased from nine to 12 semester hours. Therefore, the total pedagogical requirement for teachers of students with disabilities is 33 semester hours, which is adequate. The Department believes that the existing requirement of 24 semester hours of pedagogical coursework for the literacy certificate is also sufficient.

COMMENT: In view of the major shortage of teachers occasioned by baby boomer teacher retirements, it is imperative that certification by transcription evaluation be continued.

RESPONSE: The Department believes that continuation of the individual evaluation (transcript evaluation) option for initial certification in the classroom teaching service is necessary at this time to address teacher shortages.

NOTICE OF ADOPTION

Continuing Education Requirements for Licensed Land Surveyors

I.D. No. EDU-39-03-00007-A

Filing No. 1404

Filing date: Dec. 16, 2003

Effective date: Jan. 1, 2004

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Addition of section 68.12 to Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided), 212(3), 6502(1), 6504 (not subdivided), 6507(2)(a), 6508(1), 7212(1)(a), (b), (c), and (d), (2), (3), (4), (5), and (6); L. 2002, ch 135, section (2); and L. 2003, ch. 410, section (1)

Subject: Mandatory continuing education requirements for licensed land surveyors.

Purpose: To establish continuing education requirements and standards that licensed land surveyors must meet to be registered to practice in New York State and requirements for approval of sponsors of such continuing education.

Substance of final rule: The Commissioner of Education proposes to add section 68.12 of the Regulations of the Commissioner of Education, relating to mandatory continuing education for licensed land surveyors. The following is a summary of the substance of the proposed regulation:

A new section 68.12 is added to the Regulations of the Commissioner of Education, establishing continuing education requirements for licensed land surveyors.

Subdivision (a) of section 68.12 establishes an expiration date for this section, as follows: In accordance with section 2 of Chapter 135 of the Laws of 2002, this section shall not be in effect on or after June 30, 2014. It also defines the term acceptable accrediting agency.

Subdivision (b) of section 68.12 cites the applicability of the continuing education requirement, namely that each licensed land surveyor required to register with the Department to practice in New York State shall comply with the mandatory continuing education requirements prescribed in the section. This subdivision also provides for exemptions and adjustments to the requirement.

Exemptions are allowed for those licensed land surveyors who are: (a) in the triennial registration period during which they are first licensed to practice land surveying in New York State, except those first licensed pursuant to an endorsement of a license of another jurisdiction; (b) licensees whose first registration date following January 1, 2004 occurs prior to January 1, 2005, for periods prior to such registration date; and (c) licensees who are not engaged in the practice of land surveying in New York State, as evidenced by not being registered to practice in New York State, except as otherwise provided.

An adjustment to the requirement is permitted for the licensee who documents good cause that prevents compliance, such as poor health certified by a physician, or a specific physical or mental disability certified by an appropriate health care professional, or extended active duty with the armed forces of the United States, or other good cause beyond the licensee's control which in the judgment of the Department makes it impossible for the licensee to comply with the continuing education requirements in a timely manner.

Paragraph (1) of subdivision (c) of section 68.12 sets forth the general mandatory continuing education requirement for licensed land surveyors. Subparagraph (i) establishes the requirement: 24 hours of continuing education acceptable to the Department for each triennial registration period, provided that at least 16 hours of such continuing education shall be in courses of learning, and no more than eight hours of such continuing education shall be in other educational activities, including but not limited to self-study programs. Licensees whose first registration following January 1, 2004 is less than three years from that date but on or after January 1, 2005 shall be required to complete continuing education hours on a prorated basis at the rate of one hour of acceptable continuing education per month up to a maximum of 24 hours, for the period beginning January 1, 2004 up to the first registration date thereafter. Subparagraph (ii) sets forth the continuing education requirement during each registration period of less than three years.

Paragraph (2) of subdivision (c) defines continuing education that is acceptable to the State Education Department. Such continuing education must be in the subjects prescribed in subparagraph (i) of this paragraph and

be the types of learning activities prescribed in subparagraph (ii) of this paragraph.

Subparagraph (i) of paragraph (2) prescribes that acceptable continuing education shall contribute to practice in land surveying and shall have as its focus one or more of the subjects which are listed in the subparagraph.

Subparagraph (ii) of paragraph (2) prescribes that acceptable continuing education shall be the types of learning activities prescribed in this subparagraph and be subject to the limitations prescribed in the subparagraph. The subparagraph specifies acceptable learning activities.

Subdivision (d) of section 68.12 provides that at each re-registration, the licensed land surveyor must certify to the Department compliance with or exemption or adjustment to the continuing education requirement.

Subdivision (e) of section 68.12 prescribes the requirement for a licensee returning to the practice of land surveying after a lapse in practice, defined as not being registered to practice in New York State.

Subdivision (f) of section 68.12 prescribes the requirements for the issuance of a conditional registration to a licensed land surveyor who attests to or admits to noncompliance with the continuing education requirement.

Subdivision (g) of section 68.12 requires the licensed land surveyor to maintain and ensure access by the Department to records of completed continuing education as specified in the subdivision.

Subdivision (h) of section 68.12 provides for the measurement of continuing education study, specifically, that for continuing education courses 50 minutes shall equal one hour of continuing education credit and, for credit bearing college or university courses, each semester-hour of credit equals 15 continuing education hours of credit and each quarter-hour of credit equals 10 continuing education hours of credit.

Subdivision (i) of section 68.12 prescribes sponsor approval requirements. Paragraph (1) of subdivision (i) states that sponsors of continuing education to licensed land surveyors in the form of courses of learning or self-study programs shall meet the requirements of either paragraphs (2) or (3) of this subdivision.

Paragraph (2) of subdivision (i) provides that the Department will deem approved as a sponsor of continuing education to licensed land surveyors in the form of courses of learning or self-study programs a sponsor approved by organizations prescribed in the paragraph, or a postsecondary institution that has authority to offer programs that are registered pursuant to Part 52 of this Title or authority to offer equivalent programs that are accredited by an acceptable accrediting agency.

Paragraph (3) of subdivision (i) sets the standards for Department review of sponsors to offer continuing education to licensed land surveyors in the form of courses of learning or self-study programs.

Subdivision (j) of section 68.12 sets the fees for mandatory continuing education, conditional registration, and the fee for an organization desiring to offer continuing education to licensed land surveyors in the form of courses of learning or self-study programs for a three-year term based upon a Department review.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 68.12(c)(1)(ii), (2), (2)(ii)(b)(3), (d) and (i)(1).

Text of rule and any required statements and analyses may be obtained from: Mary Gammon, Legal Assistant, Office of Counsel, Education Department, Albany, NY 12234, (518) 473-8296, e-mail: legal@mail.nysed.gov

Regulatory Impact Statement

Since publication of the Notice of Proposed Rule Making on October 1, 2003, the following nonsubstantial revisions were made to the proposed rule:

Section 68.12(c)(1)(ii) is nonsubstantially revised to correct a typographical error by removing the hyphen between the words "three" and "years" and adding an apostrophe after the word "years".

The opening paragraph of section 68.12(c)(2) is nonsubstantially revised to correct a typographical error by adding a comma after the word "department" in the first sentence.

Section 68.12(c)(2)(ii)(b)(3) is nonsubstantially revised to correct a typographical error by removing the unnecessary word "a" before the words "an organization".

Section 68.12(d) is nonsubstantially revised to correct a typographical error by removing a semicolon between the words "section" and "or" and substituting a comma.

Section 68.12(i)(1) is nonsubstantially revised to correct a typographical error by replacing the word "paragraphs" with the word "paragraph".

The above revisions to the proposed rule do not require any changes to the previously published Regulatory Impact Statement.

Regulatory Flexibility Analysis

Since publication of the Notice of Proposed Rule Making in the *State Register* on October 1, 2003, nonsubstantial revisions were made to the proposed rule as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith.

The revisions to the proposed rule do not require any changes to the previously published Regulatory Flexibility Analysis for Small Businesses and Local Governments.

Rural Area Flexibility Analysis

Since publication of the Notice of Proposed Rule Making in the *State Register* on October 1, 2003, nonsubstantial revisions were made to the proposed rule as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith.

The revisions to the proposed rule do not require any changes to the previously published Rural Area Flexibility Analysis.

Job Impact Statement

Since publication of the Notice of Proposed Rule Making in the *State Register* on October 1, 2003, nonsubstantial revisions were made to the proposed rule as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith.

Section 7212 of the Education Law, as added by Chapter 135 of the Laws of 2002 and renumbered and amended by Chapter 410 of the Laws of 2003, establishes mandatory continuing education requirements for licensed land surveyors registered to practice in New York State. The proposed regulation, as revised, establishes standards for acceptable continuing education to meet the statutory requirement.

The proposed regulation implements specific statutory requirements and directives. Section 7212 of the Education Law establishes the requirement that licensed land surveyors must complete a prescribed number of hours of continuing education in order to be registered to practice in this State. Therefore, any impact on jobs and employment opportunities by establishing a continuing education requirement for licensed land surveyors is attributable to the statutory requirement, not the proposed rule, which simply establishes consistent standards as directed by statute.

In any event, a similar statutory continuing education requirement was established for individuals licensed in public accountancy in 1985, and the Department is not aware that the requirement significantly affected jobs or employment opportunities in that profession. In addition, the statutory requirement should increase job and employment opportunities for instructors and administrators who will be needed to provide the continuing education instruction to licensees.

Because it is evident from the nature of the proposed regulation, as revised, which implements specific statutory requirements and directives, that the proposed rule will have no impact on jobs or employment opportunities attributable to its adoption or only a positive impact, no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one was not prepared.

Assessment of Public Comment

The proposed rule was published in the *State Register* on October 1, 2003. Below is a summary of written comments received by the State Education Department concerning the proposed rule making and the Department's assessment of issues raised by the comments.

COMMENT: Dual licensed professional engineers and land surveyors should be eligible to receive credit toward both the professional engineer and land surveying continuing education requirements for the same activity.

RESPONSE: The amendment does not prohibit a licensee from receiving credit for both engineering and land surveying continuing education for the same educational activity, provided that the activity meets the requirements for both professions.

COMMENT: I think the regulation generally does a good job of dealing with the topic of continuing education for licensed land surveyors.

RESPONSE: No response is necessary.

NOTICE OF ADOPTION

Impartial Hearing Officer Determinations for Students with Disabilities

I.D. No. EDU-39-03-00008-A

Filing No. 1406

Filing date: Dec. 16, 2003

Effective date: Jan. 1, 2004

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Amendment of Part 279 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101 (not subdivided), 207 (not subdivided), 311 (not subdivided), 4403(1) and (3), 4404(2) and 4410(13)

Subject: Procedures for State level review of impartial hearing officer determinations regarding services for students with disabilities.

Purpose: To clarify procedures.

Text or summary was published in the notice of proposed rule making, I.D. No. EDU-39-03-00008-P, Issue of October 1, 2003.

Final rule as compared with last published rule: No changes.

Text of rule and any required statements and analyses may be obtained from: Mary Gammon, Legal Assistant, Office of Counsel, Education Department, Albany, NY 12234, (518) 473-8296, e-mail: legal@mail.nysed.gov

Assessment of Public Comment

Since publication of a Notice of Proposed Rule Making in the *State Register* on October 1, 2003, the State Education Department has received the following comments.

1. COMMENT:

Appeals to the Office of State Review (OSR) of determinations of impartial hearing officers take an excessive amount of time to be resolved. This may result in fiscal hardship to parents who place their children at a private school and must wait for a decision on whether they are entitled to tuition reimbursement. Long delays also cost parents money for attorneys' fees. The commentator believes that some school districts initiate an appeal to the OSR as a tactic to delay a decision, even in cases when the district's appeal is clearly without merit. The commentator indicated she was supportive of any actions that would lead to State Review Officer (SRO) determinations being rendered as soon as possible.

DEPARTMENT RESPONSE:

The purpose of the proposed amendment is to clarify procedures for practice on State Level review of impartial hearing officer determinations for students with disabilities, and thereby expedite and otherwise facilitate the processing of petitions for review. The amendment's emphasis on timelines in which to file a petition, and clarification of procedures in which to ask for extensions in filing other pleadings, will reduce the time the parties spend on raising and arguing timeline issues unnecessarily before the SRO. The proposed limitation in length, and uniformity in format of petitions, answers and memoranda of law, as well as more timely receipt of complete and readable records, will permit the OSR to devote more staff time to directly assisting SROs. The additional assistance to SROs in the review of appeals rather than having staff time allocated to the time-consuming tasks of "cleaning-up" and organizing records on appeal will expedite review and reduce costs.

2. COMMENT:

The verification requirement in section 279.7 is unnecessary, will only serve to add complexity to the State review process and further burden pro se parents, and may conflict with federal due process regulations which have no requirement.

DEPARTMENT RESPONSE:

The proposed amendment does not impose any new verification requirements.

It merely takes the existing verification requirement found in 8 NYCRR section 275.5 (which, pursuant to 8 NYCRR section 279.1(a) is made applicable to the SRO review process) and places it within the Part 279 regulations for ease of reference. Verification of pleadings is a long-standing practice in both Education Law section 310 appeals to the Commissioner and Part 279 appeals to the State Review Office and is consistent with practice under the Civil Practice Law and Rules.

3. COMMENT:

The proposed section 279.8 establishing an elaborate set of rules regarding the form of pleadings and memoranda of law is overly formal and burdensome on pro se parents.

DEPARTMENT RESPONSE:

The proposed section 279.8 incorporates within Part 279 for ease of reference certain existing requirements in 8 NYCRR 275.3, which is made applicable to Part 279 proceedings by section 279.1(a). In addition, the proposed section restates commonly accepted principles in appellate practice for the submission of pleadings and memoranda of law. The requirements should not be burdensome to pro se parties because, in general, the form of pleadings submitted by pro se parties are reviewed liberally by the SRO in the absence of prejudice to the opposing party.

4. COMMENT:

The apparent mandate in proposed section 279.10(e) eliminating extensions of time unless timely made in writing is over-reaching and could

preclude a pro se parent with limited literacy of a favorable impartial hearing decision. Extension requests should be subject to a "good cause" consideration. DEPARTMENT RESPONSE:

The proposed section 279.10(e) closely tracks existing requirements for extensions found in 8 NYCRR section 276.3 (which is made applicable to Part 279 proceedings pursuant to section 279.1(a)). The only substantive change is that applications for extensions must be postmarked no later than the date on which the time to answer or reply shall expire instead of the existing requirement that the application be postmarked no later than five days prior to the expiration date. The proposed amendment therefore affords more time to apply for extensions than existing requirements.

5. COMMENT:

The proposed section 279.12(b) permitting extensions of time at the request of the SRO is contrary to federal law, which permits only the parties to extend the time for a decision, and also is contrary to other provisions in the Part 279 regulations intended to make the parties expedite the process. The SRO should not be permitted to request an extension based on the extent of the record; the SRO should be required to provide the parties with an option of either seeking an extension of time to allow the decision maker additional time to address complex issues and/or a substantial record or having the decision issued according to the required deadline.

DEPARTMENT RESPONSE:

The proposed section 279.12(b) expressly provides that both parties must consent before the timeline may be extended to allow the SRO sufficient time to review an extensive record on appeal.

6. COMMENT:

The remedy for untimely SRO decisions is best addressed by the addition of staff to reduce the present back-log of decisions.

DEPARTMENT RESPONSE:

This comment is beyond the scope of the proposed rule making, which seeks to expedite and otherwise facilitate the processing of petitions for review to the extent possible through amendments to applicable regulations. The Department is also considering other means to accomplish these objectives as well, including the possibility of increased staffing.

7. COMMENT:

The proposed amendment provides no remedy when the SRO fails to issue a decision within the required timelines. The regulations should provide that on the day the SRO decision becomes overdue, the underlying impartial hearing decision under appeal should, upon petition of either party, be ratified and issued as the decision of the State Review Office.

DEPARTMENT RESPONSE:

The Department believes that this proposal would require a statutory change since Education Law section 4404(2) requires the State Review Officer to review ("shall review . . .") impartial hearing officer determinations that are appealed to the State Review Office.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Standing Committees of the Board of Regents

I.D. No. EDU-52-03-00028-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: Amendment of sections 3.2 and 4-1.5 of Title 8 NYCRR.

Statutory authority: Education Law, section 207 (not subdivided)

Subject: Standing committees of the Board of Regents.

Purpose: To conform the rules of the Board of Regents to a recent reorganization of the committee structure of the Board of Regents, which merged the Committee on Higher and Professional Education and the Committee on Professional Practice, and merged the Committee on Elementary, Middle, Secondary and Continuing Education and the Committee on Vocational Educational Services for Individuals with Disabilities.

Text of proposed rule: 1. Section 3.2 of the Rules of the Board of Regents is amended, effective March 18, 2004, as follows:

3.2 Committees.

(a) [On or before the 15th day of April in each year, the] *The* chancellor shall appoint the following standing committees and designate the [chairperson and vice-chairperson] *leadership* of each committee:

(1) Quality.

(2) [Higher and Professional Education] *Higher Education and Professional Practice*.

(3) Elementary, Middle, Secondary and Continuing Education and Vocational and Educational Services for Individuals with Disabilities.

(4) Cultural Education.

(5) [Professional Practice.

(6) Vocational and Educational Services for Individuals with Disabilities.

(7)] Ethics

(b) . . .

(c) . . .

(d) The functions of the standing committees shall include:

(1) . . .

(2) Committee on [Higher and Professional Education] *Higher Education and Professional Practice*:

(i) develops policy recommendations regarding postsecondary education and retraining programs, and develops policy recommendations regarding standards of professional conduct, continuing competence standards, professional practice issues, professional assistance programs, and the disciplinary process, and monitors implementation of such functions by the department;

(ii) oversees preparation of the statewide plan for the development of postsecondary education and reviews and approves amendments to institutional or sectoral master plans for new programs and facilities;

(iii) reviews and approves amendments to the Rules of the Board of Regents and Regulations of the Commissioner of Education pertaining to postsecondary education issues, including academic and professional program approval, student and institutional financial aid, professional licensure requirements, and the administration of continuing professional competence requirements, and amendments relating to professional practice and professional conduct;

(iv) oversees administration of continuing competence requirements for professional licensure and registration;

(v) develops policy recommendations concerning professional manpower, examination and licensure issues and requirements, including minority access to professional education and licensure;

(vi) reviews and approves appointments to the State boards for regular service (advising on licensure, examinations, practice and discipline) for the professions [in conjunction with the Committee on Professional Practice];

(vii) reviews and approves the recommendations of the Staff Committee on the Professions on applications for waiver of licensure requirements;

(viii) monitors the financial conditions of postsecondary institutions;

(ix) develops legislative and budgetary proposals for higher and professional education, professional practice and professional discipline, and monitors advocacy of such proposals;

(x) recommends appointments to advisory councils and boards; and

(xi) seeks input from the public and the field concerning postsecondary education policies and practices; and

(xii) reviews and makes recommendations to the full board on incorporation and chartering of higher education institutions and organizations, professional organizations, and institutions offering professional education programs.

(xiii) reviews and approves appointments to the State Boards for the Professions for service on licensure/disciplinary panels;

(xiv) reviews Regents Review Committee recommendations and proposed consent orders and surrenders of license in professional discipline cases;

(xv) reviews the recommendations of the Staff Committee on the Professions on petitions for restoration of a professional license, and;

(xvi) seeks input from the public and the professions concerning professional practice and professional discipline policies and practices;

(3) Committee on Elementary, Middle, Secondary and Continuing Education and Vocational and Educational Services for Individuals with Disabilities:

(i) develops policy recommendations regarding elementary, middle and secondary education, workforce preparation and continuing education, vocational rehabilitation and special education, overall coordination of vocational and educational services for individuals with disabilities, and coordination of interagency agreements and activities;

(ii) reviews the monitoring of elementary, middle and secondary education and workforce preparation and continuing education programs, services, and results;

(iii) monitors State aid programs to elementary, middle and secondary schools;

(iv) seeks input from the public and the professional field concerning elementary, middle and secondary education and workforce preparation and continuing education policies and practices;

(v) reviews and approves amendments to the Rules of the Board of Regents and Regulations of the Commissioner of Education pertaining to elementary, middle and secondary education and workforce preparation and continuing education, and amendments relating to vocational rehabilitation, special education and related educational services for individuals with disabilities;

(vi) reviews the provision of technical assistance to elementary, middle and secondary schools;

(vii) develops legislative and budgetary proposals for elementary, middle and secondary education and workforce preparation and continuing education, vocational rehabilitation, special education and related educational services for individuals with disabilities, [and] monitors the advocacy of such proposals, and leads in pressing for legislative and budgetary priorities within the department and with the Legislature;

(viii) initiates studies and activities leading to the improvement of educational conditions and outcomes for children from birth through high school graduation and adults in workforce preparation and continuing education programs; and

(ix) reviews and makes recommendations to the full board on incorporation and chartering of institutions and organizations proposing to offer prekindergarten, kindergarten, elementary, middle or secondary education programs.

(x) monitors the implementation of vocational rehabilitation and special education programs and services and of interagency agreements;

(xi) reviews the development and implementation of the Regents Comprehensive Plan for the Office of Vocational and Educational Services for Individuals with Disabilities; and

(xii) seeks input from the public and professional field on policies and practices concerning vocational rehabilitation; special education and related educational services for individuals with disabilities.

(4) . . .

(5) [Committee on Professional Practice:

(i) develops policy recommendations regarding standards of professional conduct, continuing competence standards, professional practice issues, professional assistance programs, and the disciplinary process;

(ii) monitors implementation of such functions by the department;

(iii) reviews and approves amendments to the Rules of the Board of Regents and Regulations of the Commissioner of Education relating to professional practice and professional conduct;

(iv) reviews and approves appointments to the State Boards for the Professions for service on licensure/disciplinary panels;

(v) reviews Regents Review Committee recommendations and proposed consent orders and surrenders of license in professional discipline cases;

(vi) reviews the recommendations of the Staff Committee on the Professions on petitions for restoration of a professional license;

(vii) seeks input from the public and the professions concerning professional practice and professional discipline policies and practices;

(viii) develops legislative and budgetary proposals relating to professional practice and professional discipline policies and practices and monitors advocacy of such proposals.

(6) Committee on Vocational and Educational Services for Individuals with Disabilities.

(i) develops policy recommendations regarding vocational rehabilitation and special education, overall coordination of vocational and educational services to individuals with disabilities, and coordination of interagency agreements and activities;

(ii) monitors the implementation of vocational rehabilitation and special education programs and services and of interagency agreements;

(iii) develops legislative and budgetary proposals for vocational rehabilitation, special education and related educational services for individuals with disabilities, and leads in pressing for legislative and budgetary priorities within the department and with the Legislature;

(iv) reviews and approves amendments to the rules of the Board of Regents and regulations of the Commissioner of Education relating to vocational rehabilitation, special education and related educational services for individuals with disabilities;

(v) reviews the development and implementation of the Regents Comprehensive Plan for the Office of Vocational and Educational Services for Individuals with Disabilities; and

(vi) seeks input from the public and professional field on policies and practices concerning vocational rehabilitation; special education and related educational services for individuals with disabilities.

(7)] Committee on Ethics:

- (i) . . .
- (ii) . . .
- (iii) . . .
- (iv) . . .
- (v) . . .
- (vi) . . .

(e) . . .

(f) Each committee shall meet at the time and place designated by its [chairperson] *leadership*, and notice thereof shall be mailed to each member of the committee five days prior to the date of such meeting.

(g) . . .

(h) . . .

2. Subparagraph (iii) of paragraph (11) of subdivision (b) of section 4-1.5 of the Rules of the Board of Regents is amended, effective March 18, 2004, as follows:

(iii) The commissioner shall transmit the appeal papers to a standing subcommittee on accreditation appeals of the committee on [higher and professional education] *higher education and professional practice* of the Board of Regents.

Text of proposed rule and any required statements and analyses may be obtained from: Mary Gammon, Legal Assistant, Office of Counsel, Education Department, Albany, NY 12234, (518) 473-8296, e-mail: legal@mail.nysed.gov

Data, views or arguments may be submitted to: Thomas E. Sheldon, Associate Commissioner for Planning and Policy Development, Education Department, Education Bldg., Rm. 128, Albany, NY 12234, (518) 474-5836

Public comment will be received until: 45 days after publication of this notice.

This action was not under consideration at the time this agency's regulatory agenda was submitted.

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

Education Law section 207 gives the Board of Regents broad authority to adopt rules to carry into effect the laws and policies of the State pertaining to education and the functions, powers and duties conferred upon the University of the State of New York and the State Education Department. Inherent in such authority is the authority to adopt rules concerning the internal management and committee structure of the Board of Regents.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment reorganizes the committee structure of the Board of Regents to assist the Board in meeting its statutory responsibility to determine the educational policies of the State and to carry out the laws and policies of the State relating to education.

3. NEEDS AND BENEFITS:

The proposed amendment is necessary to conform the Rules of the Board of Regents to a recent reorganization of the committee structure of the Board of Regents so that the Board may more effectively meet its statutory responsibilities. The Committee on Higher and Professional Education and the Committee on Professional Practice have been merged into a Committee on Higher Education and Professional Practice. The Committee on Elementary, Middle, Secondary and Continuing Education have been merged into a Committee on Elementary, Middle, Secondary and Continuing Education and Vocational and Educational Services for Individuals with Disabilities. This will reduce the time spent by members of the Board of Regents in committee meetings, reduce paperwork and multiple review of items, provide for the efficient review of numerous priority issues that otherwise overlap existing committee functions, and thereby permit the Regents to devote more time to full Board discussion of policy issues.

4. COSTS:

(a) Cost to State government: None.

(b) Cost to local government: None.

(c) Costs to private regulated parties: None.

(d) Costs to the regulating agency for implementation and continuing administration of the rule: None.

The proposed amendment relates to the internal organization of the Board of Regents and merely reorganizes the committee structure of the Board of Regents, and will not impose any costs on State and local government, private regulated parties or the State Education Department.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment relates to the internal organization of the Board of Regents and consequently will not impose any program, service, duty or responsibility on local governments.

6. PAPERWORK:

The proposed amendment does not impose any reporting, recordkeeping or other paperwork requirements.

7. DUPLICATION:

The proposed amendment does not duplicate any existing State or federal requirements.

8. ALTERNATIVES:

There are no significant alternatives to be considered.

9. FEDERAL STANDARDS:

The proposed amendment does not exceed any minimum federal standards for the same or similar subject areas, since it relates solely to the internal organization of the Board of Regents of the State of New York and there are no federal standards governing such.

10. COMPLIANCE SCHEDULE:

The proposed amendment relates solely to the internal organization of the Board of Regents and will not impose compliance requirements on local governments or private parties.

Regulatory Flexibility Analysis

The proposed amendment relates to the internal organization of the Board of Regents and therefore does not have any adverse economic impact or impose any compliance requirements on small businesses or local governments. Because it is evident from the nature of the proposed amendment that it will have no impact on small businesses or local governments, no further steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis is not required and one has not been prepared.

Rural Area Flexibility Analysis

The proposed amendment relates to the internal organization of the Board of Regents and therefore does not have any adverse economic impact or impose any compliance requirements on entities in rural areas. Because it is evident from the nature of the proposed amendment that it will have no impact on entities in rural areas of the State, no further steps were needed to ascertain that fact and none were taken. Accordingly, a rural area flexibility analysis is not required and one has not been prepared.

Job Impact Statement

The proposed amendment relates to the internal organization of the Board of Regents and will not have a substantial adverse impact on jobs or employment opportunities. Because it is evident from the nature of the proposed amendment that it will have no impact on jobs or employment opportunities, no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

**REVISED RULE MAKING
NO HEARING(S) SCHEDULED**

Impartial Hearings for Students with Disabilities

I.D. No. EDU-33-03-00011-RP

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following revised rule:

Revised action: Amendment of section 200.5(i) of Title 8 NYCRR.

Statutory authority: Education Law, sections 101 (not subdivided), 207 (not subdivided), 305(1), (2) and (20), 4402(1), 4403(3) and 4404(1)

Subject: Impartial hearings for students with disabilities.

Purpose: To prescribe procedures to ensure the timeliness of impartial hearings as required by the Federal Individuals with Disabilities Education Act and its implementing regulations.

Text of revised rule: 1. Paragraph (3) of subdivision (i) of section 200.5 of the Regulations of the Commissioner is amended, effective May 1, 2004, as follows:

(3) The board of education shall arrange for such a hearing to be conducted in accordance with the following rules:

(i) Appointment from the impartial hearing officer list must be made in accordance with the rotational selection process established in section 200.2(e)(1) of this Part and the administrative procedures established by the board of education pursuant to section 200.2(b)(9) of this Part.

(a) The rotational selection process must be initiated immediately, but not later than two business days after receipt by the school district of the written request for the hearing.

(b) The impartial hearing officer may not accept appointment unless he or she is available to initiate the hearing within the first 14 days of being appointed [contacted] by the school district.

(ii) The board of education or trustees shall immediately appoint an impartial hearing officer to conduct the hearing. A board of education may designate one or more of its members to appoint the impartial hearing officer.

(iii) *The hearing, or a prehearing conference, shall be scheduled to begin within the first 14 days of the impartial hearing officer's appointment, unless an extension is granted pursuant to subparagraph (i) of paragraph (4) of this subdivision.*

(iv) The impartial hearing officer shall be authorized to administer oaths and to issue subpoenas in connection with the administrative proceedings before him/her.

[(iv)](v) A written or, at the option of the parents, electronic verbatim record of the proceedings before the impartial hearing officer shall be maintained and made available to the parties.

[(v)](vi) At all stages of the proceeding, where required, interpreters of the deaf, or interpreters fluent in the native language of the student's parent, shall be provided at district expense.

[(vi)](vii) The impartial hearing officer shall preside at the hearing and shall provide all parties an opportunity to present evidence and testimony.]

(vii) The parties to the proceeding may be accompanied and advised by legal counsel and by individuals with special knowledge or training with respect to the problems of students with disabilities. *At all stages of the proceeding, the impartial hearing officer may assist an unrepresented party by providing information relating only to the hearing process.*

(viii) In the event the impartial hearing officer requests an independent evaluation as part of a hearing, the cost of the evaluation must be at public expense.

(ix) In the event the impartial hearing officer determines that the interests of the parent are opposed to or *are* inconsistent with those of the student, or that for any other reason the interests of the student would best be protected by appointment of a guardian ad litem, the impartial hearing officer shall appoint a guardian ad litem to protect the interests of such student, unless a surrogate parent shall have previously been assigned. The impartial hearing officer shall ensure that the procedural due process rights afforded to the student's parent pursuant to this section are preserved throughout the hearing whenever a guardian ad litem is appointed.

(x) The hearing shall be conducted at a time and place which is reasonably convenient to the parent and student involved and shall be closed to the public unless the parent requests an open hearing.

(xi) *A prehearing conference with the parties may be scheduled. Such conference may be conducted by telephone. A transcript or a written summary of the prehearing conference shall be entered into the record by the impartial hearing officer. The results of the prehearing conference shall be reduced to writing and entered into the record. A prehearing conference is for the purposes of:*

- (a) *simplifying or clarifying the issues;*
- (b) *establishing dates(s) for the completion of the hearing;*
- (c) *identifying evidence to be entered into the record;*
- (d) *identifying witnesses expected to provide testimony; and/or*
- (e) *addressing other administrative matters as the impartial hearing officer deems necessary to complete a timely hearing.*

(xii) The parents, school authorities, and their respective counsel or representative, shall have an opportunity to present evidence, compel the attendance of witnesses and to confront and question all witnesses at the hearing. Each party shall have the right to prohibit the introduction of any evidence, the substance of which has not been disclosed to such party at least five business days before the hearing.

(a) Additional disclosure of information. [At] *Except as provided for in section 201.11 of this Title, at least five business days prior to a hearing, each party shall disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing. An impartial hearing officer may bar any party that fails to comply with this requirement from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.*

(b) *The impartial hearing officer, wherever practicable, shall enter into the record a stipulation of facts and/or joint exhibits agreed to by the parties.*

(c) *The impartial hearing officer may receive any oral, documentary or tangible evidence except that the impartial hearing officer shall exclude evidence that he or she determines to be irrelevant, immaterial, unreliable or unduly repetitious. The impartial hearing officer may receive testimony by telephone, provided that such testimony shall be made under oath and shall be subject to cross examination.*

(d) *The impartial hearing officer may limit examination of a witness by either party whose testimony the impartial hearing officer determines to be irrelevant, immaterial or unduly repetitious.*

(e) *The impartial hearing officer may limit the number of additional witnesses to avoid unduly repetitious testimony.*

(f) *The impartial hearing officer may take direct testimony by affidavit in lieu of in-hearing testimony, provided that the witness giving such testimony shall be made available for cross examination.*

(g) *The impartial hearing officer may receive memoranda of law from the parties not to exceed 30 pages in length, with typed material in minimum 12 point type (footnotes minimum 10 point type) and not exceeding 6½ by 9½ inches on each page.*

(xiii) *Each party shall have up to one day to present its case unless the impartial hearing officer determines that additional time is necessary for a full, fair disclosure of the facts required to arrive at a decision. Additional hearing days, if required, shall be scheduled on consecutive days wherever practicable.*

[(xii)](xiv) The parents shall have the right to determine whether the student shall attend the hearing.

[(xiii)](xiv) If, by mutual agreement of the parties, the impartial hearing officer is deemed incapacitated or otherwise unavailable or unwilling to continue the hearing or issue the decision, the board of education shall rescind the appointment of the impartial hearing officer and appoint a new impartial hearing officer in accordance with the procedures as set forth in this subdivision.

[(xiv)](xvi) Commencing July 1, 2002, each board of education shall report information relating to the impartial hearing process, including but not limited to the request for, initiation and completion of each impartial hearing, to the Office of Vocational and Educational Services for Individuals with Disabilities of the State Education Department in a format and at an interval prescribed by the commissioner.

2. Paragraph (4) of subdivision (i) of section 200.5 of the Regulations of the Commissioner is amended, effective May 1, 2004, as follows:

(4) Except as provided in section [200.16(g)(a)] 200.16(g)(9) of this Part and section 201.11 of this Title, the impartial hearing officer shall render a decision, and mail a copy of the written, or at the option of the parents, electronic findings of fact and the decision to the parents, to the board of education, and to the Office of Vocational and Educational Services for Individuals with Disabilities (VESID) of the State Education Department, not later than 45 days after the receipt by the board of education of a request for a hearing or after the initiation of such a hearing by the board. *In cases where extensions of time have been granted beyond the applicable required timelines, the decision must be rendered and mailed no later than 14 days from the date the impartial hearing officer closes the record. The date the record is closed shall be indicated in the decision.* The record of the hearing and the findings of fact and the decision shall be provided at no cost to the parents. All personally identifiable information shall be deleted from the copy forwarded to VESID.

(i) An impartial hearing officer may grant specific extensions of time beyond the periods set out in this paragraph, *in subparagraph (iii) of paragraph (3) of this subdivision, or in section 200.16(g)(9) of this Part at the request of either the school district or the parent. Each extension shall be for no more than 30 days. The reason for [the] each extension must be documented in the hearing record. [In such case, the impartial hearing officer shall render the decision and mail a copy of the written, or at the option of the parents, electronic findings of fact and the decision to the parents, to the board of education, and to VESID no later than 14 days from the date the record is closed, including any post hearing submissions, and the transcript is received by the impartial hearing officer.]*

(ii) *The impartial hearing officer may grant a request for an extension only after fully considering the cumulative impact of the following factors:*

(a) *the impact on the child's educational interest or well-being which might be occasioned by the delay;*

(b) *the need of a party for additional time to prepare or present the party's position at the hearing in accordance with the requirements of due process;*

(c) *any financial or other detrimental consequences likely to be suffered by a party in the event of delay; and*

(d) whether there has already been a delay in the proceeding through the actions of one of the parties.

(iii) Absent a compelling reason or a specific showing of substantial hardship, a request for an extension shall not be granted because of school vacations, a lack of availability resulting from the parties' and/or representatives' scheduling conflicts, school vacations, attorney vacations settlement discussions between the parties or other similar reasons. Agreement of the parties is not a sufficient basis for granting an extension.

(iv) The impartial hearing officer shall respond in writing to each request for an extension. The response, which writing shall become part of the record. The impartial hearing officer may render an oral decision to an oral request for an extension, but shall subsequently provide that decision in writing and include it as reduce that decision to writing, which writing shall become (just trying to match the simplified language in this paragraph) part of the record. For each extension granted, the impartial hearing officer shall set a new date for rendering his or her decision, and notify the parties in writing of such date.

(v) The impartial hearing officer shall determine when the record is closed and notify the parties of the date the record is closed. The decision of the impartial hearing officer shall be based solely upon the record of the proceeding before the impartial hearing officer, and shall set forth the reasons and the factual basis for the determination. The decision shall reference the hearing record to support the findings of fact. The impartial hearing officer shall attach to the decision a list identifying each exhibit admitted into evidence. Such list shall identify each exhibit by date, number of pages and exhibit number or letter. In addition, the decision shall include an identification of all other items the impartial hearing officer has entered into the record. The decision shall also include a statement advising the parents and the board of education of the right of any party involved in the hearing to obtain a review of such a decision by the State review officer in accordance with subdivision (j) of this section. The decision of the impartial hearing officer shall be binding upon both parties unless appealed to the State review officer.

Revised rule compared with proposed rule: Substantial revisions were made in section 200.5(i)(3)(iii), (vii), (x), (xi), (xii)(b), (g); and (4)(iv).

Text of revised proposed rule and any required statements and analyses may be obtained from: Mary Gammon, Legal Assistant, Office of Counsel, Education Department, Albany, NY 12234, (518) 473-8296, e-mail: legal@mail.nysed.gov

Data, views or arguments may be submitted to: Rebecca H. Cort, Interim Deputy Commissioner, Office of Vocational and Educational Services for Individuals with Disabilities, Education Department, One Commerce Plaza, Rm. 1606, Albany, NY 12234, (518) 474-2714, e-mail: rcort@mail.nysed.gov

Public comment will be received until: 30 days after publication of this notice.

Revised Regulatory Impact Statement

Since publication of a Notice of Proposed Rule Making in the *State Register* on August 20, 2003, the following revisions were made to the proposed rule:

8 NYCRR section 200.5(i)(3)(iii) has been revised to replace the phrase "The impartial hearing officer shall schedule the hearing to begin within the first 14 days of being appointed by the school district" with the phrase "The hearing, or a prehearing conference, shall be scheduled to begin within the first 14 days of the impartial hearing officer's appointment, unless an extension is granted pursuant to subparagraph (i) of paragraph (4) of this subdivision." This will provide the parties with the option of a prehearing conference while otherwise ensuring the timely conduct of impartial hearings.

Section 200.5(i)(3)(x) has been revised to delete the sentence "Upon appointment, the impartial hearing officer shall contact the parties to schedule the hearing." This sentence is unnecessary since 200.5(i)(3)(iii) requires that the hearing, or a prehearing conference, shall be scheduled to begin within the first 14 days of the impartial hearing officer's appointment, unless an extension is granted.

Section 200.5(i)(3)(xi) was revised to provide that either a transcript or a written summary of a prehearing conference shall be entered into the record by the impartial hearing officer. Public comment revealed that in many instances prehearing conferences are transcribed by certified court reporters and the impartial hearing officer should be allowed the option of entering the prepared transcript in lieu of a written summary. Section 200.5(i)(3)(xi) was also revised to replace the sentence "The impartial hearing officer may schedule a prehearing conference with the parties" with the sentence "A prehearing conference with the parties may be scheduled." This revision was made to provide flexibility to school districts,

particularly those in large cities, that use a centralized scheduling system for impartial hearings.

Section 200.5(i)(3)(xi)(d) was also revised to replace "and" with "and/or" to clarify that a prehearing conference could be held for one, for all, or for any combination, of the purposes listed in clauses (a) through (e).

The phrase "The impartial hearing officer may assist an unrepresented party by providing information relating only to the hearing process" was deleted from section 200.5(i)(3)(xi), relating to prehearing conferences, and revised and added as the second sentence in section 200.5(i)(3)(vii), relating to the representation and advisement of parties, as follows: "The impartial hearing officer may assist an unrepresented party by providing information relating only to the hearing process." The revision was made to clarify that such assistance is not limited to only the prehearing conference but may be provided with respect to the entire hearing process, including prehearing conferences.

Section 200.5(i)(3)(xii)(b) was revised to replace the phrase "shall require the stipulation of facts and introduction of joint exhibits into the record" with the phrase "shall enter into the record a stipulation of facts and/or joint exhibits agreed to by the parties" to clarify that the parties must agree upon any stipulation and/or joint exhibits before they may be entered into the hearing record.

Section 200.5(i)(3)(g) was revised to replace the sentence "The impartial hearing officer may receive memoranda of law from the parties not to exceed fifteen pages in length" with the sentence "The impartial hearing officer may receive memoranda of law from the parties not to exceed thirty pages in length, with typed material in minimum 12 point type (footnotes minimum 10 point type) and not exceeding 6½ by 9½ inches on each page." This revision was made after consideration of public comments asserting that the 15 page limitation was too restrictive. The revision also clarifies and standardizes the typeface requirements for each page, consistent with the typeface requirements proposed for memoranda of law submitted in appeals to State Review Officers as proposed under a separate rule making relating to the amendment of 8 NYCRR Part 279 (EDU-39-03-00008).

Subparagraph (iv) of section 200.5(i)(4), relating to allowing only one 30-day extension for settlement discussions, has been deleted in response to public comment asserting that such provision is too restrictive and would discourage settlements. In response to the deletion of subparagraph (iv), the first sentence of subparagraph (iii) of section 200.5(i)(4) was revised to delete the language "except as provided in subparagraph (iv) of this paragraph" and subparagraphs (v) and (vi) were relettered as (iv) and (v).

The above revisions require that the Paperwork section of the Regulatory Impact Statement previously filed herein be revised to read as follows:

PAPERWORK:

A transcript or a written summary of the prehearing conference shall be entered into the record by the impartial hearing officer. In cases where extensions of time have been granted beyond the applicable required timelines, the impartial hearing officer's decision must be rendered and mailed no later than 14 days from the date the impartial hearing officer closes the record. The date the record is closed shall be indicated in the decision. The impartial hearing officer shall respond in writing to each request for an extension. The response shall become part of the record. The impartial hearing officer may render an oral decision to an oral request for an extension, but shall subsequently provide that decision in writing and include it as part of the record.

The impartial hearing officer shall determine when the record is closed and notify the parties of the date the record is closed. The decision of the impartial hearing officer shall reference the hearing record to support the findings of fact. The impartial hearing officer shall attach to the decision a list identifying each exhibit admitted into evidence. Such list shall identify each exhibit by date, number of pages, and exhibit number or letter. In addition, the decision shall include an identification of all other items the impartial hearing officer has entered into the record.

Regulatory Flexibility Analysis

Since publication of a Notice of Proposed Rule Making in the *State Register* on August 20, 2003, the proposed rule was revised as set forth in the Revised Regulatory Impact Statement filed herewith.

The above revisions to the proposed rule do not require any revisions to the previously published Regulatory Flexibility Analysis.

Revised Rural Area Flexibility Analysis

Since publication of a Notice of Proposed Rule Making in the *State Register* on August 20, 2003, the proposed rule was revised as set forth in the Revised Regulatory Impact Statement filed herewith.

The above revisions to the proposed rule require that the Reporting, Recordkeeping and Other Compliance Requirements; and Professional Services section of the previously published Regulatory Flexibility Analysis be revised to read as follows:

REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS; AND PROFESSIONAL SERVICES:

The proposed amendment applies to hearings conducted by impartial hearing officers to rule on disputes between parents and school districts over special education programs and services. The amendment does not impose any reporting, recordkeeping or other compliance requirements on school districts, but merely prescribes procedures for the conduct of hearings by impartial hearing officers to ensure that such hearings are conducted in a timely manner pursuant to Federal requirements.

The hearing, or a prehearing conference, shall be scheduled to begin within the first 14 days of the impartial hearing officer's appointment, unless an extension is granted pursuant to proposed section 200.5(i)(4)(i).

At all stages of the proceeding, the impartial hearing officer may assist an unrepresented party by providing information relating only to the hearing process.

A prehearing conference with the parties may be scheduled. Such conference may be conducted by telephone. A transcript or written summary of the prehearing conference shall be entered into the record by the impartial hearing officer.

The impartial hearing officer, wherever practicable, shall enter into the record a stipulation of facts and/or joint exhibits agreed to by the parties. The impartial hearing officer may receive any oral, documentary or tangible evidence, except that the impartial hearing officer may exclude evidence that he or she determines to be irrelevant, immaterial, unreliable or unduly repetitious, may limit examination of a witness by either party whose testimony the impartial hearing officer determines to be irrelevant, immaterial, or unduly repetitious, and may limit the number of additional witnesses to avoid unduly repetitious testimony. The impartial hearing officer may receive testimony by telephone, provided that such testimony shall be made under oath and shall be subject to cross examination. The impartial hearing officer may take direct testimony by affidavit in lieu of in-hearing testimony, provided that the witness giving such testimony shall be made available for cross examination. The impartial hearing officer may receive memoranda of law from the parties not to exceed 30 pages in length, with typed material in minimum 12 point type (footnotes minimum 10 point type) and not exceeding 6½ by 9½ inches on each page.

Each party shall have up to one day to present its case unless the impartial hearing officer determines that additional time is necessary for a full, fair disclosure of the facts required to arrive at a decision. Additional hearing days, if required, shall be scheduled on consecutive days wherever practicable. In cases where extensions of time have been granted beyond the applicable required timelines, the hearing officer's decision must be rendered and mailed no later than 14 days from the date the impartial hearing officer closes the record. The date the record is closed shall be indicated in the decision. Each extension shall be for no more than 30 days.

The impartial hearing officer may grant a request for an extension only after fully considering the cumulative impact of the following factors:

- (a) the impact on the child's educational interest or well being which might be occasioned by the delay;
- (b) the need of a party for additional time to prepare or present the party's position at the hearing in accordance with the requirements of due process;
- (c) any financial or other detrimental consequences likely to be suffered by a party in the event of delay; and
- (d) whether there has already been a delay in the proceeding through the actions of one of the parties.

Absent a compelling reason or a specific showing of substantial hardship, a request for an extension shall not be granted because of school vacations, a lack of availability resulting from the parties' and/or representatives' scheduling conflicts, settlement discussions between the parties or other similar reasons except as provided in subparagraph (iv) of section 200.5(i)(4). Agreement of the parties is not a sufficient basis for granting the extension.

The impartial hearing officer shall respond in writing to each request for an extension. The response shall become part of the record. The impartial hearing officer may render an oral decision to an oral request for an extension, but shall subsequently provide that decision in writing and include it as part of the record. For each extension granted, the impartial hearing officer shall set a new date for rendering his or her decision, and notify the parties in writing of such date.

The impartial hearing officer shall determine when the record is closed and notify the parties of the date the record is closed. The decision of the impartial hearing officer shall reference the hearing record to support the findings of fact. The impartial hearing officer shall attach to the decision a list identifying each exhibit admitted into evidence. Such list shall identify each exhibit by date, number of pages, and exhibit number or letter. In addition, the decision shall include an identification of all other items the impartial hearing officer has entered into the record.

Job Impact Statement

Since publication of the Notice of Proposed Rule Making in the *State Register* on August 20, 2003, the proposed rule was revised as set forth in the Revised Regulatory Impact Statement filed herewith.

The proposed rule, as so revised, relates to procedures to ensure compliance with required timelines for conducting impartial hearings under the Individuals with Disabilities Education Act (IDEA) and its implementing regulations. The revised rule will not have a substantial adverse impact on job or employment opportunities. Because it is evident from the nature of the revised rule that it will have no impact on jobs or employment opportunities, no further measures were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Assessment of Public Comment

Since publication of a Notice of Proposed Rule Making in the *State Register* on August 20, 2003, the State Education Department received the following comments.

- 1. Schedule hearing to begin within fourteen days [200.5(i)(3)(iii)]

COMMENTS:

The amendment would not allow parties enough time to adequately prepare or be available for the hearing, to settle on a mutually convenient hearing date and would limit the ability to settle before a hearing.

DEPARTMENT RESPONSE:

The amendment is intended to prescribe procedures to ensure the timeliness of impartial hearings under Federal law. Parties may request an extension and provide information regarding mutually convenient dates. The amendment has been revised to allow for a prehearing conference or hearing to begin within 14 days of appointment of the impartial hearing officer (IHO). This will provide the parties with the option of a prehearing conference while otherwise ensuring the timely conduct of impartial hearings pursuant to Federal requirements.

COMMENTS:

Cases in which the sole issue is reimbursement do not require same level of immediacy, and should not be subject to fourteen day requirement.

DEPARTMENT RESPONSE:

Federal statutory and regulatory requirements imposing time limitations for the rendering of a decision in impartial hearings do not distinguish between reimbursement cases and other types of cases.

- 2. Prehearing conference [200.5(i)(3)(xi)]

COMMENTS:

Public comment varied. Comments indicated that the change was unnecessary; that prehearing conferences should be mandated and held during regular business days/hours at the school district and within a specified number of days after appointment of the IHO; that the purpose of the conference should include identifying and specifically stating the issues on which proof will be taken; that the IHO should be allowed to dismiss claims *sua sponte* or on motion; and that court reporter transcripts should be allowed in lieu of a written summary of the conference.

DEPARTMENT RESPONSE:

The provision regarding prehearing conferences is necessary to encourage IHOs to utilize this option and to set regulatory guidelines as to purpose and manner conducted. Clarifying issues during the prehearing conference should reduce costs and time. The prehearing conference option must be left to the discretion of the hearing officer and the time and place of the hearing must be convenient to the parent. The amendment has been revised to allow for court reporter transcripts in lieu of a written summary of the conference. No revision to the amendment to require mandatory prehearing conferences has been made since this would require Federal and State statutory change.

- 3. Testimony by telephone or affidavit [200.5(i)(3)(xii)(c)]

COMMENTS:

Concern was expressed that lack of face-to-face contact would diminish hearing officer's ability to ascertain credibility and demeanor of witness, that oaths would be difficult to administer, and communication would be hampered.

DEPARTMENT RESPONSE:

The amendment is consistent with Court decisions allowing testimony by telephone and by affidavit under certain specified circumstances. It

permits, but does not require, use of telephone and affidavit testimony, and leaves such use to the discretion of the hearing officer to determine the appropriateness of such use in individual cases. Further clarification regarding the use of telephone or affidavit testimony can be addressed through guidance documents.

4. Joint exhibits and stipulation of facts [200.5(i)(3)(xii)(b)]

COMMENTS:

Concern was expressed that the amendment would force joint exhibits and stipulation of facts, and would otherwise burden unrepresented parents.

DEPARTMENT RESPONSE:

The amendment has been revised to indicate at all stages of the proceeding the hearing officer may assist an unrepresented party by providing information relating only to the hearing process, and to clarify that the parties must agree upon any stipulation and/or joint exhibits before they may be entered into the hearing record.

5. Fifteen-page limit on memoranda of law [200.5(i)(3)(xii)(g)]

COMMENTS:

The fifteen-page limitation is unclear and too restrictive.

DEPARTMENT RESPONSE:

The amendment has been revised to provide that memoranda of law from the parties is not to exceed 30 pages in length, with typed material in minimum 12 point.

6. Witnesses [200.5(i)(3)(xii)(d) and (e)]

COMMENTS:

Comments varied from supporting the proposed amendment, to limiting the examination of a witness or the number of additional witnesses if determined to be irrelevant, immaterial or unduly repetitious, to suggesting a mandatory limitation on both the number of witnesses and the testimony the hearing officer may determine to be irrelevant.

DEPARTMENT RESPONSE:

No revisions to the amendment is necessary. The Department believes that matters concerning limitation of the number and testimony of witnesses are best left to the discretion of the hearing officer to determine in individual cases. The "irrelevant, immaterial or unduly repetitious" standard is consistent with standards applied in the decisions of State Review Officers.

7. Impartial hearing officer discretion to exclude evidence [200.5(i)(3)(xii)(c)]

COMMENTS:

Comments included that allowing the IHO discretion in excluding evidence could be a burden on unrepresented parents. It was also recommended that repetitious materials should be allowed to show a pattern.

DEPARTMENT RESPONSE:

Determining repetitious materials is best left to the IHO's discretion and the proposed amendment does not preclude the use of evidence to establish a pattern. Further clarification can be provided in a guidance document. The proposed language in 200.5(i)(3)(vii) has been revised to indicate at all stages of the proceeding the hearing officer may assist an unrepresented party by providing information relating to the hearing process.

COMMENTS:

Comments recommended that State Administrative Procedure Act (SAPA) section 306 language be added regarding evidence or cross-examination.

DEPARTMENT RESPONSE:

The Department believes it would not be appropriate to make the suggested revision since special education impartial hearings are not "adjudicatory proceedings" within the meaning of SAPA Article 3 [see SAPA section 102(3)].

8. Decision due within fourteen days of close of record [200.5(i)(4)]

COMMENTS:

Comments indicated language is confusing and ambiguous and that the requirement to render a decision in fourteen days is impractical.

DEPARTMENT RESPONSE:

No revisions are necessary. As indicated in 200.5 (i)(4)(vi), the IHO determines when the record is closed and must indicate the date in the decision. The fourteen days limitation is found in existing language and is not a new requirement.

9. Extensions [200.4(i)(4)(i), (ii), (iii) and (iv)]

COMMENTS:

Comments state that there is a conflict in 200.5(i)(4)(i) because the impartial hearing officer can grant extensions but is limited to only one extension for settlement purposes. Limiting settlement discussions may conflict with the IDEA and lead to an increase in impartial hearings and

litigation. Comments also included that agreement of the parties should be a sufficient basis for an impartial hearing officer to grant an extension. Clarification of the term "substantial hardship" was requested.

DEPARTMENT RESPONSE:

The proposed amendment has been revised to remove the limitation on extensions for settlement agreements to one 30-day period. Agreement of two parties to extend time is not sufficient because pursuant to 34 CFR section 300.511(c), the IHO, and not the parties, is vested with the authority to determine whether to grant specific extensions of time. Issues regarding "substantial hardship" are best left to the discretion of the IHO to determine under the facts of each individual case and can otherwise be addressed in a guidance document.

COMMENTS:

The requirement that the IHO consider the impact of an extension on the child's educational interest or well-being is unclear and will create unnecessary contentions by parties. Clarification is needed regarding how financial and other detrimental consequences when considering an extension would be determined.

DEPARTMENT RESPONSE:

The Department believes the requirements for granting an extension are sufficiently stated in the amendment and that no revisions are necessary. Consideration of the factors for granting an extension is best left to the discretion of the IHO to determine under the circumstances of each individual case and any clarification that may become necessary can otherwise be provided in a guidance document.

COMMENTS:

Comments included concern that limiting settlements may lead to an increase in impartial hearing and litigation, that it precludes the possibility of using independent educational evaluations as a settlement vehicle and that it may be illegal under IDEA to deny extensions for settlement discussions.

DEPARTMENT RESPONSE:

The amendment has been revised to remove the limitation on extensions for settlement agreements to one 30-day period.

10. One day to present [200.5(i)(3)(xiii)]

COMMENTS:

Comments reflected concerns that allowing only one day for each side to present may not be enough time in all cases and could result in erroneous decisions, limited cross-examination and inadequate rebuttal time.

DEPARTMENT RESPONSE:

No revisions to the amendment are necessary since the proposed amendment permits the hearing officer to permit additional time if necessary for a full, fair disclosure of the facts required to arrive at a decision.

COMMENTS:

Many attorneys feel the need for time between hearing dates to prepare for the next day and that the requirement that any additional days be scheduled consecutively is too restrictive.

DEPARTMENT RESPONSE:

No change is necessary. Proposed language indicates consecutive days shall be scheduled "wherever practicable." This matter is best left to the discretion of the IHO to determine under the circumstances of each individual case.

11. Decision shall reference the hearing record to support findings of fact [200.3(i)(4)(v)]

COMMENTS:

Comments supported the amendment. One comment suggested deleting the terms "all other items" the hearing officer has entered into the record.

DEPARTMENT RESPONSE:

The phrase "all other items" is necessary to clarify that the IHO's decision, in addition to including a list identifying each exhibit by date, number of pages and exhibit number or letter, shall also include an identification of all other items the IHO has entered into the record.

12. Hearing decision format [200.5(i)(4)(v)]

COMMENTS:

The provisions are ambiguous and sanctions for failing to follow are not defined.

DEPARTMENT RESPONSE:

No revisions to the proposed amendment are necessary since the format complies with the accepted standards for drafting administrative decisions.

13. General topics

COMMENTS:

Comments indicated support for all proposed changes as well as concerns that the proposed amendments will increase both the financial and human resource cost to districts.

DEPARTMENT RESPONSE:

These proposed amendments should result in shorter hearings and therefore, decreased costs.

COMMENTS:

No change should be made to regulation until the Individuals with Disabilities Education Act (IDEA) is reauthorized.

DEPARTMENT RESPONSE:

The proposed amendments are in response to court directives. The IDEA will not be reauthorized until 2004 and there is nothing in either HR 1350 or S 1248 that would have an impact on the proposed amendment's provision. Draft IDEA reauthorization language only addresses binding arbitration and a 1-tiered hearing process.

COMMENT:

The State should implement a single tier administrative due process procedure under the IDEA.

DEPARTMENT RESPONSE:

This would require a statutory change to the Education Law and therefore is beyond the scope of the amendments.

COMMENTS:

IHOs should be compensated directly by State instead of school districts; IHOs should be compensated for any adjournment; IHOs should have authority to order payment for expert witnesses for parents in economic need; and the Department should increase funding for legal aid to assist *pro se* parents.

DEPARTMENT RESPONSE:

The suggestions may require statutory changes and are otherwise beyond the scope of the amendments, which are intended to prescribe procedures to ensure the timeliness of impartial hearings.

COMMENTS:

Provide the IHO with authority to remove disruptive persons from the impartial hearing. Complaints should be permitted for an IHO's failure to control a hearing.

DEPARTMENT RESPONSE:

The suggested revision is unnecessary because the authority to remove disruptive persons is inherent in the duties and responsibilities of an IHO. Providing further protection of the IHO in the exercise of such authority would require a statutory change. The failure of an IHO to control a hearing would constitute grounds for a complaint under 8 NYCRR section 200.21.

COMMENT:

The IHO should be given authority to take immediate jurisdiction over multiple hearing requests for the same child.

DEPARTMENT RESPONSE:

Under existing procedures, a party or parties may request consolidation of multiple hearing requests.

COMMENT:

The IHO should have authority to dismiss vague, evasive or bad faith claims.

DEPARTMENT RESPONSE:

Section 200.5(i)(3)(xii)(c) provides that an IHO may exclude unreliable evidence.

Purpose: To provide a two-day youth hunt prior to the regular opening of the Spring turkey season for youth hunting on a junior hunting license.

Text of proposed rule: 6 NYCRR Section 1.40, "Hunting wild turkey," is amended as follows:

§ 1.40 Hunting wild turkey.

Section 1.40 through Paragraph 1.40(c)(2) remains unchanged.

A new paragraph 1.40(c)(3) is added to read as follows:

(3) *Spring youth hunt.*

(i) *There shall be a spring youth hunt for wild turkey. Eligible participants shall be those persons holding a turkey permit and junior hunting license or persons twelve to fifteen years old holding a turkey permit but not required to have a hunting license pursuant to Section 11-0707 of the Environmental Conservation Law. The youth hunt shall be open in all areas of the state in which a spring turkey hunting season is held pursuant to paragraph 2 of this subdivision, and the dates of the youth hunt shall be as follows:*

(a) *During years in which May 1st is a Thursday, Friday, Saturday or Sunday, the spring youth hunt shall be the last full weekend (Saturday and Sunday) of April.*

(b) *During years in which May 1st is a Monday, Tuesday, or Wednesday, the spring youth hunt shall be the next to last full weekend of April.*

(ii) *The person accompanying the youth hunter, as required by Environmental Conservation Law § 11-0929, must have a valid hunting license and a turkey permit.*

(iii) *The person accompanying the youth hunter may call for and otherwise assist the youth hunter, but shall not carry a firearm or longbow or kill a wild turkey during the youth hunt.*

(iv) *A youth hunter may take one bearded turkey during the youth hunt. Any turkey taken during the youth hunt shall be counted as part of the regular spring season bag limit of 2 bearded wild turkeys.*

Subdivision 1.40(d) through end of section 1.40 remains unchanged.

Text of proposed rule and any required statements and analyses may be obtained from: Gordon Batcheller, Division of Fish, Wildlife and Marine Resources, Department of Environmental Conservation, 625 Broadway, Albany, NY 12233-4754, (518) 402-8885, e-mail: grbatche@gw.dec.state.ny.us

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 45 days after publication of this notice.

Additional matter required by statute: State Environmental Quality Review Act (ECL art. 8). Establishment of hunting seasons and thinning of wildlife surpluses are covered by a final programmatic impact statement (FPIS) on wildlife game species management (DEC 1980) and supplemental findings (DEC 1994). The proposed action does not involve significant departure from established and accepted practices as described in the FPIS and does not establish any new program or major reordering of priorities. It is therefore classified as a "type II action" under the department's SEQR regulations (see 6 NYCRR § 618.2[d][5]).

Regulatory Impact Statement

1. Statutory Authority

Section 11-0303 of the Environmental Conservation Law (ECL) directs the Department of Environmental Conservation (Department) to develop and carry out programs that will maintain desirable species in ecological balance, and to observe sound management practices. This directive is to be met with regard to: ecological factors, the compatibility of production and harvest of wildlife with other land uses, the importance of wildlife for recreational purposes, public safety, and protection of private premises. ECL Section 11-0903 and 11-0905 establish the regulatory authority for setting seasons, bag limits and hunting methods for wild turkeys.

2. Legislative Objectives

The legislative objective behind the statutory provisions listed above is to establish, or authorize the Department to establish by regulation, certain basic wildlife management tools, including the setting of open seasons, and restrictions on methods of take and possession. These tools are used by the Department to maintain desirable wildlife species in ecological balance, while observing sound management practices and providing for public use of the resource.

3. Needs and Benefits

The proposed regulatory changes would create a two day youth hunt for wild turkey for hunters holding a Junior License before the regular spring season. The season would be held either the last or next to last full weekend in April depending on what day of the week May 1 falls on. For example, if May 1st was a Monday, the youth season would be the next to

Department of Environmental Conservation

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Youth Hunt for Wild Turkey

I.D. No. ENV-52-03-00018-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: Amendment of section 1.40 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 11-0303, 11-0903 and 11-0905

Subject: Youth hunt for wild turkey.

last weekend in April. If May 1st was a Friday, the youth season would be the last weekend in April. In all cases, there would be at least a three-day "break" between the close of the youth season and the opening of the regular season. The discrete timing of the youth hunting season would facilitate both law enforcement compliance checks, and provide a time for adult hunters to do their pre-season scouting prior to May 1st without interfering with youth hunters.

This proposal would provide a high quality opportunity for adult hunters to mentor young people with much less chance of interference from other hunters. Spring turkey hunting is especially conducive to mentoring Junior Hunters because of the careful calling and high degree of skill required to harvest a bird.

As required by existing law, Junior Hunters would have to be accompanied by a licensed adult during the youth turkey hunt. Both would be required to possess a turkey permit. Adults would not be allowed to possess a firearm or longbow or take a turkey during this special season. Adults would be allowed to assist a Junior Hunter with calling. All other turkey hunting regulations would have to be followed.

During the youth hunt, Junior Hunters would be allowed to take one turkey only during the two days. They could take their second bird beginning May 1st.

This youth hunts proposal is designed as a means to expose young people to a high quality hunting opportunity and to encourage increased levels of adult supervision. A recent survey of turkey hunters in New York found that 77% of respondents feel that providing wild turkey hunting opportunities for youth is very important, second only to the department's efforts in promoting the safe use of firearms.

4. Costs

There are no other costs associated with these regulatory changes beyond normal administrative costs.

5. Local Government Mandates

This rulemaking does not impose any program, service, duty or responsibility upon any county, city, town, village, school district or fire district.

6. Paperwork

The proposed rules do not impose additional reporting requirements upon the regulated public (turkey hunters).

7. Duplication

There are no other local, state or federal regulations concerning hunting season structure and license use. The Department is the primary government agency with regulatory authority for the managed harvest of game species in New York.

8. Alternatives

The only alternative is "No Action," which is not acceptable for any of the elements of this proposed rule-making. Failure to implement the changes will result in not providing increased benefits and opportunities to youth.

9. Federal Standards

There are no federal standards affecting this regulatory proposal.

10. Compliance Schedule

Hunters will be notified of this change via news release, postings on the Department's web-site, and through agency contacts with the public.

Regulatory Flexibility Analysis

The proposed rulemaking will establish a spring youth hunt for wild turkey. The Department of Environmental Conservation (Department) has historically made regular revisions to its hunting regulations. Based on the Department's experience in promulgating those revisions and the familiarity of regional Department staff with the specific areas of the state impacted by this proposed rulemaking, the Department has determined that this rulemaking will not impose an adverse economic impact on small businesses or local governments. The new season would not have any direct impact on such entities. Any impacts on small business would be indirect and positive as the new season may prompt spending (supplies, food, etc.) by those taking advantage of the opportunity.

The Department has also determined that these amendments will not impose any reporting, recordkeeping, or other compliance requirements on small businesses or local governments. All reporting or recordkeeping requirements associated with hunting are administered by the Department.

Therefore, the Department has concluded that a regulatory flexibility analysis is not required.

Rural Area Flexibility Analysis

The proposed rulemaking will establish a spring youth hunt for wild turkey. The Department of Environmental Conservation (Department) has historically made regular revisions to its hunting and trapping regulations. Based on the Department's experience in promulgating those revisions and the familiarity of regional Department staff with the specific areas of the

state impacted by this proposed rulemaking, the Department has determined that this rulemaking will not impose an adverse economic impact on rural areas. The new season would not have any direct impact on entities in rural areas. Any impacts on private entities would be indirect and positive as the new season may prompt spending (supplies, food, etc.) by those taking advantage of the opportunity.

The Department has also determined that this rule will not impose any reporting, recordkeeping, or other compliance requirements on public or private entities in rural areas. All reporting or recordkeeping requirements associated with hunting or trapping are administered by the Department.

Therefore, the Department has concluded that a regulatory flexibility analysis is not required.

Job Impact Statement

The proposed rulemaking will establish a spring youth hunt for wild turkey. The Department of Environmental Conservation (Department) has historically made regular revisions to its hunting regulations. Based on the Department's experience in promulgating those revisions and the familiarity of regional Department staff with the specific areas of the state impacted by this proposed rulemaking, the Department has determined that this rulemaking will not have a substantial adverse impact on jobs and employment opportunities.

Few, if any, persons actually hunt as a means of employment. Those few for whom hunting is an income source (e.g., professional guides) will not suffer any substantial adverse impact as a result of this proposed rulemaking because its effect, if any, would be to increase hunting participation. For this reason, the Department anticipates that this rulemaking will have no impact on jobs and employment opportunities. Therefore, the Department has concluded that a job impact statement is not required.

Department of Health

EMERGENCY RULE MAKING

Adult Day Health Care Regulations

I.D. No. HLT-44-03-00003-E

Filing No. 1403

Filing date: Dec. 16, 2003

Effective date: Dec. 16, 2003

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Repeal of Parts 425, 426 and 427 and addition of new Part 425 to Title 10 NYCRR.

Statutory authority: Public Health Law, sections 2803(2), 2807(3) and 2808

Finding of necessity for emergency rule: Preservation of public health.

Specific reasons underlying the finding of necessity: The agency finds that immediate adoption of this rule is necessary to preserve the public health and general welfare. These regulations establish additional standards for operation of adult day health care programs. Recent allegations of large scale Medicaid fraud by an adult day health care provider evidence the need for tighter regulations to assure that quality and necessary services are provided for a dependent and at-risk population and to protect the program from fiscal abuse. The proposed regulations require that registrants of adult day health care programs receive needed care which is based upon an interdisciplinary assessment and an individualized plan of care. This will ensure not only that the individuals are assessed to identify their health needs, but also that their needs are being met with appropriate services and that providers are accountable for a meaningful assessment of the individuals' needs and are accountable and responsible for providing services in accordance with those needs. Compliance with the requirements of the State Administrative Procedure Act for filing of a regulation on a non-emergency basis including the requirements for a period of time for public comment cannot be met because to do so would be detrimental to the health and general welfare of functionally impaired individuals who are registrants of adult day health care programs and also would permit public funds to be expended for health services that are not really needed by the registrants. Interested parties have had an opportunity for comment

on the proposed regulations through public meetings as well as meetings with Department staff. The duration of this emergency will extend until permanent regulations are promulgated.

Subject: Adult day health care regulations.

Purpose: To ensure that individuals receive adult day health care when appropriate and that providers are accountable for providing necessary and appropriate care.

Substance of emergency rule: The proposed regulations repeal Parts 425, 426 and 427 of 10 NYCRR and add a new Part 425 to Title 10 NYCRR to replace existing requirements in a more comprehensive framework that provides a systematic approach to care.

The definitions have been expanded to include additional salient terms that better explain the adult day health care program to registrants, providers and other interested parties. The definitions specify that each adult day health care session must operate for a minimum of five hours duration, not including time spent in transportation, but further allow a registrant's individual visit to be for fewer than five hours depending on the assessed needs of the registrant. Unless otherwise permitted by the Department, each approved session will consist of the majority of registrants in attendance for at least five hours. A section on application requirements is explicitly included for ease of reference, and is complimented by a section that identifies the process to be used in applying to make changes in a program, and specifies that a program operator may apply for approval to run a session where the majority of registrants are or will be attending for fewer than five hours.

The proposed regulations provide for general requirements for operation, as well as specified minimum program and service components that must be available. At a minimum, services provided to each registrant must include nutrition services in the form of at least one meal and necessary supplemental nourishment, planned activities and ongoing assessment of each registrant's health status in order to provide coordinated care planning and case management. Additional services may be provided in accordance with the care plan. At least the following program components must be available: case management, interdisciplinary care planning, nursing services, nutrition, social services, assistance with activities of daily living, planned individualized therapeutic or recreational activities, pharmaceutical services, and referrals for dental services. Additionally, specialized services for registrants with AIDS or HIV and religious services and pastoral counseling may be provided. The regulations contain requirements for the assessment of individuals for admission and for retention in the program, the development of an individualized care plan for each registrant, and prescribe that the provision of needed care be based on the interdisciplinary registrant assessment and individualized care plan.

A section of the regulations provides standards for programs designated as Acquired Immune Deficiency Syndrome (AIDS) adult day health care programs.

The regulations also include standards relating to general records and clinical records, and for confidentiality of records. Provisions are also included for a quality improvement process that provides for at least an annual review of the operator's program evaluation.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of proposed rule making, I.D. No. HLT-44-03-00003-P, Issue of Nov. 5, 2003. The emergency rule will expire Feb. 13, 2004.

Text of emergency rule and any required statements and analyses may be obtained from: William Johnson, Department of Health, Division of Legal Affairs, Office of Regulatory Reform, Corning Tower, Rm. 2415, Empire State Plaza, Albany, NY 12237, (518) 473-7488, fax: (518) 486-4834, e-mail: regsna@health.state.ny.us

Regulatory Impact Statement

Statutory Authority:

Section 2803(2) of the Public Health Law authorizes the State Hospital Review and Planning Council to adopt and amend rules and regulations, subject to the approval of the Commissioner, to effectuate the provisions of such laws, and to establish minimum standards for health care facilities, including hospitals and nursing homes. This provision of the Public Health Law is the authority by which the Department repeals Parts 425, 426 and 427 and promulgates the new Part 425.

Legislative Objectives:

Section 2803(2) of the Public Health Law is intended to protect the health of residents of the State by establishing minimum standards for the operation of regulated health care providers, including hospitals and nursing homes, and to ensure the delivery of quality health care services.

These regulations further the legislative objectives by repealing existing disparate sections of regulations and replacing them with comprehensive regulations that address all pertinent aspects of the adult day health care program. The new regulations clarify the definition of what constitutes an adult day health care program, delineate the services the operator must provide, and define admission criteria. These regulations will strengthen the integrity and structure of the program, and more clearly provide explicit operating standards and responsibilities for providers.

Needs and Benefits:

A work group consisting of adult day health care providers, provider association representatives and Department staff has been working for several months on revision of the adult day health care regulations. These revisions are in part based on the recommendation of a legislatively mandated demonstration, which identified the need for a comprehensive set of regulations. Alleged Medicaid fraud in the adult day health care industry focused the workgroup's efforts and concerns. It became apparent that revision of the current regulations is needed to ensure that registrants of adult day health care programs receive needed care which is based upon an interdisciplinary assessment and an individualized plan of care. This will ensure not only that the individuals receive the care that they need, but also that providers are accountable for a meaningful assessment of the individual's needs and are accountable and responsible for providing services in accordance with those needs.

COSTS:

Costs to Regulated Parties for the Implementation of and Continuing Compliance with these

Regulations:

The new regulations recast existing requirements in a comprehensive framework that represents a more systematic approach to care, and in general represent what quality providers have been doing. While any additional costs to providers should be minimal, some programs may need to employ one additional full-time equivalent registered professional nurse at an estimated total annual expense of \$60,000. The Department will permit additional costs, including the additional nurse, to be addressed through an appeal for those programs that are not at the statutory ceiling of 65% of the sponsoring nursing home's rate. The Department has convened a work group including representatives of the industry to develop a system for reimbursement of transportation costs.

Costs to State and Local Governments:

The State and local shares of Medicaid expenditures for the adult day health care program are 25% and 25%, respectively. The new program regulations are revising the admission criteria for adult day health care programs. If individuals are currently inappropriately receiving services in these programs, implementation of these regulations will decrease utilization, which will reduce the Medicaid expenditures associated with adult day health care.

Costs to the Department of Health:

There will be no additional costs to the Department of Health.

Local Government Mandates:

This regulation imposes no program, service, duty or other responsibility upon any city, town, village, school, fire district or other special district except those operating adult day health care programs. They will be subject to the same standards as non-government operators. The regulations will provide counties with alternative placements to help maintain functionally impaired individuals in the community.

Paperwork:

The proposed regulations impose minimal reporting requirements, forms or other paperwork. These requirements are needed to insure care rendered is necessary and is based on an interdisciplinary assessment and an individualized care plan.

Duplication:

There is no duplication of federal or State requirements.

Alternative Approaches:

Questions regarding the fiscal integrity of the adult day health care program necessitate the establishment of standards that protect the program against abuse, while still providing for necessary services for a dependent and at-risk population. One alternative that the Department considered was to include amendments to 10 NYCRR Part 86 governing reimbursement for adult day health care programs. As a result of discussions with regulated parties, the Department determined not to include amendments to 10 NYCRR Part 86, but rather to convene a work group including representatives of the industry to develop a system for reimbursement of transportation costs.

The proposed definition of "operating hours" for an adult day health care program includes a requirement that each approved adult day health

care session must operate for a minimum of five hours duration, not including transportation. In order to accommodate concerns raised by providers that some registrants are unable to attend a five hour session because of poor health, frailty or other factors, the Department has modified this requirement so that unless otherwise permitted by the Department, each approved session will consist of the majority of registrants in attendance for at least five hours. The proposed regulations further provide at section 425.3(d) that an operator of an approved adult day health care program may apply to the Department for approval to run a session where the majority of the registrants are or will be attending fewer than five hours. The Department had considered as an alternative allowing a program to request a waiver from the five hour minimum if it had a registrant or registrants who would attend the adult day health care program for fewer than five hours, but determined that the additional paperwork involved in establishing a waiver process was unnecessary in all such cases and that Department approval would be required only if the majority of the registrants would be attending for fewer than five hours.

Federal Standards:

The rule does not exceed any minimal standards of the federal government for the same or similar subject areas.

Compliance Schedule:

These regulations will be effective upon filing with the Secretary of State. Similar regulations were previously filed by the Department of Health on an emergency basis.

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Regulatory Flexibility Analysis

Effect on Small Business and Local Governments:

For purposes of the Regulatory Flexibility Analysis, small businesses were considered to be nursing facilities with 100 or fewer full-time equivalents. Based on recent financial and statistical data extracted from the RHC4-4 cost reports, 180 nursing facilities were identified as employing fewer than 100 employees. Adult day health care programs are sponsored by nursing facilities. The regulations will apply to any adult day health care operator that may be considered a small business or that is a local government. There are seven (7) adult day health care programs operated by local governments.

Compliance Requirements:

The regulations clarify the reporting and recordkeeping requirements to the extent of specifying the information that must be contained in registrant and program assessment forms, but remove unnecessary yearly reviews, outside committee reviews of program and unnecessary agreements between operators and registrants.

Professional Services:

For most programs, no additional professional services will be necessary to comply with the proposed rule. Some programs may need to employ one additional full-time equivalent registered professional nurse at an estimated total annual expense of \$60,000.

Compliance Costs:

There will be no initial capital costs as a result of compliance with this rule. Adult day health care providers may incur nominal costs for providing additional information relative to registrant assessments and coordination of services.

Minimizing Adverse Impact

The Department of Health considered the approaches in section 202-b(1) of the State Administrative Procedure Act and found them inapplicable. Exemption of small businesses or local governments from the proposed rule would not serve the purposes of assuring quality and necessary services to all program registrants and protecting the program from inappropriate admission and fiscal abuse. All adult day health care programs must comply with these requirements.

Economic and Technical Feasibility Assessment:

The proposed rule would impose no compliance requirements which would raise technological or feasibility issues.

Small Business and Local Government Input:

Numerous meetings were held with representatives from the industry and their provider associations since the regulation was first filed as an emergency. These meetings, plus the public comment period during the

joint meeting of the Codes and Regulations Committee and the Fiscal Policy Committee of the State Hospital Review and Planning Council, have provided the Department an opportunity to address their major concerns and change the proposed regulations accordingly. Representatives of adult day health care providers and provider associations, including those that may be considered small businesses, were consulted during the development of the proposed rule through direct meetings.

Local governments and small businesses were originally given notice of this proposal by its inclusion on the agenda of the State Hospital Review and Planning Council for its February 3, 2000 meeting and subsequently in a joint meeting of the Codes and Regulations Committee and Fiscal Policy Committee of the State Hospital Review and Planning Council on March 23, 2000, and its inclusion on the agenda of the State Hospital Review and Planning Council for its April 6, 2000 meeting, as well as by its inclusion on the agenda of the May 18, 2000 meeting of the Codes and Regulations Committee of the State Hospital Review and Planning Council, and its inclusion on the agenda of the State Hospital Review and Planning Council for its June 1, 2000 meeting, its inclusion on the agenda of the September 21, 2000 meeting of the Codes and Regulations Committee of the State Hospital Review and Planning Council and its subsequent inclusion on the agenda of the State Hospital Review and Planning Council for its October 5, 2000 meeting, its inclusion on the agenda of the November 16, 2000 meeting of the Codes and Regulations Committee of the State Hospital Review and Planning Council, and its inclusion on the agenda of the State Hospital Review and Planning Council for its December 7, 2000 meeting, its inclusion on the agenda for the January 18, 2001 meeting of the Codes and Regulations Committee of the State Hospital Review and Planning Council and its inclusion on the agenda of the State Hospital Review and Planning Council of its February 1, 2001 meeting, its inclusion on the agenda for the May 24, 2001 meeting of the Codes and Regulations Committee of the State Hospital Review and Planning Council and its inclusion on the agenda of the State Hospital Review and Planning Council of its June 7, 2001 meeting, its inclusion on the agenda for the July 15, 2001 meeting of the Codes and Regulations Committee of the State Hospital Review and Planning Council which was subsequently canceled with the decision being made to place renewal of the emergency filing on the agenda of the State Hospital Review and Planning Council of its August 2, 2001 meeting, and by its inclusion on the agenda for the November 15, 2001 meeting of the Codes and Regulations Committee of the State Hospital Review and Planning Council and its inclusion on the agenda of the State Hospital Review and Planning Council of its December 6, 2001 meeting, its inclusion on the agenda for the January 24, 2002 meeting of the Codes and Regulations Committee of the State Hospital Review and Planning Council and its inclusion on the agenda of the State Hospital Review and Planning Council of its February 7, 2002 meeting, its inclusion on the agenda of the May 23, 2002 meeting of the Codes and Regulations Committee of the State Hospital Review and Planning Council, its inclusion on the agenda of the State Hospital Review and Planning Council for its June 6, 2002 meeting, its inclusion on the agenda of the State Hospital Review and Planning Council for its August 7, 2002 meeting and its inclusion on the agenda of the State Hospital Review and Planning Council for its December 5, 2002 meeting, its inclusion on the agenda of the January 23, 2003 meeting of the Codes and Regulations Committee of the State Hospital Review and Planning Council, its inclusion on the agenda of the State Hospital Review and Planning Council for its February 6, 2003 meeting, its inclusion on the agenda of the May 22, 2003 meeting of the Codes and Regulations Committee of the State Hospital Review and Planning Council, its inclusion on the agenda of the State Hospital Review and Planning Council for its June 5, 2003 meeting, its inclusion on the agenda of the State Hospital Review and Planning Council for its August 7, 2003 meeting, its inclusion on the agenda of the State Hospital Review and Planning Council for its December 4, 2003 meeting.

Rural Area Flexibility Analysis

Effect on Rural Areas:

Rural areas are defined as counties with a population less than 200,000 and, for counties with a population greater than 200,000, includes towns with population densities of 150 persons or less per square mile. The following 44 counties have a population less than 200,000:

Allegany	Hamilton	Schenectady
Cattaraugus	Herkimer	Schoharie
Cayuga	Jefferson	Schuyler
Chautauqua	Lewis	Seneca
Chemung	Livingston	Steuben
Chenango	Madison	Sullivan

Clinton	Montgomery	Tioga
Columbia	Ontario	Tompkins
Cortland	Orleans	Ulster
Delaware	Oswego	Warren
Essex	Seneca	Washington
Franklin	Putnam	Wayne
Fulton	Rensselaer	Wyoming
Genesee	St. Lawrence	Yates
Greene	Saratoga	

The following 9 counties have certain townships with population densities of 150 persons or less per square mile:

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

Compliance Requirements:

The proposed regulations do not impose any new reporting requirements, forms or other paperwork, although they do specify information that is required for reports and forms to be maintained by providers. The regulations clarify the reporting and recordkeeping requirements to the extent of specifying the information that must be contained in registrant and program assessment forms, but remove unnecessary yearly reviews and outside committee reviews of program and unnecessary agreements between operators and registrants.

Professional Services:

For most programs, no additional professional services will be necessary to comply with the proposed rule. Some programs may need to employ one additional full-time equivalent registered professional nurse at an estimated total annual expense of \$60,000.

Compliance Costs:

There will be no initial capital costs as a result of compliance with this rule. Adult day health care providers may incur nominal costs for providing additional information relative to registrant assessments and coordination of services.

Minimizing Adverse Impact:

In general, the regulations attempt to minimize the adverse economic impact on all providers, including those operating in rural areas. The Department of Health considered the approaches in section 202-bb(2) of the State Administrative Procedure Act and found them inapplicable. Exemption of rural providers from the proposed rule would not serve the purposes of provision of assuring quality and necessary services to all program registrants and protecting the program from inappropriate admission and fiscal abuse. All adult day health care programs must comply with these requirements.

Opportunity for Rural Area Participation:

Representatives of adult day health care providers and associations, including those that operate in rural areas, were consulted during the development of the proposed rule through direct meetings. In addition, the Department held numerous meetings with the regulated entities to hear their concerns. Those concerns and those heard at the public joint meeting of the Code and Regulations Committee and the Fiscal Policy Committee of the State Hospital Review and Planning Council were addressed by changes in these regulations. Rural areas were originally given notice of this proposal by its inclusion in the agenda of the State Hospital Review and Planning Council for its February 3, 2000 meeting, and subsequently in a joint meeting of the Code and Regulations Committee Fiscal Policy Committee of the State Hospital Review and Planning Council on March 23, 2000, and its inclusion in the agenda of the State Hospital Review and Planning Council for its April 6, 2000 meeting, a meeting of the Codes and Regulations Committee of the State Hospital Review and Planning Council on May 18, 2000, and its inclusion in the agenda of the State Hospital Review and Planning Council for its June 1, 2000 meeting, its inclusion on the agenda of the September 21, 2000 meeting of the Codes and Regulations Committee of the State Hospital Review and Planning Council and by its subsequent inclusion on the agenda for the October 5, 2000 meeting of the State Hospital Review and Planning Council, its inclusion on the agenda for the November 16, 2000 meeting of the Codes and Regulations Committee of the State Hospital Review and Planning Council and on the agenda of the State Hospital Review and Planning Council for its December 7, 2000 meeting, its inclusion on the agenda for the January 18, 2001 meeting of the Codes and Regulations Committee of the State Hospital Review and Planning Council and its inclusion on the agenda of the State Hospital Review and Planning Council of its February 1, 2001 meeting, its inclusion on the agenda for the May 24, 2001 meeting of the Codes and Regulations Committee of the State Hospital Review and Planning Council and its inclusion on the agenda of the State Hospital Review and

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Exemption of adult day health care providers in rural areas from the proposed rule would not serve the purposes of assuring quality and necessary services to all program registrants and protecting the program from fiscal abuse. An adult day health care program must comply with these requirements.

Job Impact Statement

A Job Impact Statement is not necessary because it is apparent, from the nature and purpose of the proposed rule, that it will not have a substantial adverse impact on jobs or employment opportunities. These regulations establish additional standards for operation of adult day health care programs and are not expected to result in reductions of staff providing necessary care.

**EMERGENCY
RULE MAKING**

Environmental Laboratory Standards

I.D. No. HLT-52-03-00001-E
Filing No. 1395
Filing date: Dec. 11, 2003
Effective date: Dec. 11, 2003

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Addition of section 55-2.13 to Title 10 NYCRR.

Statutory authority: Public Health Law, section 502

Finding of necessity for emergency rule: Preservation of public health, public safety and general welfare.

Specific reasons underlying the finding of necessity: The Department of Health finds that immediate adoption of this rule is necessary to preserve the public health, safety and general welfare, and that compliance with State Administrative Procedure Act (SAPA) Section 202(1) for this rulemaking would be contrary to the public interest. These regulations add a new section to existing Subpart 55-2, which, under the authority of Public Health Law Section 502, implements standards for examination of environmental samples containing or potentially containing agents that pose significant public health or national security risks, and for certification of laboratories performing such examinations. The proposed emergency amendment must be adopted immediately to ensure timely and reliable environmental testing for biological and chemical so-called "critical agents," including such recognized deadly agents of bioterrorism as anthrax.

Numerous unregulated firms have risen to the challenge of testing samples for agents of bioterrorism from environments such as public office buildings and private residences. These firms bring to the marketplace a

broad range of analytical experience, capacity and expertise, and use various testing methods for ruling out the presence of infectious organisms such as anthrax. However, market forces alone cannot ensure the quality and reliability of critical agent testing. Therefore, emergency rules for laboratory certification must be promulgated without delay in this critically urgent emergent area of public health protection. These proposed regulations will protect the public from unqualified providers of environmental testing services for critical agents by promulgating minimum standards for: laboratory director and testing personnel qualifications; use of approved methods for sample collection and decontamination; recordkeeping systems to track the location of isolated agents; chain-of-custody protocols to ensure the admissibility of test results as evidence in legal proceedings; test result reporting procedures; client reports content; and sample and/or isolate referral protocols.

Reliable and early identification, enhanced by this emergency filing, is crucial to appropriate public health response to biological or chemical terrorism, and/or other such incidents posing a significant public health threat. To that end, the Department of Health has established standards for a new area of certification, environmental critical agent testing, to improve New York State's preparedness for, and rapid response, to adverse public health events, including terrorist-instigated disease outbreaks. The new certification will permit the Department and the public to quickly identify and engage laboratories to test environmental samples for microorganisms and chemical agents posing a public health or security risk, in the event of terrorist-initiated environmental contamination. Furthermore, certification in critical agent testing will provide indispensable regulatory oversight to shield the public from unproven or incorrectly applied test methods that could generate compromised or unreliable results in emergency health threat situations. Department oversight afforded by this emergency filing will also help reduce use of ineffective and unproven safety procedures that could fail to confine a dangerous agent or, in the worst case, even promote its further dissemination to threaten an even larger population.

Rule filing on a non-emergency basis, including the delay incurred from a public comment period, is unacceptable, as it would permit individuals and laboratories to test for critical agents without any assurance that testing is being performed in a safe and reliable manner.

Subject: Environmental laboratory standards.

Purpose: To establish minimum standards for laboratory testing of critical agents.

Text of emergency rule: Subpart 55-2 is amended by reserving new Section 55-2.12 for future use and adding new Section 55-2.13 as follows:

Section 55-2.12 (reserved)

Section 55-2.13 Requirements for laboratories engaged in testing for critical agents in environmental samples.

(a) *For purposes of this Subpart, critical agent shall mean an organism, chemical element or chemical compound, which is recognized as posing a risk to national security and/or requiring special action to protect the public health because the agent: can be disseminated (e.g., in air, water or food) or transmitted person-to-person with ease; causes moderate to high mortality and/or morbidity; and can have a significant public health impact. The term organism includes, but is not limited to, a virus, bacterium, or product of an organism. Critical agents shall include critical biological and chemical agents specified by the federal Centers for Disease Control and Prevention (CDC) in published documents, and other such agents as the Commissioner of Health has determined meet the above criteria.*

(b)(1) *Prior to performing testing for any critical agent in an environmental sample, a laboratory shall submit a request to the department, and receive an initial or revised certificate of approval that includes the specialty of critical agent testing. The certificate of approval shall also list the specific critical agent(s) included in the approval, the approved method(s), and the types of samples (e.g., surface swipes, powder, fluid and bulk material) the laboratory may accept for testing. No laboratory shall examine an environmental sample for a biological or chemical critical agent without certification of approval specific to each critical agent for which testing is conducted.*

(2) *The department may withhold or limit its approval if the department is not satisfied that the laboratory has in place adequate policies, procedures, facilities, equipment, instrumentation and trained personnel to ensure that collection, labeling, accessioning, preparation, analysis, result reporting, storage, transportation, shipping, and disposition of all environmental samples, derivatives and related materials shall be performed in a manner that: ensures consistently correct performance of the approved methods; ensures the protection of the health, safety and welfare of the laboratory's employees and the public; and is consistent with the*

requirements of this Subpart, and all other applicable laws, rules and regulations. The department shall also consider a laboratory's (bio)safety level facilities and practices in its determination to approve the laboratory for critical agent testing in environmental samples.

(c) *In addition to application and attestation requirements found elsewhere in this Subpart, a laboratory seeking approval to perform critical agent testing in environmental samples shall submit:*

(1) *a standard operating procedure manual documenting laboratory policies, procedures, facilities, equipment, supplies, instrumentation and personnel for critical agent testing, which are designed to ensure that collection, labeling, accessioning, preparation, analysis, result reporting, storage, transportation, shipping, and disposition of all environmental samples, derivatives and related materials shall be performed in a manner that ensures consistently correct performance of the approved methods; ensures the protection of the health, safety and welfare of the laboratory's employees and the public; and is consistent with the requirements of this Subpart, and all other applicable laws, rules and regulations; and*

(2) *an attestation signed by the owner(s) and director(s) that the laboratory will accept only the type(s) of samples (e.g., surface swipes, powder, fluid and bulk material) specified on the laboratory's certificate of approval, and that the owner(s) and director(s) will take whatever action is necessary to ensure that such samples are collected, labeled, accessioned, prepared, analyzed, stored, transported, shipped and disposed of, and all results are reported in a manner consistent with the approved method and with all other documentation submitted to the department.*

(d) *In addition to the preceding requirements of this Subpart, a laboratory engaged in critical agent testing in environmental samples, through its owner(s) and director(s), shall:*

(1) *establish, maintain, review periodically, and implement written policies and procedures which are designed to ensure that collection, labeling, accessioning, preparation, analysis, result reporting, storage, transportation, shipping and disposition of samples shall be performed in a manner that ensures consistently correct performance of the approved methods, ensures the protection of the health, safety and welfare of laboratory personnel, sample collectors and the public to the extent possible, and is consistent with all applicable laws, rules and regulations, as well as recognized standards of practice designed to minimize the risks associated with potential exposure to similar hazardous substances or critical agents. Such policies and procedures shall include specific procedures for containment, secured storage, decontamination, and/or disposal or destruction of the sample(s), derivatives, and related collection materials, supplies and/or equipment, as necessary and/or appropriate for the relevant suspected critical agent;*

(2) *have written policies and procedures in place to implement a chain-of-custody protocol whenever required by a law enforcement agency. Such policies and procedures shall be developed in consultation with law enforcement officials or other persons with appropriate experience and training in chain-of-custody issues, and shall at a minimum require an intact continuous record of the physical possession, storage, and disposition of the sample and any derivatives, including the signatures of all persons who access the sample and derivatives, the date of such access and other pertinent information;*

(3)(i) *ensure that all laboratory employees engaged in collecting and/or transporting environmental samples receive sufficient training in hazardous material handling techniques to ensure they will perform their responsibilities in a safe and reliable manner. Such training shall include, but not be limited to, training in sample collection, packaging, decontamination, transportation, and chain-of-custody policies and procedures established by the laboratory. The laboratory shall maintain documentation of such training for a minimum of three (3) years and take such other action as is necessary to ensure ongoing compliance with such policies and procedures;*

(ii) *develop and implement sample acceptance criteria designed to protect the health, safety and welfare of laboratory personnel, sample collectors, and the public to the extent feasible. Such criteria shall be consistent with approved methods for sample collection, handling, packaging and decontamination, and shall minimally define conditions under which a sample shall be rejected, and conditions under which a sample shall be tested and results reported with limitations. The laboratory shall make its sample acceptance criteria available to clients;*

(4) *issue reports of test results in a format and of a content required by the approved method, and necessary for interpretation of the test results, including, but not limited to, unambiguous identification of the tested environmental sample, including collection location, source and sample type, and limitations of the method. The department may restrict a*

laboratory's ability to report information concerning a test result whenever confirmatory or supplemental testing is required by the approved method;

(5) report laboratory findings to the department within twenty-four (24) hours via telephone, facsimile and/or electronic transmission, using a number or e-mail address designated by the department, whenever the findings indicate that an environmental sample contains an organism, its product or component, or a chemical, any of which exhibits characteristics or properties consistent with those of a critical agent. Whenever the department determines that supplemental testing is necessary to confirm the results of a test, and/or further identify the characteristics of a critical agent for public health protection, law enforcement or research purposes, the laboratory shall submit all or part of the sample or its derivative(s) to the department or its designee, as directed by the department; and

(6) establish and implement a critical agent inventory and tracking system that accounts for all environmental samples and their derivatives suspected or confirmed to contain critical agents. Unless required to document chain of custody pursuant to paragraph (2) above or required by this paragraph, a laboratory may discontinue inventory and tracking of samples and derivatives, provided laboratory findings have established the absence of a critical agent. Inventory and tracking documentation shall include the identity of all individuals who access such materials and the date of access, as well as specific information regarding transfer, disposal or other disposition of the materials. Samples and their derivatives, access records, chain of custody records and records of the analyses shall be maintained in a secure manner until the statute of limitations for bringing any related criminal or civil action has expired, and the sample and its derivatives are no longer needed for evidence in any pending legal matter or by law enforcement officials. Access records, chain of custody records and records of the analyses of confirmed positive samples, shall be maintained for ten (10) years, or as required above if longer.

(e) For critical biological agents that are microbiologic organisms, an environmental laboratory's proficiency testing performance shall be evaluated based on the known presence or absence of a specific microorganism, or its product or component. Satisfactory performance shall be a result correctly indicating the presence or absence of the microorganism or its product or component. Unsatisfactory performance shall be a result incorrectly indicating the presence or absence of the microorganism, or its product or component.

(f) Personnel requirements for environmental sample testing for critical biological agents that are microbiologic organisms shall be as follows:

(1) notwithstanding the requirements of section 55-2.10 of this Subpart, the environmental laboratory shall employ, as director, one of the following:

(i) a person who holds or meets the qualifications for a New York State clinical laboratory director certificate of qualification in the applicable subspecialty of microbiology (such as bacteriology), pursuant to Part 19 of this Title;

(ii) a person with an earned doctoral degree or master's degree in the chemical, environmental, physical or biological sciences or engineering, with at least sixteen (16) college semester credit hours in the biological sciences including at least one (1) course having microbiology as a major component, and at least one year of experience in analysis of representative analytes for which the laboratory is approved or seeking approval; or

(iii) a person with a bachelor's degree in the chemical, environmental, physical or biological sciences or engineering, with at least sixteen (16) college semester credit hours in the biological sciences including at least one (1) course having microbiology as a major component, and at least two years of experience in analysis of representative analytes for which the laboratory is approved or seeking approval; and

(2) sample preparation, analysis and related responsibilities shall be performed by an analyst who shall have an associate's degree or equivalent, with at least twelve (12) college semester credit hours in the biological sciences, and at least one year of experience in analysis of representative analytes; provided, however, that a person with at least three (3) years experience in the analysis of representative analytes immediately preceding the effective date of this section shall be deemed to have met the requisite qualifications for performing critical agent analysis in the laboratory in which such experience has been obtained.

(g) This section shall not apply to bacteriologic testing for total and fecal coliform bacteria (i.e., the common form of *Escherichia coli*) in potable and non-potable water.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and

will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire March 9, 2004.

Text of emergency rule and any required statements and analyses may be obtained from: William Johnson, Department of Health, Division of Legal Affairs, Office of Regulatory Reform, Corning Tower, Rm. 2415, Empire State Plaza, Albany, NY 12237, (518) 473-7488, fax: (518) 486-4834, e-mail: regsqna@health.state.ny.us

Regulatory Impact Statement

Statutory Authority:

Public Health Law Section 502 authorizes the Commissioner of Health to issue certificates of approval to environmental laboratories, and prescribe the requirements for granting such approvals. The Commissioner is also empowered to adopt and amend regulations for implementing the provisions and intent of Section 502, and to prescribe the educational and technical qualifications of environmental laboratory director(s).

Legislative Objectives:

Section 502 of the Public Health Law requires all laboratories performing environmental analysis on samples collected in New York State to hold certificates of approval on such analyses as issued by the Commissioner of Health. The Commissioner is authorized to establish standards for approved laboratories and technical and educational qualifications for laboratory directors to ensure that tests conducted for public health or personal health protection, or the protection of the environment or natural resources are performed in a reliable manner.

Needs and Benefits:

Accurate and reliable identification of critical agents in environmental samples is crucial to appropriate public health response to potential biological or chemical terrorism events, and/or other such incidents posing a significant public health threat. Therefore, the Department proposes the addition of a new Section 55-2.13 for the specialty of "critical agents testing" which sets forth minimum standards for: laboratory director and testing personnel qualifications; use of approved methods for environmental sample collection and decontamination; record keeping systems to track the location of confirmed positive samples and isolated agents; sample chain-of-custody protocols; test result reporting procedures, including appropriate notification of the Department; client result reports content; sample and/or derivative referral protocols; and proficiency testing.

The proposal's definition of "critical agents" is largely based on the federal Centers for Disease Control and Prevention (CDC)'s criteria for biological and chemical agents of significant public health or national security risk. However, the rule not only encompasses agents categorized by the CDC as critical agents, but also agents that the Commissioner of Health has determined may require special action to protect the public health because they are easily disseminated, could cause high to moderate morbidity and/or mortality and can have a significant public health impact. The proposal's consistency with the federal criteria will promote communication among responsible agencies and enhance coordinated response at all levels, while permitting the Commissioner to react swiftly to local conditions and preparedness needs.

Due to the increased complexity and special issues presented by critical agent testing, this regulation establishes new requirements in addition to expanding several minimum standards now in place for environmental laboratories. However, the decision to engage in critical agent testing is strictly voluntary, and a laboratory needs to comply with the new and expanded requisites only if it applies for the specialty.

The educational requirements for technical directors in microbiology have been expanded beyond those required for sewage and water treatment plant operation to include post-doctoral, master's and/or bachelor's degree credentials. The proposed amendment recognizes the expertise resident in clinical laboratories, and would allow clinical laboratory directors certified in clinical microbiology to oversee environmental critical agent testing for microbiological organisms, provided the facility is dually certified as an environmental laboratory with an approved specialty of "critical agent testing" pursuant to Subpart 55-2. Minimum qualifications for analysts performing microbiological critical agent testing in environmental samples are also set forth at the level of an associate's degree. The Department believes this degree or its equivalent is a necessary requisite because of the higher level of knowledge, expertise and experience required to handle critical agents safely, and follow the attendant complex testing, reporting and security protocols. The setting of minimum educational and experience qualifications for critical agent analysts is consistent with the Department's approach to certifying environmental laboratories in the Contract Laboratory Protocol (CLP) tier. CLP laboratories must demonstrate capability to adhere to stringent testing protocols and to issue reports of a content and organization able to withstand a high level of scrutiny by

scientific and legal authorities. The analyst qualifications set forth in this proposal are also consistent with those for clinical testing personnel performing high complexity testing specified in the federal Clinical Laboratory Improvement Amendment of 1988 (CLIA). To preclude displacement of any individuals currently employed due to the new minimum qualifications, the proposed rule contains a grandfather clause allowing analysts with three years' experience conducting similar analyses to qualify for critical agent testing within his or her current employment setting.

In addition to establishing personnel qualifications for environmental laboratory directors and testing personnel, the proposed amendment protects the public and ensures high quality environmental testing for biological and chemical critical agents by requiring laboratories to: use approved methods for sample collection, handling and decontamination; limit access to samples and sample derivatives, such as isolated organisms; and develop and maintain record keeping systems to track the location of samples and isolated agents. The proposed regulation also requires laboratory employees to be trained in hazardous materials handling, sample collection, packaging, decontamination, transport, disposal and chain-of-custody protocols. Furthermore, the regulation requires environmental laboratory director(s) to develop sample acceptability criteria to protect the health, safety and welfare of laboratory personnel, sample collectors and the public, and to make such criteria available to clients upon request. Such precautionary measures to be taken at the pre- and post-analytic stages are designed to reduce, to the extent feasible, submission of samples that may pose a danger to transporters and to recipient laboratory personnel.

The proposed regulation requires laboratories to employ facilities and practices for bio-safety and chemical safety as appropriate for the critical agent(s) tested, to protect the public health, safety and welfare and prevent the use of ineffective procedures that could fail to confine dangerous agents or even promote their further dissemination. Additionally, the rule effectively restricts the often complex and potentially dangerous procedures for confirmatory testing and further characterization of an agent to appropriately equipped sites.

The rule also provides for restricting the reporting of analytical results should the Department determine that limitation on report distribution, language or content is necessary to preclude dissemination of potentially misleading information, particularly for unconfirmed or preliminary results. Furthermore, the regulation requires laboratories to notify the Department of any analytical finding indicating the presence of a critical agent. This requirement will promote clear communication lines of test results for various agents, and permit the Department to make determinations regarding the need for supplemental or confirmatory testing, as well as assess the public health threat and need for further governmental intervention.

The sensitive nature of critical agent testing requires environmental laboratories to establish procedures to keep track of environmental samples and their derivatives following testing and characterization, ensure continued proper handling of samples and any derived agents, and limit inappropriate access by laboratory personnel and the public. The proposed amendment establishes requirements for a tracking and inventory control system to record and identify the exact location and disposition of environmental samples and derivatives that test positive for a critical agent. The required retention period of at least ten years for access records and analysis records is consistent with the ten-year requirement for drinking water analysis records currently in place. Samples and their derivatives, access records and records of the analyses which are needed for potential civil or criminal actions must be retained in a secure manner until the statute of limitations for bringing a civil or criminal proceeding has expired and such items are no longer needed as evidence in any pending legal matter. However, it is anticipated that in most instances where such retention is required, the Department or a law enforcement agency will assume responsibility for the sample and any derivatives. The rule's enhanced record keeping requirements will also ensure the availability of records pertaining to positive samples until no longer needed for evidence in pending legal matters or by law enforcement officials, and provide grounds for admissibility of test results by establishing a chain-of-custody documentation requirement for testing initiated by law enforcement officials.

Laboratories applying for approval in the specialty of critical agent testing will be required to submit their policies and procedures to the Department for review and approval to ensure adherence to approved methods. The amendment also details criteria for scoring of proficiency testing results for environmental bacteriologic analytes, and excludes from the proposed requirements microbiological methods for detecting and monitoring for the common form of *E. coli* in potable and nonpotable waters, for which the Department already offers certification.

Costs:

Costs to Private Regulated Parties:

The costs of compliance will vary significantly, primarily by a laboratory's existing biosafety level (*e.g.*, BSL-2 or BSL-3) and whether it meets U.S. Centers for Disease Control and Prevention (CDC) safety and security requisites for handling the particular critical agent(s) and specimen type(s) it proposes to test. A laboratory already meeting CDC's safety and security standards is expected to incur no new costs. On the other hand, a facility minimally equipped for handling infectious agents – because it limits testing to basic microbiology testing to monitor drinking water, for instance – may accrue extensive renovation and/or construction costs.

In the three months since the regulation's initial filing, thirty facilities requested application information. However, only two environmental laboratories and four clinical laboratories submitted applications and all six applicants reported needing only minor modifications to existing facilities to comply with the proposed requisites.

Facilities which do not comply with these requirements currently may incur the following compliance costs: costs for purchase and installation of a state-of-the-art biological safety cabinet; costs for establishing negative air pressure conditions and adequate air filtration with space renovation or new construction; and costs for security systems, such as installation of card-key devices, and/or locks on entrances to storage and work areas. The Department expects that commercial laboratories voluntarily incurring costs by electing to establish critical agent testing capacity will be able to offset such costs with income from fee-for-service and contractual charges imposed on clients.

According to manufacturers' estimates, costs for purchase and installation of a biological safety cabinet to meet minimal BSL-2 standards range from \$6,275 to \$11,365. Upgrading existing standard microbiology work-space to BSL-3 would require extensive modifications to usable space and air handling and filtration systems, and would be expected to result in costs comparable to new construction. According to vendors of modular construction, who gave estimates to public health officials in NYS and other states, costs for a 600-square foot BSL-3 building range from \$240,000 to \$500,000. Given the Department's experience thus far, it is unlikely that any commercial entity will choose to develop new BSL-3 capacity.

Relatively minor expenditures would be necessary for supplies related to sample collection, including personal protection gear, and secure storage of samples with presumptive or confirmed critical agent findings. Laboratory supply catalogues indicate that the two plastic zipper-lock bags per sample would cost less than \$1.00; a box of 100 disposable gloves costs approximately \$6.00; and a lockable refrigerator-freezer costs \$500. Costs to equip one individual sample collector or analyst with requisite personal protective equipment are estimated at a minimum of \$10 for one set of disposable outerwear comprised of gown, shoe covers and gloves, to a maximum of \$500 for a rechargeable self-contained breathing apparatus.

Costs related to security systems vary greatly, depending on the sophistication of the system (*i.e.*, electronic or manual), and costs of maintenance and service contracts. According to estimates given by two manufacturers of card-key systems, one portal with card-key entry would cost \$5,000. One manufacturer of video surveillance equipment estimated that a laboratory installing a sixteen-camera system would incur costs of \$15,000. It is not possible to estimate operating and maintenance of security systems, since service contracts would vary according to the size of the system. Since no express requirements are in place for security equipment, a laboratory may control access to certain areas with stringent administrative controls, including sign-in logs and identification badges, at lower costs than a mechanical or electronic system.

Clinical laboratories seeking certification as environmental laboratories, as well as previously unregulated commercial concerns offering environmental testing (*e.g.*, for anthrax on surfaces), will need to pay approval fees equivalent to first-year Department Environmental Laboratory Approval Program (ELAP) fees, estimated at \$550. Clinical laboratories and previously unregulated facilities may also incur compliance costs similar to those for existing environmental laboratories described above. Based on a written survey of clinical laboratories currently licensed in the category of microbiology pursuant to Public Health Law Article 5, Title V, the Department estimates that 73 percent of these laboratories have existing capability for critical agent testing and would not need to expend significant resources for biosafety facilities unless they need to purchase personal protective equipment and related items to comply with the more stringent safety practices for critical agents testing.

Most clinical laboratories interested in testing environmental samples for microbiological critical agents already employ laboratory directors and testing personnel who qualify under the proposed educational and experi-

ential criteria. The majority of environmental laboratories certified to perform microbiology testing limit that testing to low biosafety level work (e.g., potable water testing), and generally do not employ personnel meeting the proposed requirements. While these sites would not incur additional personnel costs for analysts because of the proposal's grandfathering provision, requirements for a technical director would entail some added costs. According to a survey published in 2001 by the American Council of Independent Laboratories, the mean hiring rate for scientists with a bachelor's degree and one to three years' experience is \$38,900. A person with these credentials would meet the proposal's minimum requirements for a technical director of a laboratory performing anthrax testing on environmental samples. Since the regulation was first filed, the Department has found that none of the environmental laboratories currently limiting their services to monitoring of sewage and water treatment facilities are interested in performing critical agent testing.

Laboratories applying for approval under these regulations will incur costs of approximately \$3.00 to \$20.00 to copy to the Department all policies and procedures relevant to critical agent testing. On occasion, a laboratory may incur costs for shipping presumptively positive samples to the Wadsworth Center or another designated facility for further testing. The cost of shipping an isolate of a biohazardous agent (e.g., a culture tube) by common carrier is estimated at between \$25 and \$50, depending on the need for keeping the agent's temperature constant with ice packs, for example. As an alternative, law enforcement officials, laboratory employees or couriers may be used for this purpose at an anticipated maximum cost of \$350, assuming an 800-mile round trip and a \$25 hourly personnel wage.

Costs for Implementation and Administration of the Rule:

Costs to State Government:

New York State, with the exception of the Department as stated below, would incur costs to the same extent as private regulated parties should any State-operated environmental laboratories, such as those operated by the Department of Environmental Conservation, take on critical agent testing.

Costs to the Department:

The Department will incur costs for development and implementation of a proficiency-testing program for one or more analytes in the critical agent specialty, and for travel to conduct onsite assessments of applicable laboratory facilities. Since existing staff will coordinate the initial development and implementation, as well as periodic mailings, of any proficiency testing designed to challenge laboratories engaged in critical agent testing, the Department anticipates no new costs for personnel salaries and overhead. Costs of one proficiency-testing event challenging 25 laboratories using a surrogate organism are in the range of \$75-\$1200 for materials (depending on the organism and source); \$325 for mailing containers; \$250 for postage; and approximately \$100 for related paperwork. However, costs related to proficiency testing, as well as travel expenses for onsite assessments, would be recovered through approval fees charged to the laboratories.

Costs to Local Government:

Local government would incur no new costs, except that local government-operated facilities providing regulated services under this proposal would incur the costs described for private regulated parties.

Paperwork:

The only new paperwork requirements imposed by this regulation are: (1) development and submission of relevant policies and procedures; (2) submission of a request for approval to perform critical agent testing; (3) development of chain-of-custody policies and procedures; (4) development of a tracking system for specimens; and (5) reporting of presumptively positive results to the Department.

Local Government Mandates:

The proposed regulations impose no new mandates on any county, city, town or village government; or school, fire or other special district, unless a county, city, town or village government; or school, fire or other special district operates an environmental laboratory, and, therefore, is subject to these regulations to the same extent as a private regulated party.

Duplication:

These rules do not duplicate any other law, rule or regulation, except that some terminology found in federal critical agent rules promulgated by the CDC has been used in this regulation to facilitate response coordination for domestic preparedness. Federal standards and recommendations for (bio) safety, sample collection, testing algorithms and reporting serve as the underpinnings of this rule, but are not duplicated therein.

This proposal is not duplicative of, but will harmonize with, anticipated Department of Environmental Conservation rules to address the treatment,

handling and disposal of waste resulting from critical agent incidents and response to such incidents.

Alternative Approaches:

The alternative to adopting the proposed amendments is to apply the Department's existing standards to critical agents testing. However, because of the special issues raised by critical agent testing the Department has determined that the alternative of applying existing minimal requirements to this area is totally unacceptable.

Federal Standards:

Since there is no federal certification program in place for environmental laboratories, these regulations do not duplicate any federal standards. To the extent that the CDC, the U.S. Environmental Protection Agency, or the federal Department of Transportation have promulgated standards affecting environmental laboratory testing for evaluation of adverse public health events, these regulations are consistent with, and complement, such standards.

Compliance Schedule:

Regulated parties which are adequately staffed and equipped to perform critical agent testing in a safe and reliable manner should be able to comply with all aspects these regulations as of their effective date, upon publication of a Notice of Emergency Adoption in the *New York State Register*, except for obtaining the approval of the Department. The Department is prepared to approve laboratories for critical agent testing for select analytes, such as anthrax, on an expedited basis. Thus, it is expected that laboratories that are fully prepared to undertake such testing may be approved within days of publication of this regulation. Laboratories that are not ready and able to meet the requirements of this regulation should not be engaged in such testing.

Regulatory Flexibility Analysis

Effect of Rule:

The Department's Environmental Laboratory Approval Program (ELAP) currently certifies 779 laboratories. Of these, 227 are located out-of-State and do not qualify as small businesses. Of the remaining 552 laboratories, 275 are governmental laboratories, and 277 are commercial entities, of which 170 are estimated to be small businesses. For the most part, governmental laboratories, which are primarily drinking water and sewage treatment plant laboratories operated by counties, municipalities and townships, are not expected to apply for the environmental testing specialty of critical agents, for which this amendment sets standards.

Of the approximately 900 facilities holding a New York State clinical laboratory permit, 135 qualify as small businesses, and 50 are owned and operated by local governments.

Compliance Requirements:

This proposed rule establishes minimum standards necessary to protect the public and laboratory employees from the health and safety risks inherent in critical agent testing. Due to the increased complexity and special issues presented by critical agent testing, this regulation establishes new requirements in addition to expanding several minimum standards now in place for environmental laboratories. However, the decision to engage in critical agent testing is strictly voluntary, and small businesses and local governments need to comply with the new and expanded requirements only if they operate environmental laboratories that apply for the specialty.

Proposed Section 55-2.13 sets forth minimum standards for: laboratory director and testing personnel qualifications; use of approved methods for sample collection and decontamination; record keeping systems to track the location of confirmed positive samples and isolated agents; sample chain-of-custody protocols; test result reporting procedures, including appropriate notification of the Department; client result reports content; sample and/or derivative referral protocols; and proficiency testing.

This regulation's requirement that laboratories retain records of sample tracking and access for ten years is consistent with the ten-year retention requirement for drinking water analysis records already in place. The Department has contacted numerous laboratories representing various types of ELAP-approved facilities, including commercial, industrial and government laboratories, and has determined that many of these laboratories, particularly those with electronic recordkeeping systems, are already retaining records for periods well in excess of five years.

Laboratories applying for approval in the specialty of critical agent testing will be required to submit their policies and procedures for Department review and approval to ensure adherence to approved methods and the requirements of this new section. Since such information, often in the format of manuals, is a universal component of all laboratories' operation, this should not be a burdensome requirement to regulated parties.

Professional Services:

No need for additional professional services is anticipated.

Compliance Costs:

It is not expected that the cost of compliance for small businesses and local governments will be different than for other regulated parties. With the possible exception of environmental testing conducted for public health purposes by county- or city-operated laboratories, the Department expects that costs could be offset by income from per-test or per-site charges imposed by a laboratory on its clients. The costs of compliance will vary significantly, primarily by a laboratory's existing biosafety level (e.g., BSL-2 or BSL-3) and whether it meets U.S. Centers for Disease Control and Prevention (CDC) safety and security requisites for handling the particular critical agent(s) and specimen type(s) it proposes to test. A laboratory already meeting CDC's safety and security standards is expected to incur no new costs. On the other hand, a small business or government-operated facility minimally equipped for handling infectious agents – because it limits testing to basic microbiology testing to monitor drinking water, for instance – may accrue extensive renovation and/or construction costs in the unlikely event it wished to take on critical agent testing.

In the three months since the regulation's initial filing, thirty facilities requested application information. However, only two environmental laboratories and four clinical laboratories submitted applications. A local government operates one applicant facility, and the Department believes that one of the three in-State applicants qualifies as a small business. All six applicants reported needing only minor modifications to existing facilities to comply with the proposed requisites.

Facilities which do not comply with these requirements currently may incur the following compliance costs: costs for purchase and installation of a state-of-the-art biological safety cabinet; costs for establishing negative air pressure conditions and adequate air filtration with space renovation or new construction; and costs for security systems, such as installation of card-key devices, and/or locks on entrances to storage and work areas.

According to manufacturers' estimates, costs for purchase and installation of a biological safety cabinet to meet minimal BSL-2 standards range from \$6,275 to \$11,365. Upgrading existing standard microbiology workspace to BSL-3 would require extensive modifications to usable space and air handling and filtration systems, and would be expected to result in costs comparable to new construction. According to vendors of modular construction, who gave estimates to public health officials in NYS and other states, costs for a 600-square foot BSL-3 building range from \$240,000 to \$500,000. Given the Department's experience thus far, it is unlikely that any commercial entity will choose to develop new BSL-3 capacity.

Relatively minor expenditures would be necessary for supplies related to sample collection, including personal protection gear, and secure storage of samples with presumptive or confirmed critical agent findings. Laboratory supply catalogues indicate that the two plastic zipper-lock bags per sample would cost less than \$1.00; a box of 100 disposable gloves costs approximately \$6.00; and a lockable refrigerator-freezer costs \$500. Costs to equip one individual sample collector or analyst with requisite personal protective equipment are estimated at a minimum of \$10 for one set of disposable outerwear comprised of gown, shoe covers and gloves, to a maximum of \$500 for a rechargeable self-contained breathing apparatus.

Costs related to security systems vary greatly, depending on the sophistication of the system (i.e., electronic or manual), and costs of maintenance and service contracts. According to estimates given by two manufacturers of card-key systems, one portal with card-key entry would cost \$5,000. One manufacturer of video surveillance equipment estimated that a laboratory installing a sixteen-camera system would incur costs of \$15,000. It is not possible to estimate operating and maintenance of security systems, since service contracts would vary according to the size of the system. Since no express requirements are in place for security equipment, a laboratory may control access to certain areas with stringent administrative controls, including sign-in logs and identification badges, at lower costs than a mechanical or electronic system.

Clinical laboratories seeking certification as environmental laboratories, as well as previously unregulated commercial concerns offering environmental testing (e.g., for anthrax on surfaces), will need to pay approval fees equivalent to first-year Department Environmental Laboratory Approval Program (ELAP) fees, estimated at \$550. Clinical laboratories and previously unregulated facilities may also incur compliance costs similar to those for existing environmental laboratories described above. Based on a written survey of clinical laboratories currently licensed in the category of microbiology pursuant to Public Health Law Article 5, Title V, the Department estimates that 73 percent of these laboratories have existing capability for critical agent testing and would not need to expend signifi-

cant resources for biosafety facilities unless they need to purchase personal protective equipment and related items to comply with the more stringent safety practices for critical agents testing.

Most clinical laboratories interested in testing environmental samples for microbiological critical agents already employ laboratory directors and testing personnel who qualify under the proposed educational and experiential criteria. The majority of environmental laboratories certified to perform microbiology testing limit that testing to low biosafety level work (e.g., potable water testing), and generally do not employ personnel meeting the proposed requirements. While these sites would not incur additional personnel costs for analysts because of the proposal's grandfathering provision, requirements for a technical director would entail some added costs. According to a survey published in 2001 by the American Council of Independent Laboratories, the mean hiring rate for scientists with a bachelor's degree and one to three years' experience is \$38,900. A person with these credentials would meet the proposal's minimum requirements for a technical director of a laboratory performing anthrax testing on environmental samples. Since the regulation was first filed, the Department has found that none of the environmental laboratories currently limiting their services to monitoring of sewage and water treatment facilities are interested in performing critical agent testing.

Laboratories applying for approval under these regulations will incur costs of approximately \$3.00 to \$20.00 to copy to the Department all policies and procedures relevant to critical agent testing. On occasion, a laboratory may incur costs for shipping presumptively positive samples to the Wadsworth Center or another designated facility for further testing. The cost of shipping an isolate of a biohazardous agent (e.g., a culture tube) by common carrier is estimated at between \$25 and \$50, depending on the need for keeping the agent's temperature constant with ice packs, for example. As an alternative, law enforcement officials, laboratory employees or couriers may be used for this purpose at an anticipated maximum cost of \$350, assuming an 800-mile round trip and a \$25 hourly personnel wage.

Economic and Technological Feasibility:

The proposed regulation would present no economic or technological difficulties to small businesses and local governments that are not already presented by undertaking these activities in a safe and reliable manner. Appropriate equipment and supplies to perform critical agent testing in a safe and reliable manner are currently available should a laboratory choose to begin testing in this specialty. The regulation does not require any laboratory, regardless of ownership type, to undertake testing for critical agents.

Minimizing Adverse Impact:

This regulation imposes requirements only on those laboratories which choose to undertake critical agent testing. Standards have been established at the absolute minimum necessary for safe and reliable testing. The department did not consider different compliance requirements or exceptions for small businesses or local governments because of the importance of this type of testing to public health, safety and welfare.

Small Business and Local Government Participation:

In the development of these regulations, the Department had informal discussions with environmental and clinical laboratories concerning their interest in and capacity to perform critical agent testing. Some of these discussions occurred with small businesses and local governments. The Department believes that the urgent need for public health and safety oversight in the area of critical agent testing obviates the need for extensive solicitation of regulated party input at this time.

Rural Area Flexibility Analysis

Effect of Rule:

The Department's Environmental Laboratory Approval Program (ELAP) currently certifies 779 environmental laboratories. Of these, 227 are located out-of-State and are not considered to be in rural areas. Of the remaining 552 laboratories, 374 are located in rural areas. Of these 374 rural facilities, 198 currently hold certifications in bacteriology, including 56 laboratories operated by counties, municipalities and townships local governments that only conduct procedures to monitor water treatment. For the most part, environmental laboratories affiliated with drinking water or sewage treatment are not expected to apply for the environmental testing specialty of critical agents, for which this amendment sets standards.

Of the approximately 900 facilities holding a New York State clinical laboratory permit, only 118 are located in areas designated as rural. Of these, only 85 currently hold permits in bacteriology general or virology general and would be possible candidates for testing critical agents.

Compliance Requirements:

This proposed rule establishes minimum standards necessary to protect the public and laboratory employees from the health and safety risks inherent in critical agent testing. Due to the increased complexity and special issues presented by critical agent testing, this regulation establishes new requirements in addition to expanding several minimum standards now in place for environmental laboratories. However, the decision to engage in critical agent testing is strictly voluntary, and a laboratory needs to comply with the new and expanded requisites only if it applies for the specialty.

Proposed Section 55-2.13 sets forth minimum standards for: laboratory director and testing personnel qualifications; use of approved methods for sample collection and decontamination; recordkeeping systems to track the location of confirmed positive samples and isolated agents; sample chain-of-custody protocols; test result reporting procedures, including appropriate notification of the Department; client result reports content; sample and/or derivative referral protocols; and proficiency testing.

This regulation's requirement that laboratories retain records of sample tracking and access for ten years is consistent with the ten-year retention requirement for drinking water analysis records already in place. The Department has contacted numerous laboratories representing various types of ELAP-approved facilities, including commercial, industrial and government laboratories, and has determined that many of these laboratories, particularly those with electronic recordkeeping systems, are already retaining records for periods well in excess of five years.

Laboratories applying for approval in the specialty of critical agent testing will be required to submit their policies and procedures for Department review and approval to ensure adherence to approved methods and the requirements of this new section. Since such information, often in the format of manuals, is a universal component of all laboratories' operation, this should not be a burdensome requirement to regulated parties.

Professional Services:

No need for additional professional services is anticipated.

Compliance Costs:

It is not expected that the cost of compliance for applicant laboratories located in rural areas will be different than for other regulated parties. With the possible exception of environmental testing for public health purposes by county- or city-operated laboratories, the Department expects that costs could be offset by income from per-test or per-site charges imposed by a rural laboratory on its clients. The costs of compliance will vary significantly, primarily by a laboratory's existing biosafety level (*e.g.*, BSL-2 or BSL-3) and whether it meets U.S. Centers for Disease Control and Prevention (CDC) safety and security requisites for handling the particular critical agent(s) and specimen type(s) it proposes to test. A laboratory already meeting CDC's safety and security standards is expected to incur no new costs. On the other hand, any facility minimally equipped for handling infectious agents – because it limits testing to basic microbiology testing to monitor drinking water, for instance – may accrue extensive renovation and/or construction costs in the unlikely event it wished to take on critical agent testing.

In the three months since the regulation's initial filing, thirty facilities requested application information. However, only two environmental laboratories and four clinical laboratories submitted applications. Two of the three in-State applicants are located in a county having townships with population densities of 150 persons or less per square mile. All six applicants reported needing only minor modifications to existing facilities to comply with the proposed requisites.

Facilities which do not comply with these requirements currently may incur the following compliance costs: costs for purchase and installation of a state-of-the-art biological safety cabinet; costs for establishing negative air pressure conditions and adequate air filtration with space renovation or new construction; and costs for security systems, such as installation of card-key devices, and/or locks on entrances to storage and work areas.

According to manufacturers' estimates, costs for purchase and installation of a biological safety cabinet to meet minimal BSL-2 standards range from \$6,275 to \$11,365. Upgrading existing standard microbiology workspace to BSL-3 would require extensive modifications to usable space and air handling and filtration systems, and would be expected to result in costs comparable to new construction. According to vendors of modular construction, who gave estimates to public health officials in NYS and other states, costs for a 600-square foot BSL-3 building range from \$240,000 to \$500,000. Given the Department's experience thus far, it is unlikely that any commercial entity will choose to develop new BSL-3 capacity.

Relatively minor expenditures would be necessary for supplies related to sample collection, including personal protection gear, and secure storage of samples with presumptive or confirmed critical agent findings.

Laboratory supply catalogues indicate that the two plastic zipper-lock bags per sample would cost less than \$1.00; a box of 100 disposable gloves costs approximately \$6.00; and a lockable refrigerator-freezer costs \$500. Costs to equip one individual sample collector or analyst with requisite personal protective equipment are estimated at a minimum of \$10 for one set of disposable outerwear comprised of gown, shoe covers and gloves, to a maximum of \$500 for a rechargeable self-contained breathing apparatus.

Costs related to security systems vary greatly, depending on the sophistication of the system (*i.e.*, electronic or manual), and costs of maintenance and service contracts. According to estimates given by two manufacturers of card-key systems, one portal with card-key entry would cost \$5,000. One manufacturer of video surveillance equipment estimated that a laboratory installing a sixteen-camera system would incur costs of \$15,000. It is not possible to estimate operating and maintenance of security systems, since service contracts would vary according to the size of the system. Since no express requirements are in place for security equipment, a laboratory may control access to certain areas with stringent administrative controls, including sign-in logs and identification badges, at lower costs than a mechanical or electronic system.

Clinical laboratories seeking certification as environmental laboratories, as well as previously unregulated commercial concerns offering environmental testing (*e.g.*, for anthrax on surfaces), will need to pay approval fees equivalent to first-year Department Environmental Laboratory Approval Program (ELAP) fees, estimated at \$550. Clinical laboratories and previously unregulated facilities may also incur compliance costs similar to those for existing environmental laboratories described above. Based on a written survey of clinical laboratories currently licensed in the category of microbiology pursuant to Public Health Law Article 5, Title V, the Department estimates that 73 percent of these laboratories have existing capability for critical agent testing and would not need to expend significant resources for biosafety facilities unless they need to purchase personal protective equipment and related items to comply with the more stringent safety practices for critical agents testing.

Most clinical laboratories interested in testing environmental samples for microbiological critical agents already employ laboratory directors and testing personnel who qualify under the proposed educational and experiential criteria. The majority of environmental laboratories certified to perform microbiology testing limit that testing to low biosafety level work (*e.g.*, potable water testing), and generally do not employ personnel meeting the proposed requirements. While these sites would not incur additional personnel costs for analysts because of the proposal's grandfathering provision, requirements for a technical director would entail some added costs. According to a survey published in 2001 by the American Council of Independent Laboratories, the mean hiring rate for scientists with a bachelor's degree and one to three years' experience is \$38,900. A person with these credentials would meet the proposal's minimum requirements for a technical director of a laboratory performing anthrax testing on environmental samples. Since the regulation was first filed, the Department has found that none of the environmental laboratories currently limiting their services to monitoring of sewage and water treatment facilities are interested in performing critical agent testing.

Rural laboratories applying for approval under these regulations will incur costs of approximately \$3.00 to \$20.00 to copy to the Department all policies and procedures relevant to critical agent testing. On occasion, a laboratory may incur costs for shipping presumptively positive samples to the Wadsworth Center or another designated facility for further testing. The cost of shipping an isolate of a biohazardous agent (*e.g.*, a culture tube) by common carrier is estimated at between \$25 and \$50, depending on the need for keeping the agent's temperature constant with ice packs, for example. As an alternative, law enforcement officials, laboratory employees or couriers may be used for this purpose at an anticipated maximum cost of \$350, assuming an 800-mile round trip and a \$25 hourly personnel wage.

Economic and Technological Feasibility:

The proposed regulation would present no economic or technological difficulties to facilities located in rural areas that are not already presented by undertaking these activities in a safe and reliable manner. Appropriate equipment and supplies to perform critical agent testing in a safe and reliable manner are currently available should a laboratory choose to begin testing in this specialty. The regulation does not require any laboratory, regardless of location, to undertake testing for critical agents.

Minimizing Adverse Impact:

This regulation only imposes requirements on laboratories choosing to undertake critical agent testing. Standards have been established at the absolute minimum necessary for safe and reliable testing. The department

did not consider different compliance requirements or exceptions for facilities located in rural areas because of the importance of this type of testing to public health, safety and welfare.

Participation by Parties in Rural Areas:

In the development of these regulations, the Department had informal discussions with environmental and clinical laboratories concerning their interest in and capacity to perform critical agent testing. Few, if any, rural laboratories chose to participate in these discussions. The Department believes that the urgent need for public health and safety oversight in the area of critical agent testing obviates the need for extensive solicitation of regulated party input at this time.

Job Impact Statement

A Job Impact Statement is not required because it is apparent, from the nature and purpose of the proposed rule, that it will not have a substantial adverse impact on jobs and employment opportunities. The revision proposes minimum standards for a recently recognized specialty of environmental laboratory testing, *i.e.*, critical agent testing. No requirement is imposed that a laboratory be certified in this specialty, and the Department expects that, of the small number of laboratories anticipated to seek certification in critical agent testing, few, if any, will need to take on additional capacity in the form of hiring new personnel. Therefore, this proposed amendment has no implications for job opportunities.

Sheet and the accompanying Form RI-1 have been revised. The M1 and M1-A are no longer used.

Text of proposed rule and any required statements and analyses may be obtained from: Diane Ridley Gatewood, Department of Law, Investment Protection Bureau, 120 Broadway, 23rd Fl., New York, NY 10271, (212) 416-8564, e-mail: diane.gatewood@oag.state.ny.us

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 45 days after publication of this notice.

This action was not under consideration at the time this agency's regulatory agenda was submitted.

Consensus Rule Making Determination

The forms and instructions in the regulations reflect changes that explain the general policies, procedures and statutory fee increases. The amendments to the regulations are considered technical and provide uniform standards currently in force by the securities industry and among other states. The new rules are not considered to impose any new standards, adverse economic burdens or record keeping requirements on small businesses, rural communities or local governments.

Insurance Department

ERRATUM

A Notice of Proposed Rule Making, I.D. No. INS-50-03-00006-P pertaining to Comprehensive Motor Vehicle Insurance Repairs Act, published in the December 17, 2003 issue of the *State Register* was erroneously labeled as an Emergency Rule Making. The notice should have been labeled a Proposed Rule Making.

The Department of State apologizes for any confusion this may have caused.

Department of Law

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Broker-Dealer and Salesperson Registration for Securities and Real Estate Securities

I.D. No. LAW-52-03-00017-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: This is a consensus rule making to amend Part 10 of Title 13 NYCRR.

Statutory authority: General Business Law, art. 23-A, sections 352-e and 359-e; and State Constitution, art. VII

Subject: Broker-dealer and salesperson registration for securities and real estate securities.

Purpose: To revise the fees and registration forms.

Substance of proposed rule: Section 10.1, registration of securities broker-dealers, issuers and sales people, is redrafted to conform to changes created by the National Securities Market Improvement Act of 1996 ("SMIA"). Fee changes were created by the state legislature in 2003 and are indicated in sections 10.1(e), 10.2(f), 10.5, 10.6 and 10.8 for registration filings. All forms have been revised to reflect the fee increases.

Technical changes in sections 10.2 through 10.9 adopt registration forms consistent with industry and other state standards. The new forms are the BD, BDW, U4 and U5. The revised forms are the M-2, M-3, M-4, M-10, M-11, NF and the Form 99. The 359-f(2) Exemption Instruction

Office of Mental Retardation and Developmental Disabilities

EMERGENCY RULE MAKING

Health Care Decisions Act for Persons with Mental Retardation

I.D. No. MRD-52-03-00003-E

Filing No. 1399

Filing date: Dec. 12, 2003

Effective date: Dec. 12, 2003

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Amendment of section 633.10 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 13.07 and 13.09; and Surrogate's Court Procedure Act, section 1750-b

Finding of necessity for emergency rule: Preservation of public health.

Specific reasons underlying the finding of necessity: The Health Care Decisions Act for persons with mental retardation establishes a specific process that can only occur "in accordance with regulations" promulgated by the Commissioner of OMRDD. These regulations are necessary to fully implement the safeguarding processes of the new law to ensure that in accordance with the new law, appropriate health care decisions can be made for persons with mental retardation who are terminally ill or have other extremely serious medical conditions.

Subject: Health Care Decisions Act for persons with mental retardation.

Purpose: To establish specific processes which are made subject to regulations of the Commissioner of OMRDD.

Text of emergency rule: ● A new paragraph (7) is added to 14NYCRR 633.10(a) to read as follows:

(7) Provisions relevant to implementation of the Health Care Decisions Act for Persons with Mental Retardation

(i) Parties involved in decisions to withdraw or withhold life-sustaining treatment.

(a) Pursuant to § 1750-b of the surrogate's court procedure act (SCPA), in addition to parties specified by the statute, parties may seek the approval of the commissioner to be authorized to perform the following duties:

(1) serve as the attending physician to confirm, with a reasonable degree of medical certainty, that the person with mental retardation lacks capacity to make health care decisions (if the consultant lacks specified additional qualifications); or

(2) serve as a consulting physician or psychologist regarding confirmation, with a reasonable degree of medical certainty, that the person with mental retardation lacks capacity to make health care deci-

sions (if the attending physician lacks specified additional qualifications); or

(3) serve as the attending physician to determine that, to a reasonable degree of medical certainty, the person with mental retardation would suffer immediate and severe injury from notification regarding implementation of a decision to withdraw or withhold life-sustaining treatment from such person (if the consultant lacks specified additional qualifications); or

(4) serve as a consulting physician or psychologist regarding a determination that, to a reasonable degree of medical certainty, the person with mental retardation would suffer immediate and severe injury from notification regarding implementation of a decision to withdraw or withhold life-sustaining treatment from such person (if the attending physician lacks specified additional qualifications).

(b) In order to obtain the approval of the commissioner, physicians and licensed psychologists shall either possess specialized training in the provision of services to persons with mental retardation or have at least three years experience in the provision of such services, and shall satisfy any other criteria established by the commissioner.

(ii) Upon receipt of notification of a decision to withdraw or withhold life-sustaining treatment in accordance with § 1750-b(4)(e)(ii) of the surrogate's court procedure act (SCPA), the chief executive officer (see § 633.99) of the agency (see § 633.99) shall confirm that the person's condition meets all of the criteria set forth in SCPA § 1750-b(4)(a) and (b). In the event that the chief executive officer is not convinced that all of the necessary criteria are met, he or she may object to the decision and/or initiate a special proceeding to resolve such dispute in accordance with SCPA § 1750-b(5) and (6).

(iii) For purposes of communicating the notification required by § 1750-b(4)(e)(iii) of the surrogate's court procedure act (SCPA), the commissioner (see § 633.99) designates the directors of each of the DDSOs (see § 633.99) to receive such notification from an attending physician. In any such case, the DDSO director shall confirm that the person's condition meets all of the criteria set forth in SCPA § 1750-b(4)(a) and (b). In the event that the director is not convinced that all of the necessary criteria are met, he or she may object to the decision and/or initiate a special proceeding to resolve such dispute in accordance with SCPA § 1750-b(5) and (6).

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire March 10, 2004.

Text of emergency rule and any required statements and analyses may be obtained from: Barbara Brundage, Acting Director, Regulatory Affairs Unit, Office of Mental Retardation and Developmental Disabilities, 44 Holland Ave., Albany, NY 12229, (518) 474-1830; e-mail: barbara.brundage@omr.state.ny.us

Additional matter required by statute: Pursuant to the requirements of the State Environmental Quality Review Act (SEQRA) and in accordance with 14 NYCRR Part 622, OMRDD has on file a negative declaration with respect to this action. Thus, consistent with the requirements of 6 NYCRR Part 617, OMRDD, as lead agency, has determined that the action described herein will not have a significant effect on the environment, and an environmental impact statement will not be prepared.

Regulatory Impact Statement

1. Statutory authority:

a. The New York State Office of Mental Retardation and Developmental Disabilities' (OMRDD) statutory responsibility to assure and encourage the development of programs and services in the area of care, treatment, rehabilitation, education and training of persons with mental retardation and developmental disabilities, as stated in the New York State Mental Hygiene Law Section 13.07.

b. OMRDD's authority to adopt rules and regulations necessary and proper to implement any matter under its jurisdiction as stated in the New York State Mental Hygiene Law Section 13.09.

c. OMRDD's authority under the New York State Surrogate's Court Procedure Act Section 1750-b to promulgate regulations to implement the statutory provisions.

2. Legislative objectives: These proposed amendments further the legislative objectives embodied in Section 1750-b of the New York State Surrogate's Court Procedure Act, which provide for regulations of the Commissioner of OMRDD as a prerequisite to implement specific aspects of safeguarding processes established by the law.

3. Needs and benefits: The newly enacted Health Care Decisions Act for Persons with Mental Retardation (Chapter 500 of the Laws of 2002),

which added a new § 1750-b to the Surrogate's Court Procedure Act, establishes procedures whereby health care decisions involving life-sustaining treatment may be made for persons with mental retardation by guardians appointed pursuant to Article 17-A of the Surrogate's Court Procedure Act.

The new law is intended to be applicable during a health care crisis so that appropriate health care decisions can be made to avoid needless pain and suffering.

Specific processes in the new law are explicitly made subject to regulations of the Commissioner of OMRDD. According to Chapter 500, OMRDD may promulgate regulations to establish a process for OMRDD approval of physicians and psychologists. Only OMRDD-approved clinicians and other clinicians meeting specifications in the statute can perform functions required by the law, such as serving as a consultant to confirm the person's lack of capacity to make health care decisions (if the attending physician is not an OMRDD-approved clinician or does not meet specifications). The law provides that in order for approval to be granted by OMRDD, physicians or psychologists must possess specialized training or three years experience in providing services to persons with mental retardation. The proposed regulations closely track the statutory language.

The regulations also include additional delineation of the responsibility of OMRDD and agencies operating OMRDD-certified residences when they receive notification of health care decisions that involve the withdrawal or withholding of life-sustaining treatment.

Similar regulations were previously adopted on an emergency basis. The regulations are necessary because without them, it may be difficult or impossible to implement the safeguarding provisions of the law in some situations. If the protections required by the law cannot be implemented because qualified physicians or psychologists are not available, desperate health care emergencies may continue to be unrelieved and pain and suffering may be needlessly prolonged.

The regulations are being adopted as an emergency rulemaking for the preservation of the public health. If OMRDD did not adopt these regulations as an emergency rule, there would be a period of time during which some physicians and psychologists would not be able to provide the services required by law to protect the person, and pain and suffering may be needlessly prolonged. It is therefore important to promulgate the new regulations on an emergency basis.

4. Costs:

a. Costs to the Agency and to the State and its local governments: There are no additional costs associated with this new regulation.

There will be no costs to local governments as a result of the proposed amendments. Local governments do not play a role in either implementation of the new regulation or the new law.

OMRDD will incur no additional costs associated with processing applications from physicians and psychologists and, from confirming that a person's condition meets the criteria of the law when notice is received of the intention to implement a decision to withdraw or withhold life-sustaining treatment. No additional personnel will be required to perform these minimal new functions.

b. Costs to private regulated parties: There are no initial capital investment costs nor initial non-capital expenses. There are no additional costs of any significance associated with implementation and continued compliance with the rule.

Physicians and psychologists who meet the qualifications will need to apply to OMRDD for approval. The time and paperwork involved in the application process is minimal.

In addition, residential agencies which receive notices pursuant to the law are required by the regulation to confirm that the person's condition meets all of the relevant criteria. Since notifications will occur only in rare circumstances, and the amount of time available for compliance is restricted (as implementation of the decision to withdraw life-sustaining treatment may occur 48 hours after notification), required compliance activities are expected to be minimal and are expected to be performed by existing personnel.

5. Local government mandates: There are no new requirements imposed by the rule on any county, city, town, village; or school, fire, or other special district.

6. Paperwork: Physicians and psychologists who meet the qualifications and seek OMRDD approval will need to provide documentation of their qualifications to OMRDD. Otherwise, no new paperwork is required of any party.

7. Duplication: The amendments do not duplicate any existing State or Federal requirements. However, the regulations reiterate some provisions

of § 1750-b of the Surrogate's Court Procedure Act, as necessary to provide a context for the regulatory concepts.

8. Alternatives: OMRDD had considered not filing regulations. However, OMRDD believes that it is crucial to take this step and to adopt the regulations on an emergency basis so as to continue to expand the pool of qualified physicians and psychologists that may be available to provide the services necessary to implement the new law and to provide guidance regarding the responsibility of residential providers who receive notification of decisions to withdraw or withhold life-sustaining treatment.

9. Federal standards: The amendments do not exceed any minimum standards of the federal government for the same or similar subject areas.

10. Compliance schedule: The emergency rule is adopted effective December 12, 2003. OMRDD intends to file the rule as a Notice of Proposed Rule Making in the future, pending approval of the proposal by the Governor's Office of Regulatory Reform, so that it can be adopted on a permanent basis within the time frames mandated by the State Administrative Procedure Act.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not being submitted because the amendments will not impose any adverse economic impact or significant reporting, recordkeeping or other compliance requirements on small businesses or local governments. This is because the amendments only establish the minimum regulations necessary to implement specific provisions of recently enacted Chapter 500 of the Laws of 2002, or section 1750-b of the Surrogate's Court Procedure Act. As discussed more thoroughly in the Regulatory Impact Statement, the process contemplated by the new law and these emergency regulations is so minimal, and is expected to be invoked so rarely, that it will not impose a burden on OMRDD or its regulated small business provider agencies. Neither the new law nor the regulations involve local government participation. Since the emergency regulations very closely track the language of this provision of recently enacted section 1750-b of the Surrogate's Court Procedure Act, any compliance activities associated with the rule will be the absolute minimum, consistent with the legislation.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not being submitted because the amendments will not impose any adverse economic impact or significant reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. This is because the amendments only establish the minimum regulations necessary to implement specific provisions of recently enacted Chapter 500 of the Laws of 2002, or section 1750-b of the Surrogate's Court Procedure Act. As discussed more thoroughly in the Regulatory Impact Statement, the process contemplated by the new law and these emergency regulations is so minimal, and is expected to be invoked so rarely, that it will not impose a burden on any party, public or private. It should be noted that clinicians wishing to participate in the process established by the law and these amendments do so voluntarily. Further, neither the law nor the regulations disadvantage any party to this process because of its geographic situation (rural or urban).

Job Impact Statement

A Job Impact Statement is not being submitted because it is evident from the subject matter of the amendments that the rule will have no impact on jobs or employment opportunities. This is because the amendments only establish the minimum regulations necessary to implement specific provisions of recently enacted Chapter 500 of the Laws of 2002, or section 1750-b of the Surrogate's Court Procedure Act. As discussed more thoroughly in the Regulatory Impact Statement, the process contemplated by the new law and these emergency regulations is so minimal, and is expected to be invoked so rarely, that it is reasonable to expect that it will not affect jobs or employment opportunities in New York State.

NOTICE OF ADOPTION

Rate Setting for Intermediate Care Facilities for Persons with Developmental Disabilities

I.D. No. MRD-43-03-00046-A

Filing No. 1401

Filing date: Dec. 16, 2003

Effective date: Jan. 1, 2004

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Amendment of section 681.14 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 13.07, 13.09 and 43.02

Subject: Rate setting for intermediate care facilities for persons with developmental disabilities (ICF/DD).

Purpose: To clarify certain provisions.

Text of final rule: ° Paragraph (a)(8) is amended to read as follows:

(8) Total reimbursable costs are reimbursable costs trended, as appropriate, per the application of subdivision (g) of this section *except that day program services costs identified in clause (c)(4)(viii)(e) of this section are not subject to the trend factors identified in subdivision (g) of this section, but will be increased by the trend factors used by OMRDD for day services similar to those paid for through the add-on described in clause (c)(4)(viii)(e) of this section.*

° Add new subclause (c)(3)(ii)(b)(4) to read as follows:

(b) The desk audit will examine base year costs against both the prior and subsequent years' costs. OMRDD will determine if costs are recurring, or are atypical and/or expended only in the base year.

(1) If OMRDD determines that base year costs for a facility are recurring, for the base periods beginning January 1, 2003 or July 1, 2003, the methodology described in this section will apply.

(2) If OMRDD determines that base year costs for a facility are atypical and/or were expended only in the base year, OMRDD will expand the desk audit. OMRDD may make adjustments to base year costs so that such costs represent typical and recurring costs.

(3) For a facility whose base year costs are subject to an expanded desk audit per subclause (b)(2) of this subparagraph, OMRDD shall continue the rate in effect on December 31, 2002 or June 30, 2003, and, if applicable, trended to 2003 or 2003-2004 dollars, until OMRDD completes the expanded desk audit. For Region II and III facilities, OMRDD shall notify the provider by December 1, 2002 if the December 31, 2002 rate shall continue. For Region I facilities, OMRDD shall notify the provider by June 1, 2003 if the June 30, 2003 rate shall continue. Upon OMRDD's completion of the expanded desk audit, for the base periods beginning January 1, 2003 or July 1, 2003, the methodology described in this section will apply.

(4) *If a facility is subject to an expanded desk audit per subclause (b)(2) of this subparagraph, but the desk audit has not been completed by January 1, 2004 or July 1, 2004, OMRDD shall continue the rate established according to the first sentence of subclause (b)(3) and, if applicable, further trended to 2004 or 2004-2005 dollars until OMRDD completes the expanded desk audit. Upon OMRDD's completion of the expanded desk audit, for the base periods and subsequent periods beginning January 1, 2003 or July 1, 2003, the methodology described in this section will apply.*

° Subparagraph (c)(3)(v) is amended to read as follows:

(v) Notwithstanding any other provisions of this section, for over 30 bed facilities the reimbursable operating costs contained in the rates shall be computed as follows. OMRDD shall determine the total reimbursable operating costs (with the exception of education and related service costs, sheltered workshop services, and day training services) included in the payment rate in effect on December 31st or June 30th, of the immediately preceding rate period applicable to that facility. The dollars for sheltered workshop, day program services identified in clause (c)(4)(viii)(e) of this section and day training services shall be revised based upon the number of individuals participating in the program. The reimbursable operating costs plus any revised sheltered work and day training costs will be increased by the trend factor identified in subdivision (g) of this section and may be adjusted for appropriate appeals, *except that day program services costs identified in clause (c)(4)(viii)(e) of this section are not subject to the trend factors identified in subdivision (g) of this section, but will be increased by the trend factors used by OMRDD for day services similar to those paid for through the add-on described in clause (c)(4)(viii)(e) of this section.* Education and related services will be updated in accordance with clause (4)(ix)(c) of this subdivision. To determine the capital cost portion of the subsequent period rate, OMRDD shall review the component relating to capital costs for substantial material changes and, if said changes conform to the requirements of paragraphs (f)(1) and (3) of this section and Subpart 635-4 of this Title, make corresponding adjustments in computing the subsequent period rate.

° Subparagraph (c)(4)(vi) is amended to read as follows:

(vi) As appropriate, OMRDD shall apply trend factors to each facility's reimbursable operating costs, except for education and related services. *However, day program services costs identified in clause (c)(4)(viii)(e) of this section are not subject to the trend factors identified in subdivision (g) of this section, but will be increased by the trend factors used by OMRDD for day services similar to those paid for through the add-on described in clause (c)(4)(viii)(e) of this section.*

◦ Clause (c)(4)(viii)(e) is amended to read as follows:
 (e) Effective January 1, 2003, a provider may request that a day program services add-on be included in the facility's rate. The day program services add-on for all day program services shall be either the day program services reimbursement included in the rate on December 31, 2002 and adjusted for actual service delivery; or the lower of:

(1) the actual costs per the *most recent* cost report *accepted by OMRDD net of any surplus calculated for the day program services*, or
 (2) the budget costs.

(3) The costs in subclauses (1) and (2) of this clause are subject to a desk audit. Administrative review of these desk audits shall be in accordance with subdivision 635-4.6(h) of this Title.

◦ Subparagraph (c)(5)(i) is amended to read as follows:

(i) The reimbursable operating costs contained in the subsequent period rates shall be computed as follows. OMRDD shall determine the total reimbursable operating costs (with the exception of education and related service costs, sheltered workshop services, day training services and day program services costs) included in the payment rate in effect on December 31st or June 30th of the immediately preceding rate period applicable to that facility. The dollars for sheltered workshop, day training, and day program services, shall be revised based upon the number of individuals participating in the program. The reimbursable operating costs plus any revised sheltered work day training, and day program services costs will be increased by the trend factor identified in subdivision (g) of this section and may be adjusted for appropriate appeals, *except that day program services costs identified in clause (c)(4)(viii)(e) of this section are not subject to the trend factors identified in subdivision (g) of this section, but will be increased by the trend factors used by OMRDD for day services similar to those paid for through the add-on described in clause (c)(4)(viii)(e) of this section.* Education and related services will be updated in accordance with clause (4)(viii)(e) of this subdivision. OMRDD will determine the capital cost portion of the subsequent period rate by reviewing the component relating to capital costs for substantial material changes. If such changes conform to the requirements of paragraphs (f)(1) and (3) of this section and Subpart 635-6 of this Title, OMRDD will make corresponding adjustments in computing the subsequent period rate.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 681.14(c)(3)(ii)(b)(4).

Text of rule and any required statements and analyses may be obtained from: Barbara Brundage, Acting Director, Regulatory Affairs Unit, Office of Mental Retardation and Developmental Disabilities, 44 Holland Ave., Albany, NY 12229, (518) 474-1830; e-mail: barbara.brundage@omr.state.ny.us

Additional matter required by statute: Pursuant to the requirements of the State Environmental Quality Review Act (SEQRA) and in accordance with 14 NYCRR Part 622, OMRDD has on file a negative declaration with respect to this action. Thus, consistent with the requirements of 6 NYCRR Part 617, OMRDD, as lead agency, has determined that the action described herein will not have a significant effect on the environment, and an environmental impact statement will not be prepared.

Regulatory Impact Statement

A Revised Regulatory Impact Statement for this rule is not being submitted because the nonsubstantive change made in the Notice of Adoption does not necessitate any revision of the previously published regulatory Impact Statement. The nonsubstantive change revises proposed subclause 681.14(c)(3)(ii)(b)(4) to clarify that facilities subject to a desk audit will receive the two intervening annual trend factors (2003 or 2003-2004, and 2004 or 2004-2005) if the desk audit has not been completed by the beginning of the 2004 or 2004-2005 rate year. This clarification does not materially alter the purpose, meaning or effect of the proposed amendment nor does it invalidate the information provided in the RIS originally published with the proposed rule making.

Regulatory Flexibility Analysis

A Revised Regulatory Flexibility Analysis for Small Businesses and Local Governments is not being submitted for this rule because nonsubstantive change made in the Notice of Adoption does not necessitate any revision of the previously published Regulatory Flexibility Analysis. The nonsubstantive change revises proposed subclause 681.14(c)(3)(ii)(b)(4) to clarify that facilities subject to a desk audit will receive the two intervening annual trend factors (2003 or 2003-2004, and 2004 or 2004-2005) if the desk audit has not been completed by the beginning of the 2004 or 2004-2005 rate year. This clarification does not materially alter the purpose, meaning or effect of the proposed amendment nor does it invalidate the information provided in the RFASB originally published with the proposed rule making.

Rural Area Flexibility Analysis

A Revised Rural Area Flexibility Analysis for these amendments is not submitted because neither the originally proposed amendments nor the nonsubstantive change made in the adoption will impose any adverse economic impact on rural areas or reporting, record keeping or other compliance requirements on public or private entities in rural areas.

Job Impact Statement

A Revised Job Impact Statement for these amendments is not being submitted because it is apparent from the nature and purposes of the amendments that they will not have an impact on jobs and/or employment opportunities. This finding is based on the fact that the proposed rule making and the nonsubstantive change made to the proposal only provide revisions to the reimbursement methodology which OMRDD uses in determining the appropriate reimbursement of voluntary agency operated Intermediate Care Facilities for persons with developmental disabilities (ICF/DD). The proposed amendments will clarify certain provisions in the rate setting methodology. These clarifications will not affect staffing patterns. Therefore, it is reasonable to expect that the proposed amendments will have no adverse impact on jobs or employment opportunities in New York State.

Assessment of Public Comment

OMRDD received one comment regarding the proposed rule making. The correspondent stated that the regulation was unclear regarding whether it would be the day treatment trend factor, the day habilitation service trend factor or some other day service trend factor that would be applied to the day program services add-on. The correspondent also wondered why sheltered workshop or day training services would receive the ICF/DD trend factor while day program services will receive the trend factor for similar programs.

In response, OMRDD would observe that day treatment programs are specifically excluded from the day program services add-on. Thus, whether day treatment programs receive a trend factor has no bearing on the add-on or any trend factor applied to the add-on. OMRDD will determine which services are most similar to those reimbursed in the day program services add-on, and will apply the corresponding trend factor to the reimbursement in the add-on. Sheltered workshops and day training programs have a reimbursement methodology that is different than that of the day program services that will be reimbursed in this add-on. Therefore, the use of the ICF/DD trend factor continues to be appropriate.

Department of Motor Vehicles

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Driver's Licenses

I.D. No. MTV-52-03-00025-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: This is a consensus rule making to amend Part 3 of Title 15 NYCRR.

Statutory authority: Vehicle and Traffic Law, sections 215(a), 385(1)(h) and 501(2)(b)

Subject: Driver's licenses.

Purpose: To clarify that a personal use endorsement is required on the licenses of drivers of 45-foot recreational vehicles which are permitted by L. 2003, ch. 493.

Text of proposed rule: Subparagraph (iii) of paragraph (1) of subdivision (b) of section 3.2 is amended to read as follows:

(iii) Personal use vehicle endorsement. An R endorsement is the personal use vehicle endorsement. It is required on a non-CDL for operation of recreational vehicles and rental vehicles over 26,000 pounds GVWR *or over forty-five feet in length* for transportation of personal household goods. It shall be issued upon passage of a skills test in a recreational vehicle over 26,000 pounds GVWR *or over forty-five feet in length* when the licensee has not passed a CDL knowledge test.

Text of proposed rule and any required statements and analyses may be obtained from: Michele Welch, Legal Bureau, Department of Motor

Vehicles, Empire State Plaza, Swan St. Bldg., Rm. 526, Albany, NY 12228, (518) 474-0871, e-mail: mwelc@dmv.state.ny.us

Data, views or arguments may be submitted to: Sean J. Martin, Assistant Counsel, Department of Motor Vehicles, Empire State Plaza, Swan St. Bldg., Rm. 526, Albany, NY 12228, (518) 474-0871, e-mail: mwelc@dmv.state.ny.us

Public comment will be received until: 45 days after publication of this notice.

Consensus Rule Making Determination

Chapter 493 of the Laws of 2003 permits the operation of house coaches of up to forty-five feet in length on the State's highways outside of New York City, provided they meet certain turning capabilities. Drivers of vehicles in excess of twenty-six thousand pounds GVWR or longer than forty feet in length are required by this Chapter to possess a license containing a personal use "R" endorsement.

This proposal is submitted for consensus rulemaking because the provisions therein merely reflect the statutory mandate of Chapter 493 of the Laws of 2003.

Job Impact Statement

A Job Impact Statement is not submitted with this regulation because the amendment will not result in a substantial adverse impact on jobs and employment opportunities. The amendment, necessary to implement Chapter 493 of the Laws of 2003, concerns the maximum length of recreational vehicles.

Power Authority of the State of New York

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Rates for the Sale of Certain Power and Energy

I.D. No. PAS-52-03-00027-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: Revisions to sale-for-resale tariffs for Expansion Power, Replacement Power and Economic Development Power in the service areas of New York State Electric & Gas Corporation and Niagara Mohawk Power Corporation – a National Grid Company.

Statutory authority: Public Authorities Law, section 1005(5) and (6)

Subject: Rates for the sale of certain power and energy.

Purpose: To maintain the system's fiscal integrity; this change in the service tariffs is not the result of a Power Authority rate increase.

Substance of proposed rule: Pursuant to the New York State Public Authorities Law, Section 1005 (5) and (6), the Power Authority of the State of New York (the "Authority") proposes to adopt the following tariff amendments providing for the recovery of costs incurred by the Authority in connection with transmission of electric power under its Expansion Power, Replacement Power, and Economic Development Power Programs in the services areas of the New York State Electric and Gas Corporation and Niagara Mohawk Power Corporation – a National Grid Company.

Rate Schedule NP-F1 (Interim Schedule of Rates for Wholesale Firm Power Service) (Replacement Power Program rates) (effective December 1, 1960)

Add a new provision to the "Adjustments" section to read as follows:

For New York Independent System Operator Transmission and Related Charges:

The customer will also compensate the Authority for the following Charges assessed on the Authority for services provided by the New York Independent System Operator, Inc. ("NYISO") or any successor organization pursuant to its Open Access Transmission Tariff ("OATT") or other tariffs (as the provisions of those tariffs may be amended and in effect from time to time) associated with deliveries to the Replacement Power recipients:

1. Ancillary Services 1 through 6 and any new ancillary services as may be defined and included in the OATT from time to time;
2. Marginal losses;

3. The New York Power Authority Transmission Adjustment Charge ("NTAC");
4. Congestion costs, less any associated grandfathered Transmission Congestion Contracts ("TCCs") as provided in Attachment K of the OATT; and
5. Any and all other charges, assessments or other amounts associated with deliveries to the Replacement Power customers that are assessed on the Authority by the NYISO under the provisions of its OATT or other tariffs.

The Authority shall designate to the customer which of the above NYISO Charges shall apply to the various Replacement Power recipients on an account-by-account basis and in accordance with all applicable agreements. Nothing in this section is intended to modify the charges for capacity and energy or any other provision of this tariff, as amended.

Service Tariff No. 46 (Expansion Power Resale Service) (Expansion Power Program rates) (effective January 1, 1988)

Add a new Special Provision to read as follows:

D. New York Independent System Operator Transmission and Related Charges

The Company will compensate the Authority for the following Charges the Authority incurs for services provided by the New York Independent System Operator, Inc. ("NYISO") or any successor organization pursuant to its Open Access Transmission Tariff ("OATT") or other tariffs (as the provisions of those tariffs may be amended and in effect from time to time) associated with deliveries to the Expansion Power customers:

- 1)–Ancillary Services 1 through 6 and any new ancillary services as may be defined and included in the OATT from time to time;
- 2) Marginal losses;
- 3) The New York Power Authority Transmission Adjustment Charge ("NTAC");
- 4) Congestion costs, less any associated grandfathered Transmission Congestion Contracts ("TCCs") as provided in Attachment K of the OATT; and
- 5) Any and all other charges, assessments or other amounts associated with deliveries to the Expansion Power customers that are assessed on the Authority by the NYISO under the provisions of its OATT or other tariffs.

The Authority shall designate to the Company which of the above NYISO Charges shall apply to particular Expansion Power Customers on an account-by-account basis and in accordance with all applicable agreements. Nothing in this Special Provision D is intended to modify the Expansion Power demand and energy charges or any other provision of this tariff, as amended.

Service Tariff No. 50 (Business Economic Development Power Service) (Economic Development Power Program rates) (effective May 1, 1994)

Add a new Special Provision to read as follows:

E. New York Independent System Operator Transmission and Related Charges.

The Company will compensate the Authority for the following Charges for services provided by the New York Independent System Operator, Inc. ("NYISO") or any successor organization pursuant to its Open Access Transmission Tariff ("OATT") or other tariffs (as the provisions of those tariffs may be amended and in effect from time to time) associated with deliveries to the EDP customers:

1. Ancillary Services 1 through 6 and any new ancillary services as may be defined and included in the OATT from time to time;
2. Marginal losses;
3. The New York Power Authority Transmission Adjustment Charge ("NTAC");
4. Congestion costs, less any associated grandfathered Transmission Congestion Contracts ("TCCs") as provided in Attachment K of the OATT; and
5. Any and all other charges, assessments or other amounts associated with deliveries to the Expansion Power customers that are assessed on the Authority by the NYISO under the provisions of its OATT or other tariffs.

The Authority shall designate to the Company which of the above NYISO Charges shall apply to the EDP Customers on an account-by-account basis and in accordance with all applicable agreements. Nothing in this Special Provision E is intended to modify the EDP demand and energy charges or any other provision of this tariff, as amended.

Copies of the three underlying tariffs may be inspected at the Authority's office at the address below and at other designated locations, or obtained from the address below.

Written comments on the proposed tariff amendments will be accepted through Tuesday, February 17, 2004, at the address below. For further information, including the address of other Authority offices at which copies of the three tariffs may be inspected, contact:

POWER AUTHORITY OF THE STATE OF NEW YORK

Angela D. Graves, Deputy Secretary
123 Main Street
White Plains, New York 10601
(914) 287-3092
(914) 681-6949 (fax)
angela.graves@nypa.gov

Text of proposed rule and any required statements and analyses may be obtained from: Angela Graves, New York Power Authority, 123 Main St., 15th Fl., White Plains, NY 10601, (914) 287-3092, e-mail: angela.graves@nypa.gov

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Statements and analyses are not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

Public Service Commission

ERRATUM

A Notice of Adoption relating to Natural Gas Transmission, Distribution and Gathering Line Facilities, I.D. No. PSC-29-03-00007-A, published in the December 17, 2003 issue of the *State Register* was erroneously submitted to the Department of State. The Notice of Adoption and filing documents have been returned to the Public Service Commission for future action.

The Department of State apologizes for any confusion this may have caused.

NOTICE OF CONTINUATION NO HEARING(S) SCHEDULED

Natural Gas Transmission, Distribution and Gathering Line Facilities

I.D. No. PSC-29-03-00007-C

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE of continuation is hereby given:

The notice of proposed rule making, I.D. No. PSC-29-03-00007-P was published in the *State Register* on July 23, 2003.

Subject: Natural gas transmission, distribution and gathering line facilities.

Purpose: To bring New York State's requirements into compliance with the Federal pipeline safety regulations contained in 49 CFR part 192.

Substance of rule: The proposed changes to Title 16 NYCRR Parts 10 and 255 will bring them into conformance with Federal Pipeline Safety Regulations. Specifically, the proposed amendments conform the Commission's regulations to the Federal regulations regarding the requirement that companies inform certain customers about excess flow valves, clarifies the extent to which a pipeline must be examined when external corrosion is found, updates the requirements concerning pipeline repairs, and adds additional requirements concerning the abandonment of pipelines. Most gas distribution companies in New York State already comply with the proposed changes to Part 255. The proposed changes to Part 10, Referenced Material, is a routine administrative process to update referenced materials to their current editions. The following is a discussion of the proposed changes to Part 255. A new requirement for companies to notify and inform certain gas customers about excess flow valves has been added to 49 CFR Part 192. Specifically, gas customers of new or replacement service lines that serve single residences and operate continuously throughout the year at a pressure of at least 10 psig, must be provided with

written notification about the availability, capabilities, and limitations of excess flow valves. Staff discussed this rule with the gas companies and the Northeast Gas Association (NGA). The NGA member companies already comply with the Federal regulations. Regarding the regulations concerning external corrosion of gas pipelines, the proposed rule would require companies to determine the full extent of external corrosion by investigating beyond the exposed portion of the pipe using visual examination or approved indirect examination, to determine whether there is additional corrosion. This is considered an effective practice and companies are currently taking this action when external corrosion is found. The proposed changes to the transmission pipeline repair requirements in Part 255 consist of housekeeping changes to improve readability, and the addition of alternate repair methods that reliable engineering tests and analyses show can permanently restore the serviceability of the pipeline. This allows companies more flexibility in determining which repair method to employ and allows them to take advantage of new technologies that can provide equivalent or better level of safety for the repaired pipeline segment, along with potential cost savings. The proposed amendments add a definition of "abandoned" and a requirement that information on abandoned pipelines crossing over, under or through commercially navigable waterways be submitted to the National Pipeline Mapping System (NPMS) or to the U.S. Department of Transportation in accordance with the requirements of 49 CFR 192.727(g).

Changes to rule: No substantive changes.

Expiration date: July 22, 2004.

Text of proposed rule and changes, if any, may be obtained from: Margaret Maguire, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-3204

Data, views or arguments may be submitted to: Jaclyn A. Brillig, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530 (02-G-0134SA1)

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Major Rate Increase by the Village of Freeport

I.D. No. PSC-52-03-00022-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, or modify, a proposal filed by the Village of Freeport to make various changes to the rates, charges, rules and regulations contained in its tariff schedule, P.S.C. No. 8—Electricity. The effective date of the filing has been suspended through March 28, 2004.

Statutory authority: Public Service Law, section 66(12)

Subject: Major rate increase.

Purpose: To increase annual electric revenues by about \$5,289,900 or 24.2 percent.

Public hearing(s) will be held at: 2:00 p.m. and 7:00 p.m. on January 7, 2004 at Freeport Recreation Center, 130 E. Merrick Rd., Freeport, NY

Accessibility: All public hearings have been scheduled at places reasonably accessible to persons with a mobility impairment.

Interpreter Service: Interpreter services will be made available to deaf persons, at no charge, upon written request submitted within reasonable time prior to the scheduled public hearing. The written request must be addressed to the agency representative designated in the paragraph below.

Substance of proposed rule: The Village of Freeport has made a tariff filing to revise rates and charges to increase annual electric revenues by about \$5,289,900 or 24.2%. The effective date of the filing is currently suspended through March 28, 2004 in Case 03-E-0686, and the Village has conditionally waived the suspension deadline through May 28, 2004. As an alternative to the 24.2% increase, the parties have negotiated a proposal that the Commission establish a three-year rate plan in which allowed revenues would increase by \$4.48 million or 18.9%, either in full on April 1, 2004 or in two stages starting on that date. The Commission may approve the tariff filing or adopt the terms of the negotiated proposal in whole or part.

Text of proposed rule may be obtained from: Margaret Maguire, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-3204

Data, views or argument may be submitted to: Jaclyn A. Brillling, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

Public comment will be received until: five days after the last scheduled public hearing.

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(03-E-0686SA1)

**PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED**

Interconnection of Networks between Verizon New York Inc. and Telecon Communications Corporation

I.D. No. PSC-52-03-00021-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Verizon New York Inc. and Telecon Communications Corporation for approval of an interconnection agreement executed on Nov. 24, 2003.

Statutory authority: Public Service Law, section 94(2)

Subject: Interconnection of networks for local exchange service and exchange access.

Purpose: To review the terms and conditions of the negotiated agreement.

Substance of proposed rule: Verizon New York Inc. and Telecon Communications Corporation have reached a negotiated agreement whereby Verizon New York Inc. and Telecon Communications Corporation will interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services and Exchange Access to their respective customers. The Agreement establishes obligations, terms and conditions under which the parties will interconnect their networks lasting until June 23, 2005, or as extended.

Text of proposed rule may be obtained from: Margaret Maguire, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223, (518) 474-3204

Data, views or arguments may be submitted to: Jaclyn A. Brillling, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(03-C-1724SA1)

**PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED**

Request for Accounting Authorization by Rochester Gas & Electric Corporation

I.D. No. PSC-52-03-00023-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, the petition of Rochester Gas & Electric Corporation for permission to defer, with interest, incremental costs incurred as a result of the blackout that occurred on Aug. 14, 2003.

Statutory authority: Public Service Law, section 66(9)

Subject: Uniform system of accounts—request for accounting authorization.

Purpose: To defer an item of expense beyond the end of the year in which it was incurred.

Substance of proposed rule: The Commission is considering whether to approve or reject, in whole or in part, the petition of Rochester Gas &

Electric Corporation for permission to defer, with interest, incremental costs incurred as a result of the blackout that occurred on August 14, 2003. The Company currently estimates that the total cost of Blackout activities will be \$3.2 million (\$3.0 million replacement power costs and \$0.2 million incremental operation and maintenance costs). The company proposes to recover these costs in accordance with its current general rate proceedings in Cases 03-0765 and 03-G-0766.

Text of proposed rule may be obtained from: Margaret Maguire, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223, (518) 474-3204

Data, views or arguments may be submitted to: Jaclyn A. Brillling, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(03-E-1696SA1)

Department of State

EMERGENCY RULE MAKING

Cease and Desist Zone for Real Estate Brokers and Salespersons

I.D. No. DOS-45-03-00002-E

Filing No. 1394

Filing date: Dec. 11, 2003

Effective date: Dec. 11, 2003

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Amendment of section 175.17(c)(2) of Title 19 NYCRR.

Statutory authority: Real Property Law, section 442-h(3)(a) and (c)

Finding of necessity for emergency rule: Preservation of general welfare.

Specific reasons underlying the finding of necessity: Based on testimony received at a public hearing, the Secretary of State has determined that some owners of residential property in the Brooklyn communities of Mill Basin, Mill Island, Bergen Beach, Futurama and Marine Park are subject to intense and repeated solicitation by real estate brokers and real estate salespersons and that such solicitations seek to have the owners place their home for sale with the real estate brokers and real estate salespersons. The Secretary of State has further determined that the homeowners have no practical means of stopping the unwanted and intrusive solicitations and that those homeowners need immediate relief. Therefore, compliance with section 201(1) of the State Administrative Procedure Act would be contrary to the public interest of providing for the general welfare of those homeowners who seek immediate relief from the continuation of the unwanted and unwelcomed solicitations by real estate brokers and salespersons.

Subject: Cease and desist zone.

Purpose: To establish a cease and desist zone in the Brooklyn communities of Mill Basin, Mill Island, Bergen Beach, Futurama and Marine Park.

Text of emergency rule: Paragraph (c)(2) of section 175.17 of Title 19 of the NYCRR is amended to add the following cease and desist zone:

*Cease and Desist Zone
(Mill Basin/Brooklyn)*

Zone:

County of Kings (Brooklyn)

Within the County of Kings as follows:

All that area of land in the County of Kings, City of New York, otherwise known as the communities of Mill Basin, Mill Island, Bergen Beach, Futurama and Marine Park, bounded and described as follows: Beginning at a point at the intersection of Flatlands Avenue and the northern prolon-

*Expiration date:
November 30, 2007*

gation of Paerdegat Basin, thence southwesterly along Flatlands Avenue to Avenue N; thence westerly along Avenue N to Nostrand Avenue; thence southerly along Nostrand Avenue to Gerritsen Avenue; thence southeasterly along Gerritsen Avenue and the southern prolongation of Gerritsen Avenue to Shore Parkway; thence northeasterly, northerly, northeasterly, and northerly along Shore Parkway to Paerdegat Basin; thence northwesterly along Paerdegat Basin and the northern prolongation of Paerdegat Basin to Flatlands Avenue and the point of beginning.

This notice is intended to serve only as a notice of emergency adoption. This agency does not intend to adopt the provisions of this emergency rule as a permanent rule. The rule will expire March 9, 2004.

Text of emergency rule and any required statements and analyses may be obtained from: Bruce Stuart, Department of State, Division of Licensing Services, 84 Holland Ave., Albany, NY 12208, (518) 473-2728

Regulatory Impact Statement

1. Statutory authority:

Section 442-h(3) (a) of the Real Property Law (“RPL”) provides that the Secretary of State may adopt a rule establishing a cease-and-desist zone if the Secretary determines that some homeowners within a defined area are subject to intense and repeated solicitation by real estate brokers and salespersons to list their homes for sale. Upon the establishment of such a zone, a homeowner may file with the Secretary a statement of desire not to be solicited. Thereafter, the Secretary will publish a list of the names and addresses of the persons who have filed the statement, and brokers and salespersons are then prohibited from soliciting persons on that list. That list is commonly referred to as a “cease-and-desist list.”

Section 442-h(3)(c) of the RPL provides that no rule establishing a cease and desist zone shall be effective for more than five years; provided, however, that the Department of State may re-adopt the rule to continue a cease and desist zone for additional periods not to exceed five years.

Based testimony received at a public hearing on February 13, 2003, the Secretary of State has determined that some homeowners within the Brooklyn communities of Mill Basin, Mill Island, Bergen Beach, Futurama and Marine Park are subject to intense and repeated solicitations from real estate brokers and salespersons. As a result, the Secretary has express statutory authority to propose and adopt a cease-and-desist zone for that community.

2. Legislative objectives:

According to the Statement of Legislative Findings for section 442-h of the Real Property Law, the Legislature has found that, from time to time, homeowners in some neighborhoods have been subject to intense and repeated solicitation by real estate brokers and salespersons to place their homes for sale, with the implication that property values would be decreasing because persons of different ethnic, social or religious backgrounds were moving into the neighborhood in greater numbers. The Statement of Legislative Findings also concluded that this type of solicitation technique constitutes a churning of the market and generated panic selling in the neighborhood. By enacting § 442-h, the Legislature sought to provide a means by homeowners could effectively express their wish not to be solicited by real estate brokers or salespersons. The Secretary has found that some homeowners in the Brooklyn communities of Mill Basin, Mill Island, Bergen Beach, Futurama and Marine Park are subject to intense and repeated solicitations to list their homes for sale. Therefore, this rule accords with the public policy objectives which the Legislature sought to advance by enacting § 442-h of the Real Property Law.

3. Needs and benefits:

A public hearing was held in P.S. 236 in Mill Basin on February 13, 2003. At the public hearing testimony was given by community leaders who spoke on behalf of their constituents. Speakers included a Congressman, two State Senators, a Member of the Assembly, the President of the Borough of Brooklyn, members of Community Board 18, representatives of civic associations for each of the communities and homeowners. Each of the speakers spoke in support of the proposed cease-and-desist zone citing the need to curb the aggressive solicitation practices of real estate agents in the affected communities. The speakers cited frequent telephone calls, unwanted mail and flyers, as well as door-to-door solicitations, as intrusive and unwanted solicitation practices by real estate brokers and salespersons. Accordingly, the Secretary of State has determined that homeowners in the Brooklyn communities of Mill Basin, Mill Island, Bergen Beach, Futurama and Marine Park have no practical means of stopping the unwanted and intrusive solicitations and that the homeowners need immediate relief. This rule will provide those homeowners who do not wish to be solicited with an effective and practical means of so notifying real estate brokers and salespersons.

4. Costs:

a. Costs to regulated parties:

Regulated parties include licensed real estate brokers and salespersons who do residential sales in the Brooklyn communities of Mill Basin, Mill Island, Bergen Beach, Futurama and Marine Park. There are approximately 1,200 real estate brokers and approximately 1,800 real estate salespersons with offices in Brooklyn.

The Department of State will have the cease-and-desist list available, at no cost, on its web site, www.dos.state.ny.us. The cease-and-desist list will also be sold to the public, including real estate brokers and salespersons, for \$10 per copy, in accordance with existing 19 NYCRR Section 175.17(c)(5). Copies will also be made available for inspection and copying at Department of State offices.

We expect that most licensees who do business in the affected communities will access the list, at no cost, on the Department’s web site. We expect that some licensees will purchase one or more copies. Some will share the expense by sharing a copy. Others will not access or purchase a copy because they do not solicit residential listings in the affected communities.

In addition, some real estate brokers may use commercial mailing lists to solicit. For those brokers, the cease-and-desist list may increase the cost of using a commercial mailing list. The list will have to be checked against the addresses in the cease-and-desist list, and the broker will have to delete the addresses that appear in the homeowner list. The Department of State is not able to estimate the cost to those brokers because the cost will depend on a number of factors, such as the number of names on the mailing list, the number of addresses in the cease-and-desist list, the technology to the licensee, and the licensee’s cost for technology and labor. On the other hand, there may be some reductions in the total cost of the mailing when the “unproductive addresses” are eliminated from the list.

Also, if a licensee uses the telephone, delivery services and personal contact to solicit residential listings, the licensee may have to spend time checking the cease-and-desist list to avoid contact with any person at an address listed. There is, of course, an expense associated with that expenditure of time. On the other hand, there may be savings associated with elimination of unproductive calls or deliveries. Whether there is a net cost or savings will depend on the circumstances and practices of each licensee. Therefore, the Department of State is not able to estimate those costs.

b. Costs to the Department of State:

The estimated costs for preparing the cease-and-desist list are as follows:

Printing owners statements	\$2,200
Mailing owners statements	640
Processing statements:	
Staff: SG-14 @ \$29,110	
10 weeks	5,600
Data entry:	
Staff: SG-6 (NYC) @ \$23,385	
10 days	900
Fringe benefits @ 36.5%	<u>2,372</u>
Total:	\$11,712

The costs for printing and mailing are unknown. The Department anticipates that most licensees will access the list, at no cost, on the Department’s website. For those few who want to purchase a paper copy, the Department will likely print a copy, on an order-by-order basis, on existing equipment. The mailing costs will be dependent on the number of copies that are ordered. However, the Department expects that the costs for printing and mailing will be incidental to the costs of preparing the list.

The Department of State expects that revenues from the sale of the list will be incidental to the costs of preparing, printing and mailing.

5. Local government mandates:

The rule does not impose any program, service, duty or responsibility upon any county, city, town, village, school district or other special district.

6. Paperwork:

Homeowners who do not want to be solicited will have to file an “owner’s statement” with the Department of State. The owner’s statement will indicate the owner’s desire not to be solicited and will set forth the owner’s name and the address of the property within the cease-and-desist zone. The Department of State will provide homeowners with a standard form although use of the form is not mandatory. Owner’s statements will be provided to community leaders for distribution to their constituents. In addition, owner’s statements will be available from the Department of State on request, as well as available on the Department’s web site. The Department of State will prepare a cease-and-desist list containing the names and addresses of all of the homeowners who filed an owner’s

statement. The list will be available, at no cost, on the Department's website. The publication will also be sold to the public, including real estate brokers and salespersons. The price will be \$10 per copy. Except for orders submitted by mail, real estate brokers and salespersons will not have to complete any paperwork or file any paperwork as a result of this rule.

7. Duplication:

This rule does not duplicate, overlap or conflict with any other state or federal requirement.

8. Alternatives:

The Department of State did not identify any alternative that would provide relief for homeowners and, at the same time, be less restrictive and less burdensome on the solicitation activities of real estate brokers and salespersons. Consideration was given to the adoption of a non-solicitation order pursuant to § 442-h(2) of the Real Property Law. However, the Department concluded that a cease-and-desist order could provide homeowners with relief from intense and repeated solicitation without imposing the more restrictive and more burdensome regulation of a non-solicitation order, which would prohibit all direct solicitation activities within the non-solicitation zone. Consequently, the Secretary of State decided to adopt the cease-and-desist order rather than a non-solicitation order.

The Department of State did not consider any other alternatives.

9. Federal standards:

There are no federal standards regulating the frequency or intensity of solicitations by real estate brokers or salespersons. Consequently, this rule does not exceed any existing federal standard.

10. Compliance schedule:

Real estate brokers and salespersons can comply with the cease-and-desist order immediately upon publication of the list.

Regulatory Flexibility Analysis

1. Effect of rule:

This cease-and-desist rule applies to an areas generally known as Mill Basin, Mill Island, Bergen Beach, Futurama and Marine Park in the Borough of Brooklyn. There are approximately 1,170 real estate brokers and approximately 1,852 real estate salespersons in the Brooklyn. Most of those licensees are small businesses, or they work for a small business. This rule will apply to most of the licensees. The exceptions will be those who do not deal in residential properties, and those who do not deal in properties located within the cease-and-desist zone.

The cease-and-desist rule will also apply to licensed real estate brokers and salespersons who are located outside of the Brooklyn but who solicit residential properties within the designated area. The Department of State does not have a practical way of estimating how many brokers and salespersons fall within this category.

The rule does not apply to local governments.

2. Compliance requirements:

The rule does not impose any reporting or record keeping requirements on the licensees. The rule does prohibit each licensee from soliciting the sale, rental or listing from any homeowner whose name appears of a cease-and-desist list published by the Department of State.

The rule does not impose any compliance requirements on local governments.

3. Professional services:

A licensee will not need professional services in order to comply with the rule.

The rule does not impose any compliance requirements on local governments.

4. Compliance costs:

The cost of compliance and the variations in the costs of compliance are detailed in section 4(c) of the Regulatory Impact Statement.

The rule does not impose any compliance costs on local governments.

5. Economic and technological feasibility:

Since the names and addresses of the homeowners who do not want to be solicited will be published by the Department of State and since the cost of the publication is \$10 per copy or free if accessed on the Department's website, it will be economically and technologically feasible for real estate brokers and salespersons to comply with the rule.

6. Minimizing adverse economic impact:

The Department of State did not identify any alternative that would provide relief for homeowners and, at the same time, be less restrictive and less burdensome on the solicitation activities of real estate brokers and salespersons. Consideration was given to the adoption of a non-solicitation order pursuant to § 442-h(2) of the Real Property Law. However, the Department concluded that a cease-and-desist order could provide homeowners with relief from intense and repeated solicitation without imposing the more restrictive and more burdensome regulation of a non-solicitation

order, which would prohibit all direct solicitation activities within the non-solicitation zone. Consequently, the Secretary of State decided to adopt the cease-and-desist order rather than a non-solicitation order.

To provide homeowners in the designated area with relief from intense and repeated solicitations from real estate brokers and salespersons, the rule must apply equally to all licensees regardless of the size of their business or the size of their employer's business. Consequently, the rule does not make special accommodations for different classes of licensees.

7. Small business participation:

The Department of State conducted an open public hearing on February 13, 2003, at P.S. 326, in the Brooklyn community of Mill Basin. The time, date and place of the public hearing was well advertised within the affected communities. Testifying at the hearing on behalf of their constituents were a Congressman, two State Senators, a Member of the Assembly, the President of the Borough of Brooklyn, members of Community Board 18, representatives of civic associations for the affected communities, and homeowners.

There were no real estate brokers or real estate salespersons who identified themselves at the public hearing, and no real estate broker or salesperson spoke at the hearing. In addition, no real estate broker or salesperson submitted any written testimony regarding the proposed re-adoption of the cease-and-desist zone.

Rural Area Flexibility Analysis

A rural area flexibility analysis is not required because this rule does not impose any adverse impact on rural areas, and the rule does not impose any reporting, recordkeeping or other compliance requirements on public or private entities in rural areas.

This rule establishes a cease-and-desist zone in the Brooklyn communities of Mill Basin, Mill Island, Bergen Beach, Futurama and Marine Park, and this rule only affects those real estate brokers and salespersons who do business in those communities.

Brooklyn is not a rural area and, therefore, a rural area flexibility analysis is not required for this rule.

Job Impact Statement

A job impact statement is not required because this rule will not have any substantial impact on jobs or employment opportunities for real estate brokers or real estate salespersons.

The rule provides a means by which homeowners in the designated community can notify real estate brokers and real estate salespersons that the homeowners do not want to be solicited for the purchase, sale or rental of their homes.

Since the homeowners who file a homeowner's statement with the Department of State are not interested in receiving solicitations from real estate brokers or real estate salespersons, publication of names and addresses of those homeowners and the resulting notification to real estate brokers and salespersons will not have any substantial impact on jobs or employment opportunities for real estate brokers or salespersons.

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Inspection of College Buildings for Fire Safety Compliance

I.D. No. DOS-52-03-00002-EP

Filing No. 1398

Filing date: Dec. 12, 2003

Effective date: Dec. 12, 2003

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Addition of Part 500 to Title 19 NYCRR.

Statutory authority: Executive Law, sections 91, 156 and 156-e; and Education Law, section 807-b

Finding of necessity for emergency rule: Preservation of public health and public safety.

Specific reasons underlying the finding of necessity: The legislation and these implementing regulations are essential to the protection of college students and staff from injury or death through a program of inspection and enforcement of the Uniform Fire Prevention and Building Code.

Subject: Inspection of college buildings for fire safety compliance with the Uniform Fire Prevention and Building Code.

Purpose: To protect college students and staff from injury or death because of fires.

Substance of emergency/proposed rule: By passage of Chapter 81 (Part A) of the Laws of 2002, the Department of State, Office of Fire Prevention and Control (OFPC), under the direction of the State Fire Administrator, was granted authority to inspect the majority of public and independent college facilities in the state for compliance with the Uniform Fire Prevention and Building Code of New York State (UFPBC) and its fire safety standards, prepare inspection reports, issue citations and corrective orders for violations, take appropriate actions to ensure compliance with its orders, and do all things necessary and appropriate to effectuate the law. It is the purpose of this Part to establish procedural and substantive requirements to implement and apply Section 156-e of the Executive Law and Section 807-b of the Education Law. This part is inapplicable to the City of New York, which shall continue to conduct inspections of public and independent colleges under its jurisdiction.

Part 500 provides for the inspection and re-inspection of college or university buildings, issuance of the Report of Inspection/Notice of Violation, issuance of Report of Re-inspection/Order to Comply, penalties; methods of abatement, Certificates of Conformance issuance and revocation and delegation of inspection authority to local governments.

OFPC may order the closing of a building, buildings or parts thereof whenever a severe or serious violation exists; or whenever justified by the cumulative effect of numerous significant violations, which constitute conditions that are considered an imminent threat to public health or safety. Fines may also be imposed by OFPC for the failure to remedy violations of the UFPBC and its fire safety standards. The authority to close buildings and impose fines will be retained by OFPC alone, and will not be delegated.

The laws which created this inspection program and these regulations result from the work of the Governor's Task Force on Campus Fire Safety. Members of the Task Force included representatives from independent and public colleges, the fire services, and college students.

This notice is intended to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire March 10, 2004.

Text of rule and any required statements and analyses may be obtained from: John F. Mueller, Department of State, 41 State St., Albany, NY 12231, (518) 474-6746

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement

1. Statutory Authority

Chapter 81 of the Laws of 2002 amended Education Law § 807-b and added a new Executive Law § 156-e. These provisions direct the Department of State, Office of Fire Prevention and Control (OFPC) to conduct fire inspections at least annually of all public and independent college buildings outside of the City of New York, to ensure compliance with the State Uniform Fire Prevention and Building Code (UFPBC) and its fire safety standards. Education Law § 807-b(3) authorizes OFPC to adopt rules establishing minimum standards for the content and frequency of inspections, and Executive Law 156-e(2) authorizes OFPC to adopt rules regarding the issuance of violations, compliance with orders, and providing time for compliance, reinspection procedures, and issuance of certificates of conformance. The statutes also authorize OFPC to take appropriate actions to ensure that violations are promptly remedied.

2. Legislative Objectives

The governing statutes constitute a legislative commitment to provide maximum possible protection to all college students and staff from the perils of fire. They clearly indicate that compliance with the UFPBC and its fire safety standards is viewed as a critical component in providing this protection. To carry out this critical public safety objective, the legislation has recognized that OFPC is best positioned both to assume inspection responsibility and to undertake effective enforcement.

3. Needs and Benefits

Following a dormitory fire at Seton Hall University in New Jersey, in which several students lost their lives, the threat fire poses to students attending schools away from home became apparent. In fact, it became apparent that all campus buildings, not just dormitories, need to be inspected for fire hazards on a regular basis. The Governor therefore created a Task Force on Campus Fire Safety. Members of the Task Force, which included representatives of public and independent colleges, students, and the fire service, all agreed on the need to designate a single inspection and enforcement entity. The Task Force Report recommended that this entity be OFPC. The Governor accepted these recommendations and they were embodied within the provisions of the Article VII bill that became Chapter

81. The expected benefits are: discovery and abatement of hazardous fire conditions; probable avoidance of personal injury and loss of life and property; savings in resulting medical and disability costs; savings in firefighting resources (which translates into enhanced protection of all properties); and greater day-to-day personal safety.

The purpose of this rule is to clarify the procedures and steps that will allow colleges to comply with Chapter 81. The establishment of uniform procedures will enhance compliance with the UFPBC by providing colleges with the framework to be utilized during the process; and will provide for the necessary enforcement steps, including the imposition of fines and the ordering of buildings to be closed. Currently, no regulations exist that detail the procedural steps necessary to comply with the law. These regulations will benefit both OFPC and the regulated parties by clearly outlining the expectations and responsibilities of each.

4. Costs

Currently, regulated parties are required to comply with the provisions of the UFPBC. This rule will not increase this requirement, but rather provide a mechanism to assure compliance. Therefore, colleges will incur no additional costs. If regulated parties are in compliance, there will be no fiscal impact. Moreover, some colleges and universities have heretofore hired contractors to conduct inspections. The inspections will now be conducted at government expense, which will result in a cost savings to colleges.

If violations are found, financial penalties may be assessed against the most recalcitrant. The rule minimizes impacts in two ways. First, it provides a reasonable time between inspection and penalty-assessment to allow the college to address the problem. Second, the rule considers fire probability and severity of the violation in determining the amount of a given penalty. This will reduce the fiscal impact of less severe violations and will result in the assessment of a realistic penalty based on the hazard.

The statutes have fiscal impacts on OFPC as resources will be required to conduct inspections and enforce compliance. These costs have been anticipated and the necessary funding has been included within the 2002-2003 State budget.

There is no fiscal impact on local governments except for those who volunteer to be delegated inspection duties by OFPC.

5. Local Government Mandates

This rule places no mandate upon local governments.

6. Paperwork

The bulk of paperwork requirements will be fulfilled by OFPC, which will produce an inspection report for each building, issue orders and complete the paperwork necessary to obtain compliance with the UFPBC. Reporting requirements for regulated parties are minimal. Paperwork consists primarily of documentation of actions taken to abate fire safety violations. In any event, even before Education Law § 807-b was amended to authorize promulgation of this rule, all colleges and universities were required to file annual fire inspection reports with the Commissioner of Education.

Any paperwork requirements for local governments will be occasioned only by a local government's voluntary participation in the inspection process.

7. Duplication

There will be no duplication. Only OFPC or a delegated local government may conduct the required inspections, and only OFPC will have enforcement authority.

8. Alternatives

There are no viable alternatives to this rule. It is necessary to effect satisfactory compliance with the governing statutes.

9. Federal Standards

There are no applicable federal standards related to this rule.

10. Compliance Schedule

This rule became effective in substantially similar form as an Emergency Rule on January 1, 2003. Compliance will only be required following inspections, at which point the time periods provided in the rule will apply. These periods are long enough to abate most of the violations. Where an inspection shows a condition extremely hazardous to life, health or safety, compliance times will accordingly be shorter.

Regulatory Flexibility Analysis

1. Effect of Rule

The only businesses affected by this rule will be the colleges and universities outside of the City of New York. According to information provided by the State Education Department, there only 15 colleges which employ fewer than 101 people and qualify as small businesses under SAPA. This rule will not affect them, except as noted below, because under prior law, they were required to have annual inspections for compli-

ance with the UFPBC and file the resulting inspection reports with the Commissioner of Education. They were then required by the UFPBC to correct any violations.

This rule will not impact local governments because a request for statutory delegation of authority to conduct inspections is entirely voluntary. No requirements are otherwise imposed upon local governments.

2. Compliance Requirements

Affected colleges and universities will be required to correct violations noted as a result of the inspection, as was true under prior law. In order to allow compliance with the UFPBC to be undertaken in a reasonable manner, OFPC may allow colleges to develop compliance plans to address each violation. These are expected to be under exceptional circumstances.

3. Professional Services

In some instances, colleges and universities may need to utilize the services of a professional engineer or licensed architect in the development of compliance plans. It is anticipated that this activity will be infrequent due to the focus of the inspection relating to behavioral aspect or maintenance rather than structural or design features.

4. Compliance Costs

Compliance costs associated with the rule will vary based on the following: level of compliance currently found at each college; nature and severity of the noncompliant items; length of time the noncompliant condition continues to exist. Again, this is no different as was the case under prior law, as compliance with the UFPBC has always been required and violations would have to be addressed. The statute and rule will actually reduce costs to small business as OFPC will be providing the inspections at no cost, whereas previously, the colleges bore the inspection cost themselves.

Part 500 provides for the establishment of a reasonable time frame to allow correction of noncompliant items before the penalty portion of the rule becomes effective. If the correction is not completed within the original abatement date, a second date is established. It is this second date by which the penalty assessments are based.

5. Economic and Technological Feasibility

Economic impact on colleges will solely be driven by the level of current compliance with the UFPBC and its standards. Again, nothing in this rule increases the current requirements placed on colleges, but rather, the rule is designed to assure compliance. Colleges which address noncompliant conditions in a reasonable time frame will not incur any additional economic impacts than they would have under prior law.

The allowance of a compliance plan as outlined in Part 500 permits the college to incorporate technological changes and advancements when addressing noncompliant items.

6. Minimizing Adverse Impact

Deferring the penalty assessment portion of the rule to the second abatement date allows a period of time for the college to correct the violation without fear of penalty. This greatly reduces any negative economic impact the rule may have in terms of the assessment of fines.

7. Small Business and Government Participation

Representatives of the Commission on Independent Colleges and Universities were members of the Governor's Task Force on Campus Fire Safety, which actually recommended to the Governor that OFPC be given the statutory authority which the rule implements. In addition, the proposed rule will be available for public comment for a period of at least 45 days.

Rural Area Flexibility Analysis

1. Types and Estimated Numbers of Rural Areas

Approximately 167 colleges and universities will be inspected under Section 807-b of the Education Law and Section 156-e of the Executive Law. While many of this number are in rural areas, the regulations will not negatively impact rural areas. Inspection of colleges and universities was a legislative mandate under prior law, and continues to be so under the new statutes. The only difference is that OFPC will conduct the inspections.

Rural areas will actually benefit from the new inspection program. In many instances code enforcement personnel in rural areas conducted the inspections required by Education Law 807-b prior to the change in statute. The laws requiring the state to conduct inspections shifts responsibility to the OFPC relieving the local official of an unfunded mandate while not negatively impacting their employment status.

In addition, any impacts on rural areas at all are the result of a legislative mandate, and not these regulations.

2. Reporting, Recordkeeping and Other Compliance Requirements

Reporting and recordkeeping requirements of colleges is minimal and consists primarily of describing the mechanism for compliance of identified violations if they are not quickly abated. There may be a need for architectural or engineering professional services to develop compliance plans. It is anticipated that this will not be a frequent occurrence. There are no additional reporting or record keeping requirements for regulated parties within rural areas. Local governments within rural areas have no reporting or record keeping requirements unless they voluntarily choose to conduct required inspections under the delegation portion of the rule.

3. Costs

No adverse changes in costs are expected. Compliance with the UFPBC and its fire safety standards, and annual fire inspections of colleges were mandated by statute before Chapter 81 of the Laws of 2002 was adopted. This remains unchanged, except that the state will now conduct the inspections. For those colleges and universities who paid a contractor to conduct annual fire inspections, this cost will now be eliminated.

4. Minimizing Adverse Impact

Statute directs OFPC to assure compliance and empowers OFPC to assess fines for non-compliance. This rule establishes time periods between the initial inspection and the first re-inspection whereby colleges can correct the violation without fear of penalty. College facilities within rural areas that comply with the applicable fire safety standards should translate into a reduction in the fire protection demands within the rural area. Properly designed and maintained buildings will reduce the potential for a fire to occur.

5. Rural Area Participation

The proposed rule will be available for public comment for a period of at least 45 days.

Job Impact Statement

As provided in SAPA section 201-a(2)(a), it is apparent from the nature and purpose of this rule that it will not have a substantial adverse impact on jobs or employment opportunities. Instead, DOS has determined that the rule will have a positive impact on jobs and employment opportunities.

The inspection function performed by OFPC has already created over twenty state positions necessary to accomplish legislative objectives. Many of these positions will be regionally based throughout the state, and have already presented job opportunities for localized individuals who are qualified to perform OFPC's statutory duties, and have been presented with state employment which would not otherwise have been available.

OFPC staff members are well qualified in familiarity with the requirements of the UFPBC, and the majority have experience in code enforcement and fire fighting. With the implementation of this comprehensive fire safety inspection program, annual inspections by qualified individuals will first ensure that inspections are made; and second allow comprehensive enforcement activity to take place to correct violations. Before inspection and enforcement authority was conferred upon OFPC, there existed no efficient mechanism to make certain that annual inspections occurred or that violations be corrected.

Many violations of the UFPBC will require employment of qualified individuals to correct violations detected. It is expected that under some circumstances correction of violations will require the expertise of trained individuals, including electricians, contractors, engineers and design professionals.

In many instances, Local Code Officials conducted the inspections pursuant to Education Law 807-b prior to the change in statute. The statutory change shifts this responsibility to the OFPC, relieving the local government of an unfunded mandate, while not negatively impacting the employment status of local inspectors. They will still be required to perform all of the other duties they are responsible for under the UFPBC. In a few cases, private contractors were employed by the colleges to conduct inspections. While the change in statute may have a minimal impact on this specific group, the Legislature and Governor removed them as eligible inspectors in the new law. Therefore, it is not these regulations which may have an effect on them.

The statutory scheme which created the inspection program will positively impact both state and local employment opportunities.

**EMERGENCY/PROPOSED
RULE MAKING
NO HEARING(S) SCHEDULED**

Filing of Security Interests**I.D. No.** DOS-52-03-00019-EP**Filing No.** 1400**Filing date:** Dec. 15, 2003**Effective date:** Dec. 15, 2003

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Repeal of Part 143 of Title 19 NYCRR adopted on May 22, 1964 and Part 144 of Title 19 NYCRR adopted on September 24, 1986; and addition of Part 143 to Title 19 NYCRR.

Statutory authority: Uniform Commercial Code, section 9-526(a) and Executive Law, section 96-a

Finding of necessity for emergency rule: Preservation of general welfare.

Specific reasons underlying the finding of necessity: This rule is being adopted on an emergency basis to preserve the general welfare. Article 9 of the Uniform Commercial Code plays an important role in the economy of the State of New York. Accordingly, the volume and value of international, interstate and intrastate secured transactions filed in the State of New York requires that electronic filing be permitted and encouraged, and that revised article 9 of the Uniform Commercial Code be otherwise implemented and continued without interruption. Uniform Commercial Code § 9-526 directs the Secretary of State to adopt rules necessary to carry out the provisions of the revised article 9. This rule is adopted on an emergency basis because, in the Department's opinion, compliance with the requirements of section 202(1) of the State Administrative Procedure Act would be contrary to the public interest that will be served by permitting and encouraging electronic filing of financing statements and amendments under the Uniform Commercial Code and by otherwise ensuring that the revised article 9 is effectively administered on a continuing basis, thus avoiding potential disruption and uncertainty relating to the creation, filing and perfection of security interests in the State of New York.

Subject: Filing of security interests.

Purpose: To implement the provisions of art. 9 of the Uniform Commercial Code.

Substance of emergency/proposed rule: This rule implements the provisions of the Article 9 of the Uniform Commercial Code (UCC), as revised by Chapter 84 of the Laws of 2001. This rule (1) adopts standard forms and procedures for filing UCC documents with the Department of State and other filing offices, (2) prescribes procedures for the delivery and filing of UCC documents, (3) designates specific forms as approved UCC forms, (4) prescribes formats for the entry of names on UCC forms, (5) establishes procedures for correcting errors, (6) establishes procedures for submitting and responding to search requests, and (7) establishes fees for services rendered under Article 9 of the UCC and Article 10-A of the Lien Law.

This notice is intended to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire Feb. 12, 2004.

Text of rule and any required statements and analyses may be obtained from: Joseph Ball, Department of State, 41 State St., Albany, NY 12231, (518) 473-2278, e-mail: jball@dos.state.ny.us

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement

1. Statutory authority:

Section 9-526 of the Uniform Commercial Code (UCC) provides that the Secretary of State shall adopt rules to implement Article 9 of the UCC, as revised by Chapter 84 of the Laws of 2001 (Revised Article 9). Subparts 143-1, 143-2, 143-3, and 143-4 of this rule consist of implementing rules relating to general instructions, promulgation of approved UCC forms, rules for delivery of UCC forms to filing offices, rules for the filing and indexing of UCC forms, rules for submission of electronic UCC forms, and rules governing search requests.

Section 9-525 of the UCC provides that fees shall be determined in accordance with Executive Law § 96-a. Executive Law § 96-a provides that the Secretary of State shall determine the fees for services provided by filing offices pursuant to the provisions of the UCC and Lien Law Article

10-A. Executive Law § 96-a further provides that such fees shall be subject to the approval of the Division of Budget. Subpart 143-5 of this rule sets forth fees that have been approved by the Division of Budget.

2. Legislative objectives:

Revised Article 9, is based, in substantial part, on the "model" version of revised Article 9 as proposed and recommended by the American Law Institute and the National Conference of Commissioners on Uniform State Laws. Similar legislation has been enacted by other states across the nation. The intent of the Legislature in adopting Chapter 84 of the Laws of 2001 was to ensure that New York's Revised Article 9 is substantially similar to Article 9 in other states. This rule accords with the Legislature's intent by providing and implementing (1) rules by which filers prepare and file UCC forms, (2) rules by which filing offices file and index UCC forms, (3) rules by which the Secretary of State receives and responds to UCC search requests, and (4) rules establishing the fees for filing, search and copying services.

3. Needs and benefits:

This rule is necessary to implement Revised Article 9 of the UCC. By providing rules on matters such as what forms to use, how to complete those forms and how to file those forms, this rule allows filers to avoid mistakes that could cause expense or delay, or otherwise jeopardize the perfection and priority of a security interest. By providing rules regarding the manner in which a filing office receives and responds to a search request, this rule will enable an interested party to prepare a search request and to evaluate the search results, and should help a potential lender to avoid mistakes that could cause expense or delay, or otherwise jeopardize the perfection or priority of security interests. The fees are required by UCC § 9-525 and, as user fees, will defray the cost of administering Revised Article 9.

4. Costs:

a. Costs to regulated parties:

Persons who file UCC forms or request UCC information will purchase and use the approved forms, which are prescribed in § 143-1.3 of this rule. The cost of a form is not known, but the cost per form is expected to be minimal. In addition, the forms are available free on several web-sites, including the Department of State's web site at www.dos.state.ny.us.

Persons who file UCC forms, request UCC searches or request copies of filed UCC documents will have to pay the fees for the services set forth in Subpart 143-5 of this rule. These fees are higher than the fees that were applicable under former Article 9, and higher than the fees that were applicable under Revised Article 9 prior to April 1, 2003. However, this rule permits the filing of electronic UCC financing statements and amendments at a cost of \$20, which is one-half the cost of filing paper-based documents (\$40). This fee structure should encourage use of electronic filing. Further, the Department of State has developed and implemented a computer system that permits interested parties to conduct UCC searches at no cost via the internet. This computer system also permits interested parties to print their own copies of documents returned by the internet search; again, there is no charge for such copies. It is anticipated that many parties will rely, in whole or in part, on the free internet searches, and it is further anticipated that for some filers, the total cost of a transaction under the fee structure set forth in this rule will be lower under than the total cost of a similar transaction under former Article 9. For example, under former Article 9, a filer may have ordered at least one official UCC search prior to closing (fee: \$7.00 per search), ordered copies of filed documents revealed by that search (fee: \$1.50 per page), filed a paper UCC document (fee: \$7 for a one-page filing or \$12 for a multiple-page filing), ordered a post-closing official search (fee: \$7.00), and ordered a copy of the filed UCC document (fee: \$1.50 per page). The total fees charged by the Department of State for such a transaction would be at least \$21.00 plus the cost of any copies (at \$1.50 per page). Under the new fee structure, a filer who takes advantage of the electronic filing option may opt to perform his or her own internet search prior to closing (fee: \$0), print copies of documents revealed by that search (fee: \$0), file electronically (fee: \$20.00), perform an internet search following the closing (fee: \$0), and print a copy of the filed document (fee: \$0). The total fee charged by the Department of State for such a transaction would be \$20.00. These potential cost savings should be available to all persons involved in UCC transactions.

b. Costs to the Department of State:

The Department of State will not incur any significant new costs for implementing or continuing administration of this rule. The costs of administering Revised Article 9 are largely attributed to the statute, and not significantly to this implementing rule.

The search logic provisions contained in this rule reflect the search capabilities of the computer system recently installed at the Department of

State. This system permits off-site searching of UCC records by the public via the internet. It is anticipated that the availability of free internet UCC searches will reduce the demand for searches prepared by the Department of State. The Department of State should realize a reduction in the costs associated with performing UCC searches, and a reduction in revenue derived from fees for performing searches.

c. Costs to other State agencies:

This rule does not impose any costs on other State agencies. (Note however, that to the extent that any State agency may now be required to pay the applicable fees for filing UCC documents or requesting UCC information, such State agency will be required to pay the fees specified in Subpart 143-5 of this rule for such services.)

d. Cost to local governments:

Under Revised Article 9 of the UCC, the Secretary of State's office is the central filing office and the New York City Register's offices in New York County, Bronx County, Kings County and Queens County and the County Clerk's office in each of the other 58 counties are local-filing offices. Revised Article 9 imposes certain duties on all filing offices, including the local-filing offices, with regard to UCC filings and requests for UCC information. The County Clerks and the New York City Register should not incur any significant new costs for implementing or continuing administration of this rule. The costs of administering Revised Article 9 are largely attributed to the statute, and not significantly to this implementing rule.

5. Paperwork:

This rule imposes no reporting requirements.

This rule designates approved forms to be used to file UCC documents and to request UCC information. These forms, which are described in § 143-1.3 of this rule, are national forms that are used in other states. These forms, or substantially similar versions of these forms, have been in use under revised Article 9 since July 1, 2001. Further, these forms are, in many respects, similar to the forms that were used under former Article 9. Completion of the forms described in this rule should not impose any new burdens on any person who files a UCC form or requests UCC information.

6. Local government mandates:

Under former UCC Article 9, the New York City Register's offices in New York County, Bronx County, Kings County and Queens County and the County Clerk's office in each of the other 58 counties were designated as local-filing offices and, thus, were responsible for filing and indexing UCC forms and for responding to information requests. Those duties remain substantially the same under Revised Article 9, and this rule does not impose any substantial new duties.

7. Duplication:

This rule does not duplicate, overlap or conflict with any other relevant rules or legal requirements of state or federal governments.

8. Alternatives:

Revised Article 9 ("RA9") requires the Department of State to promulgate implementing regulations and, in doing so, to consider the corresponding regulations adopted by other states. Some other states that have adopted RA9 regulations have adopted versions of the "model rule" promulgated by the International Association of Commercial Administrators (the "IACA Model Rule"). A copy of the IACA Model Rules can be found at the following page on the IACA web site: <http://www.iaca.org/sts/modrulfu.doc>.

In preparing this rule, the Department of State considered the IACA Model Rule. Certain portions of this rule reflect concepts covered by the IACA Model Rule and use language that is substantially similar to that found in the IACA Model Rule. Other portions of this rule reflect concepts covered by the IACA Model Rule but use language that has been revised in a manner believed to be better suited to use in this State. In other portions of this rule (e.g., the fee provisions), the language used is substantially similar to the language used in the rules previously adopted under Former Article 9, in order to provide for as much continuity in interpretation as possible. This rule does not address certain matters covered by the IACA Model Rule (e.g., specifying the precise hours of operation of the UCC filing office), because the Department of State believes such matters are not appropriate for a rule of this type.

9. Federal standards:

There are no federal standards relating to State and local filings pursuant to the UCC.

10. Compliance schedule:

This rule can be complied with immediately. Revised Article 9 has been effective in this State and in most other states since July 1, 2001. Compliance with this rule should be substantially similar to compliance

with prior versions of rules implementing Revised Article 9. Lenders and other persons who do significant UCC business should be prepared to comply with this rule immediately.

Regulatory Flexibility Analysis

1. Effect of rule:

This rule affects any business or person who files a Uniform Commercial Code (UCC) form with, or requests UCC information from, the Department of State or any local-filing office. Some of the businesses affected will be small businesses. However, the Department of State is unable to determine how many small businesses might be affected.

This rule will have some effect on the New York City Register's offices in New York County, Bronx County, Kings County and Queens County, and on the County Clerk's office in each of the other 58 Counties, all of which are designated by UCC Revised Article 9 as local-filing offices.

2. Compliance requirements:

Small businesses, like all other businesses, must use the approved UCC forms when filing UCC related documents. The approved forms are designated in § 143-1.3 of this rule. In addition, small businesses, like all other businesses, must pay the fees prescribed in Subpart 143-5 of this rule.

The new fees set forth in Subpart 143-5 of this rule are higher than those applicable under former UCC Article 9. However, the search logic provisions contained in this rule reflect the searching capabilities of the computer system recently installed at the Department of State. This computer system permits off-site searching of UCC records by the public via the internet. The Department of State charges no fee for such internet searches. The public is permitted to print copies of UCC documents retrieved by the internet search system; again, the Department of State charges no fee for such copies. Further, this rule permits UCC documents to be transmitted to the Department of State's office by facsimile transmission and by XML transmission. These delivery methods should simplify filing, particularly where parties located some distance from Albany wish to file quickly. These advantages will be available to all businesses, including small businesses.

The fee applicable to electronic filings under this rule, coupled with the ability to perform free searches via the internet and to print free copies of the documents found by such internet searches, may result in the overall cost of a UCC transaction being lower under this rule than it was under the rules implementing former Article 9. For example, under former Article 9, a filer may have ordered at least one official UCC search prior to closing (fee: \$7.00 per search), ordered copies of filed documents revealed by that search (fee: \$1.50 per page), filed a paper UCC document (fee: \$7 for a one-page filing or \$12 for a multiple-page filing), ordered a post-closing official search (fee: \$7.00), and ordered a copy of the filed UCC document (fee: \$1.50 per page). The total fees charged by the Department of State for such a transaction would be at least \$21.00 plus the cost of any copies (at \$1.50 per page). Under the new fee structure, a filer who takes advantage of the electronic filing option may opt to perform his or her own internet search prior to closing (fee: \$0), print copies of documents revealed by that search (fee: \$0), file electronically (fee: \$20.00), perform an internet search following the closing (fee: \$0), and print a copy of the filed (fee: \$0). The total fee charged by the Department of State for such a transaction would be \$20.00. These potential cost savings should be available to all businesses, including small businesses, involved in UCC transactions.

The New York City Register's offices in New York County, Bronx County, Kings County and Queens County, and the County Clerks' offices in the other 58 Counties, must file and index UCC forms in accordance with Subparts 143-1 and 143-2 of this rule, and accept the fees prescribed in Subpart 143-5 of this rule.

3. Professional services:

Small businesses will not require any professional services to complete or file the approved UCC forms.

4. Compliance costs:

Under the former UCC Article 9, large and small businesses completed UCC forms and filed such forms with the Department of State and with the local-filing offices. Under Revised Article 9, businesses will follow a similar procedure using similar forms. Accordingly, with the exception of the higher filing fees specified in this rule, the Department of State does not anticipate that this rule will impose any new costs on businesses.

County Clerks and the New York City Register's offices were local-filing offices under the former Article 9 and their duties under Revised Article 9 are not significantly different. Accordingly, the Department of State does not anticipate that this rule will impose any new costs on the counties.

5. Economic and technological feasibility:

The procedures and forms prescribed by Revised Article 9 and this rule are substantially similar to the procedures and forms prescribed by the former UCC Article 9 and the rules implementing former Article 9. Compliance with the former rules was economically and technologically feasible for small businesses. Accordingly, the Department of State believes that it will be economically and technologically feasible for small businesses to comply with this rule.

This rule permits, but does not mandate, filing by XML transmission. The Department of State anticipates that bulk filers and service companies will be able to develop the technologies necessary to file via XML transmission, and the Department of State anticipates that filing via XML transmission will be economically and technologically feasible for bulk filers and for service companies and their customers. Again, filers who opt not to file via XML transmission will still be able to file paper-based UCC documents.

The computer system recently installed at the Department of State permits off-site searching of UCC records by the public via the internet. Small businesses with internet access can use this feature without cost. The Department of State will continue to perform searches for those who request such service. Therefore, small businesses without internet access will continue to be able to obtain UCC searches in the same manner such searches are now obtained. The Department of State will continue to charge the applicable fee for performing such searches. This fee will increase from \$7 under the rules implementing former UCC Article 9 to \$25 under this rule.

6. Minimizing adverse impact:

Revised Article 9 of the UCC is intended to provide uniform rules and procedures for the creation, perfection, amendment and termination of security interests. Accordingly, this rule does not make special provisions for small businesses.

The County Clerks and the New York City Register's offices served as local-filing offices under the former Article 9 and the rules implementing former Article 9. Accordingly, their designation as filing local-offices under Revised Article 9 and their compliance with this rule implementing Revised Article 9 should impose no adverse economic impact.

7. Small business and local government participation:

The Department of State previously solicited comments from County Clerks, and intends to solicit further comments. Representatives of the New York State Association of Counties reacted positively to the new fee schedule which first became effective (pursuant to prior rule) on April 1, 2003, and which is continued in this rule. Based on input from representatives of the New York State Association of Counties, the extra 50 cent fee applicable to certain UCC records indexed against real estate (which had been included in regulations implementing Former Article 9 and in earlier versions of regulations implementing Revised Article 9) was eliminated, and the extra block and lot fees applicable to filings in the counties in New York City and in Nassau County were continued.

The Department of State previously solicited comments from the business community, and intends to solicit further comments. For example, before it implemented the internet search system and the electronic filing systems that are now available, the Department of State solicited participation by service companies and other high-volume filers in intensive stress-testing of the systems. Further, this rule continues the new fee schedule that first became effective (pursuant to a prior rule) on April 1, 2003; before it implemented the new fee schedule, the Department of State sent approximately 10,000 notices to recent UCC filers, service companies, and other potentially affected parties. The Department of State has received numerous telephone calls, e-mails and letters from the business community. For the most part, comments regarding the internet search system, the electronic filing systems and fax filing system have been very positive; comments regarding the recently introduced systems that permit payment of certain fees by credit card and drawdown account have been positive (some complaints regarding the new payment options have been received; most such complaints involve the inability to use a particular payment option to pay for a particular service, such as the inability to use a drawdown account to pay for filings submitted by the recently introduced UCC e-file system); and comments regarding the new fee schedule have been negative. Most of the negative comments regarding the fee schedule were received within the first few weeks after its adoption on April 1, 2003; the number and the frequency of negative comments have since tapered off considerably. The Department of State believes that negative comments regarding the new fee schedule will continue to taper off as more and more UCC filers become aware of the free internet searching, free internet copying, fax filing capability, new payment options, and electronic filing options that are now available.

Further, the Department of State will continue to review its new UCC e-file system to determine if it can be modified in a manner that will permit the use of drawdown accounts to pay the processing fees applicable to documents submitted by that system.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

Revised Article 9 of the Uniform Commercial Code (UCC) applies uniformly throughout the State. Similarly, this rule implementing Revised Article 9 will apply uniformly throughout the State, including all rural areas of the State. (Note that this rule includes provisions for additional filing fees to be charged by local-filing offices in New York City and Nassau County; however, such provisions are similar to those found in prior rules implementing UCC Article 9).

2. Reporting, recordkeeping and other compliance requirements:

This rule does not impose any reporting or recordkeeping requirements. It is not likely that professional services will be required in order to comply with this rule. (Professional services are frequently required in connection with secured transactions and other activities governed by Revised Article 9; however, such professional services are necessitated by the nature of the underlying transactions and the nature of the governing statute, and not by this rule.)

3. Costs:

The Department of State does not anticipate that persons who file UCC forms or request UCC information under this rule will be required to incur any significant initial capital cost. Persons who wish to file UCC documents electronically, or to perform UCC searches via the internet, will need appropriate computer equipment and software and internet access; however, this rule does not require electronic filing, and a person who does not wish to perform a UCC search via the internet will still be permitted to order a search from the filing office.

A person filing a UCC document or requesting UCC information under this rule will be required to fill in an approved form and pay the applicable fee; the annual cost to any such person will depend on the number of filings and information requests such person makes each year. The approved forms are prescribed in § 143-1.3 of this rule. The cost of a form is expected to be minimal. In addition, the forms are available free on several websites, including the Department of State's web site at www.dos.state.ny.us. The fees are set forth in Subpart 143-5 of this rule. These fees are uniformly applied to all filers, so there should be no variation in such costs for different types of public and private entities in rural areas.

4. Minimizing adverse impact:

The Department of State is not aware of any information suggesting that this rule may impose any adverse impact on rural areas. Fees for services rendered under Revised Article 9 of the UCC and Article 10-A of the Lien Law are increased; however, except for the provisions permitting local-filing offices in New York City and Nassau County to charge certain additional filing fees, the fees specified in this rule apply uniformly throughout the State. (Note that the provisions allowing the local-filing offices in New York City and Nassau County to collect certain additional filing fees are substantially similar to the provisions in the rules implementing Former UCC Article 9, and, in any event, do not affect rural areas.) Further, (1) this rule permits submission of UCC documents to the Department of State by electronic means (XML transmission) and by facsimile, and (2) the Department of State has recently introduced an on-line search function that permits searching of the Department of State's UCC records via the internet. These innovations permit easier UCC filing and searching by all, particularly by those located in areas more distant from Albany.

5. Rural area participation:

The Department of State previously solicited comments from County Clerks, and intends to solicit further comments. Representatives of the New York State Association of Counties reacted positively to the new fee schedule which first became effective (pursuant to prior rule) on April 1, 2003, and which is continued in this rule. Based on input from representatives of the New York State Association of Counties, the extra 50 cent fee applicable to certain UCC records indexed against real estate (which had been included in regulations implementing Former Article 9 and in earlier versions of regulations implementing Revised Article 9) was eliminated, and the extra block and lot fees applicable to filings in the counties in New York City and in Nassau County were continued.

The Department of State previously solicited comments from the business community, and intends to solicit further comments. For example, before it implemented the internet search system and the electronic filing systems that are now available, the Department of State solicited participation by service companies and other high-volume filers in intensive stress-

testing of the systems. Further, this rule continues the new fee schedule that first became effective (pursuant to a prior rule) on April 1, 2003; before it implemented the new fee schedule, the Department of State sent approximately 10,000 notices to recent UCC filers, service companies, and other potentially affected parties. The Department of State has received numerous telephone calls, e-mails and letters from the business community. For the most part, comments regarding the internet search system, the electronic filing systems and fax filing system have been very positive; comments regarding the recently introduced systems that permit payment of certain fees by credit card and drawdown account have been positive (some complaints regarding the new payment options have been received; most such complaints involve the inability to use a particular payment option to pay for a particular service, such as the inability to use a drawdown account to pay for filings submitted by the recently introduced UCC e-file system); and comments regarding the new fee schedule have been negative. Most of the negative comments regarding the fee schedule were received within the first few weeks after its adoption on April 1, 2003; the number and the frequency of negative comments have since tapered off considerably. The Department of State believes that negative comments regarding the new fee schedule will continue to taper off as more and more UCC filers become aware of the free internet searching, free internet copying, fax filing capability, new payment options, and electronic filing options that are now available.

Further, the Department of State will continue to review its new UCC e-file system to determine if it can be modified in a manner that will permit the use of drawdown accounts to pay the processing fees applicable to documents submitted by that system.

Job Impact Statement

This rule will not have any substantial impact on jobs or employment opportunities. The procedures for filing, indexing and requesting information under Revised Article 9 of the Uniform Commercial Code (UCC) and this rule implementing Revised Article 9 are similar to the procedures under the former Article 9 and the rules implementing Former Article 9. Accordingly, Revised Article 9 and this rule should have not have a substantial impact on jobs or employment opportunities.

The search logic provisions contained in this rule reflect the searching capabilities of the computer system recently installed at the Department of State. This computer system permits off-site searching of UCC records by the public via the internet. The Department of State anticipates that private businesses, including small businesses, will offer UCC searching services to lenders and others with a need for such services. This may create some new private sector jobs and employment opportunities.

Department of Taxation and Finance

NOTICE OF ADOPTION

New York State, New York City, and Yonkers Withholding Tables

I.D. No. TAF-43-03-00045-A

Filing No. 1402

Filing date: Dec. 16, 2003

Effective date: Dec. 31, 2003

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Amendment of sections 171.4(b)(1), 251.1(b), and 291.1(b); repeal of Appendixes 10, 10-A, and 10-C; and addition of new Appendixes 10, 10A, and 10-C to Title 20 NYCRR.

Statutory authority: Tax Law, sections 171, subd. First; 671(a)(1); 697(a); 1309; 1312(a); 1329(a); 1332(a); and Model Local Law, section 7 found in section 1340(c); Codes and Ordinances of the City of Yonkers, sections 15-105; 15-108(a); 15-121; and 15-130; Administrative Code of the City of New York, sections 11-1771(a); 11-1797(a); 11-1909; and 11-1943

Subject: New York State, City of New York and City of Yonkers withholding tables and other methods.

Purpose: To reflect the revision of certain tax rates and the tax table benefit recapture for wages and compensation paid on or after Jan. 1, 2004.

Text or summary was published in the notice of proposed rule making, I.D. No. TAF-43-03-00045-P, Issue of Oct. 29, 2003.

Final rule as compared with last published rule: No changes.

Text of rule and any required statements and analyses may be obtained from: Diane M. Ohanian, Tax Regulations Specialist 4, Department of Taxation and Finance, Bldg. 9, State Campus, Albany, NY 12227, (518) 457-2254

Assessment of Public Comment

The agency received no public comment.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Personal Income Tax Regulations

I.D. No. TAF-52-03-00024-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: Amendment of sections 114.1, 115.1 and 115.4; repeal of sections 113.1, 114.1(b), 115.2; and 115.3; and addition of new sections 113.1, 115.2 and 115.3 to Title 20 NYCRR.

Statutory authority: Tax Law, sections 171, subd. First, and 697(a)

Subject: Deduction of a resident individual.

Purpose: To update the New York deduction used in computing the New York taxable income of a resident individual.

Substance of proposed rule: This proposal amends the New York State Personal Income Tax regulations, as published in Title 20 NYCRR. Article 2 of the Personal Income Tax regulations deals with the taxation of residents. The purpose of these amendments is to update Parts 113, 114 and 115 of this Article, which concern the deductions subtracted by a resident individual from New York adjusted gross income in arriving at New York taxable income. These parts are amended to remove incorrect language and material which either mirrors the statute or only serves to illustrate the statute where no additional guidance is needed. To compensate for the removal of the statutory material, references to the Tax Law are added.

The proposal includes the following sections.

Section 1 of the proposal repeals section 113.1 and adds a new section 113.1 (New York Deduction of a Resident Individual). The section is shortened by removing unnecessary material and includes references to Tax Law sections.

Sections 2 and 3 amend section 114.1 (New York Standard Deduction of a Resident Individual). The section is shortened by removing some material which mirrors the statute and includes references to the Tax Law.

Sections 5 and 6 repeal sections 115.2 (Modifications reducing Federal itemized deductions) and 115.3 (Modifications increasing Federal itemized deductions), respectively, and add new sections in their place. Some of the material in repealed section 115.2 provided for the computation of subtraction modifications under the method invalidated by the Tax Appeals Tribunal in the Matter of James R. Shorter, Jr. decision. New section 115.2 sets forth the computation of subtraction modifications on a pro rata basis, as mandated by the decision and in accordance with our Personal Income Tax forms and instructions. The listing of other subtraction modifications in repealed section 115.2 was removed because it only mirrored or illustrated the statute.

New section 115.3 refers to statutory material regarding addition modifications in place of repealed section 115.3, which had included a listing of some addition modifications.

Sections 4 and 7 of the proposal amend sections 115.1 and 115.4, respectively, to change cross-references and to direct readers to the law or correct regulation section.

Text of proposed rule and any required statements and analyses may be obtained from: Diane M. Ohanian, Tax Regulations Specialist 4, Department of Taxation and Finance, Bldg. 9, State Campus, Albany, NY 12227, (518) 457-2254

Data, views or arguments may be submitted to: Marilyn Kaltenborn, Director, Taxpayer Services Division, Department of Taxation and Finance, Bldg. 9, State Campus, Albany, NY 12227, (518) 457-1153

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement

1. Statutory authority: Tax Law, section 171, subdivision First, generally authorizes the Commissioner of Taxation and Finance to promulgate regulations; Tax Law, section 697(a), provides the authority for the Com-

missioner to make such reasonable rules and regulations as are necessary to enforce the personal income tax.

2. Legislative objectives: This proposal contains amendments which demonstrate the Commissioner's ability to take regulatory action when it is warranted. Regulatory action is necessary in order to update the Personal Income Tax regulations and to remove incorrect and unnecessary material from the regulations.

3. Needs and benefits: The purpose of these amendments is to update the Personal Income Tax regulations concerning the New York deduction used in computing the New York taxable income of a resident individual. Article 2 of the Personal Income Tax regulations deals with the taxation of residents. Parts 113, 114 and 115 of Article 2 concern the deductions subtracted by a resident individual from New York adjusted gross income in arriving at New York taxable income.

The amendments to Parts 113, 114, and 115 remove incorrect language and material which either mirrors the statute or only serves to illustrate the statute where no additional guidance is necessary. To compensate for the removal of the statutory material, the amendments include references to the Tax Law. This drafting procedure will help ensure that the regulations will not become outdated when amendments are made to the Tax Law or language in the statute becomes obsolete. This approach also accords with the Governor's directive to reduce regulations.

These amendments provide for a reflection in the regulations of the Tax Appeals Tribunal decision in the *Matter of James R. Shorter, Jr.* This decision invalidated the method for determining the subtraction modifications from itemized deductions contained in section 115.2(g) of the regulations. The method for determining these modifications mandated by the Shorter decision has already been reflected in the Personal Income Tax forms and instructions issued by the Department since the 1997 tax year. A clear benefit of the regulation is the elimination of the confusion caused by having the invalidated method remaining in the regulations.

4. Costs: There are no costs to regulated parties, this agency, the state or local governments for the implementation and continuing compliance with this rule beyond those already imposed by statute.

This analysis is based on a review of the statutory provisions and on discussions among personnel from the Department's Technical Services Bureau, Office of Counsel, Division of Tax Policy Analysis, Bureau of Fiscal Management, and Client Services Division.

5. Local government mandates: There are no local government mandates associated with these amendments.

6. Paperwork: There are no additional paperwork requirements associated with these amendments.

7. Duplication: This amendment does not duplicate any other requirements.

8. Alternatives: Because the current regulations are not up-to-date, the alternatives to proposing these amendments would be to (1) leave the currently out-of-date regulations in place, or (2) repeal the existing regulations without adding any further guidance. After examining both of these alternatives, we have decided that it is preferable to make this proposal to attain the benefits listed in section 3 above.

9. Federal standards: This rule does not exceed any minimum Federal standards for the same or similar subject area.

10. Compliance schedule: There is no time period needed for regulated parties to comply with these amendments. The proposed amendments include updates to the regulations to reflect existing Department policy which taxpayers should already be aware of.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not being submitted with this rule because this rule will not impose any adverse economic impact or reporting, recordkeeping, or other compliance requirements on small businesses or local governments. The rule does not distinguish between different types and sizes of regulated parties. The rule does not distinguish between regulated parties located in different geographical areas.

The purpose of these amendments is to update the Personal Income Tax regulations concerning the New York deduction used in computing the New York taxable income of a resident individual. As part of the update, these amendments provide for a reflection in the regulations of the Tax Appeals Tribunal decision in the *Matter of James R. Shorter, Jr.* The Shorter decision held that regulation section 115.2(g) is invalid for purposes of determining the amount of the Tax Law section 615(c) subtraction modification for State and local income taxes, and that the Internal Revenue Code section 68 reduction should be allocated on a pro rata basis.

The following organizations were notified that the Department was in the process of developing this rule and were given an opportunity to

participate in its development: the Small Business Council of the New York State Business Council, the Division for Small Business of Empire State Development, the National Federation of Independent Businesses, the Retail Council of New York State, the New York State Association of Counties, the Association of Towns of New York State, the New York Conference of Mayors, and the Office of Local Government and Community Services of the New York State Department of State.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not being submitted with this rule because it will not impose any adverse impact on rural areas or any reporting, recordkeeping, or other compliance requirements on public or private entities in rural areas. The rule does not distinguish between regulated parties located in different geographical areas.

The purpose of these amendments is to update the Personal Income Tax regulations concerning the New York deduction used in computing the New York taxable income of a resident individual. As part of the update, these amendments provide for a reflection in the regulations of the Tax Appeals Tribunal decision in the *Matter of James R. Shorter, Jr.* The Shorter decision held that regulation section 115.2(g) is invalid for purposes of determining the amount of the Tax Law section 615(c) subtraction modification for State and local income taxes, and that the Internal Revenue Code section 68 reduction should be allocated on a pro rata basis.

Job Impact Statement

A Job Impact Statement is not being submitted with this rule because it is evident from the subject matter of the rule that it would have no adverse impact on jobs and employment opportunities.

The purpose of these amendments is to update the Personal Income Tax regulations concerning the New York deduction used in computing the New York taxable income of a resident individual. As part of the update, these amendments provide for a reflection in the regulations of the Tax Appeals Tribunal decision in the *Matter of James R. Shorter, Jr.* The Shorter decision held that regulation section 115.2(g) is invalid for purposes of determining the amount of the Tax Law section 615(c) subtraction modification for State and local income taxes, and that the Internal Revenue Code section 68 reduction should be allocated on a pro rata basis.