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 Audit and Control

NOTICE OF ADOPTION

Purchase of Military Service

I.D. No. AAC-11-03-00001-A
Filing No. 1021
Filing date: Sept. 12, 2003
Effective date: Oct. 1, 2003

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

Action taken: Addition of Part 378 to Title 2 NYCRR.

Statutory authority: Retirement and Social Security Law, section 11(a)

Subject: Payment of member cost for purchase of military service.

Purpose: To set forth the time period for the commencement of payment of the member cost for purchase of military service.

Text or summary was published in the notice of proposed rule making, I.D. No. AAC-11-03-00001-P, Issue of March 19, 2003.

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

Text of rule and any required statements and analyses may be obtained from: Robert E. Coughlin, Office of the State Comptroller, 110 State St., Albany, NY 12244, (518) 473-6556, e-mail: rcoughlin@osc.state.ny.us

Assessment of Public Comment

The agency received no public comment.

Department of Civil Service

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-21-03-00001-A
Filing No. 1018
Filing date: Sept. 11, 2003
Effective date: Oct. 1, 2003

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

Action taken: Amendment of Appendix(es) 1 of Title 4 NYCRR.

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

Subject: Jurisdictional classification.

Purpose: To classify as position in the exempt class in the Department of Taxation and Finance.

Text was published in the notice of proposed rule making, I.D. No. CVS-21-03-00001-P, Issue of May 28, 2003.

Final rule compared with proposed rule: No changes.

Text of rule 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

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-21-03-00002-A
Filing No. 1019
Filing date: Sept. 11, 2003
Effective date: Oct. 1, 2003

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

Action taken: Amendment of Appendix(es) 1 of Title 4 NYCRR.

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

Subject: Jurisdictional classification.

Purpose: To classify as position in the exempt class in the Banking Department.

Text was published in the notice of proposed rule making, I.D. No. CVS-21-03-00002-P, Issue of May 28, 2003.

Final rule compared with proposed rule: No changes.

Text of rule 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

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-21-03-00003-A
Filing No. 1012
Filing date: Sept. 11, 2003
Effective date: Oct. 1, 2003

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

Action taken: Amendment of Appendix(es) 2 of Title 4 NYCRR.

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

Subject: Jurisdictional classification.

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

Text was published in the notice of proposed rule making, I.D. No. CVS-21-03-00003-P, Issue of May 28, 2003.

Final rule compared with proposed rule: No changes.

Text of rule 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

Assessment of Public Comment
The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-21-03-00004-A
Filing No. 1016
Filing date: Sept. 11, 2003
Effective date: Oct. 1, 2003

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

Action taken: Amendment of Appendix(es) 2 of Title 4 NYCRR.

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

Subject: Jurisdictional classification.

Purpose: To delete a position from the non-competitive class in the Department of Correctional Services.

Text was published in the notice of proposed rule making, I.D. No. CVS-21-03-00004-P, Issue of May 28, 2003.

Final rule compared with proposed rule: No changes.

Text of rule 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

Assessment of Public Comment
The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-21-03-00005-A
Filing No. 1017
Filing date: Sept. 11, 2003
Effective date: Oct. 1, 2003

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

Action taken: Amendment of Appendix(es) 2 of Title 4 NYCRR.

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

Subject: Jurisdictional classification.

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

Text was published in the notice of proposed rule making, I.D. No. CVS-21-03-00005-P, Issue of May 28, 2003.

Final rule compared with proposed rule: No changes.

Text of rule 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

Assessment of Public Comment
The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-21-03-00006-A
Filing No. 1013
Filing date: Sept. 11, 2003
Effective date: Oct. 1, 2003

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

Action taken: Amendment of Appendix(es) 2 of Title 4 NYCRR.

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

Subject: Jurisdictional classification.

Purpose: To delete positions from and classify positions in the non-competitive class in the State Department Service, Department of Health and State University of New York.

Text was published in the notice of proposed rule making, I.D. No. CVS-21-03-00006-P, Issue of May 28, 2003.

Final rule compared with proposed rule: No changes.

Text of rule 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

Assessment of Public Comment
The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-21-03-00007-A
Filing No. 1015
Filing date: Sept. 11, 2003
Effective date: Oct. 1, 2003

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

Action taken: Amendment of Appendix(es) 2 of Title 4 NYCRR.

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

Subject: Jurisdictional classification.

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

Text was published in the notice of proposed rule making, I.D. No. CVS-21-03-00007-P, Issue of May 28, 2003.

Final rule compared with proposed rule: No changes.

Text of rule 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

Assessment of Public Comment
The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-21-03-00008-A
Filing No. 1014
Filing date: Sept. 11, 2003
Effective date: Oct. 1, 2003

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

Action taken: Amendment of Appendix(es) 1 and 2 of Title 4 NYCRR.

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

Subject: Jurisdictional classification.

Purpose: To delete positions from and classify positions in the exempt and non-competitive classes in the Department of Agriculture and Markets and Department of Labor.

Text was published in the notice of proposed rule making, I.D. No. CVS-21-03-00008-P, Issue of May 28, 2003.

Final rule compared with proposed rule: No changes.

Text of rule 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

Assessment of Public Comment
The agency received no public comment.

Education Department

EMERGENCY RULE MAKING

Parental Consent for Special Education Services

I.D. No. EDU-23-03-00006-E
Filing No. 1028
Filing date: Sept. 12, 2003
Effective date: Sept. 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 200.5 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101 (not subdivided), 207 (not subdivided), 305(1), (2) and (20), 3713(1) and (2), 4402(1)(b)(2), (3) and (2)(a), 4403(3) and 4404(1)

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

Specific reasons underlying the finding of necessity: The proposed amendment is necessary to conform the Commissioner's Regulations to the parental consent provisions of section 614(a) of Part B of the Individuals with Disabilities Education Act (IDEA) and 34 CFR 300.505, as clarified in recent guidance received from the U.S. Department of Education. The U.S. Department of Education has informed the State Education Department that Part B of the IDEA requires parental consent for the initial provision of special education and related services and does not permit public agencies to use the IDEA due process hearing procedures to override a parental refusal to consent to the initial provision of special education and related services.

Consistent with federal requirements, the proposed amendment repeals provisions in section 200.5(b)(1)(ii) and (iii) that require, in the event that a parent does not grant consent for an initial provision of special education services within 30 days of a notice of recommendation, a board of education to initiate an impartial hearing to determine if the provision of special education services is warranted without parental consent.

The proposed amendment was adopted as an emergency measure, effective June 20, 2003, at the June 16 -17, 2003 meeting of the Board of Regents, and will expire on September 17, 2003, 90 days after its filing with the Department of State. The proposed amendment is to be adopted as a permanent rule at the September 10 -12, 2003 Regents meeting, which is the first meeting scheduled after expiration of the 45-day public comment period provided for in State Administrative Procedure Act section 202(1)(a). However, pursuant to SAPA section 202(5), the permanent adoption cannot become effective until after its publication in the *State Register* on October 1, 2003. A lapse in the rule's effective date may result in a disruption of the State's receipt of federal funds under Individuals with Disabilities Education Act (IDEA). A second emergency adoption is therefore necessary to ensure that the rule remains continuously in effect until the effective date of its adoption as a permanent rule.

Emergency action to adopt the proposed amendment is necessary for the preservation of the general welfare to ensure that the amendment remains continuously in effect until the effective date of its adoption as a permanent rule, and thereby ensure compliance with the parental consent provisions of Part B of the Individuals with Disabilities Education Act (IDEA) and the requirements for receipt of federal funds under the Act.

Subject: Parental consent for special education services.

Purpose: To conform the commissioner's regulations to the Federal Individuals with Disabilities Education Act and its implementing regulations by repealing the requirement that a school district initiate an impartial hearing when a parent does not provide consent for the initial provision of special education services.

Text of emergency rule: Subdivision (b) of section 200.5 of the Regulations of the Commissioner of the Commissioner is amended, effective September 12, 2003, as follows:

(b) Consent. (1) Written consent of the parent, defined in section 200.1(l) of this Part, is required:

(i) . . .

(ii) prior to the initial provision of special education to a student who has not previously been identified as having a disability[:]. [(a) consent] *Consent* for initial evaluation may not be construed as consent for initial provision of special education services; [and

(b) Except in the case of a preschool child, in the event that a parent does not grant consent for an initial provision of special education services within 30 days of a notice of recommendation, the board of education shall initiate an impartial hearing to determine if such provision of special education services is warranted without parental consent;]

(iii) prior to initial provision of special education services in a 12-month special service and/or program[:] .

[(a) except in the case of a preschool child, in the event that a parent does not grant consent for an initial provision of special education services in a 12-month program within 30 days of a notice of recommendation, the board of education shall initiate an impartial hearing to determine if such provision of services is warranted without parental consent.]

(iv) . . .

(v) . . .

(2) . . .

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. EDU-23-03-00006-P, Issue of June 11, 2003. The emergency rule will expire November 10, 2003.

Text of emergency 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

STATUTORY AUTHORITY:

Education Law section 101 continues the existence of the Education Department, with the Board of Regents at its head and the Commissioner as the chief administrative officer, and charges the Department with the general management and supervision of public schools and the educational work of the State.

Education Law section 207 empowers the Board of Regents and the Commissioner of Education to adopt rules and regulations to carry out the laws of the State regarding education and the functions and duties conferred by law on the State Education Department.

Education Law section 305(1) and (2) provide that the Commissioner, as chief executive officer of the State system of education, shall have general supervision over all schools and institutions subject to the provisions of the Education Law, or any statute relating to education, and shall be responsible for executing all educational policies determined by the Regents. Section 305(20) provides that the Commissioner shall have and execute such further powers and duties as he shall be charged with by the Regents.

Education Law section 3713(1) and (2) authorizes the State and school districts to accept federal law making appropriations for educational purposes and authorizes the Commissioner to cooperate with federal agencies to implement such law.

Education Law section 4402 describes the duties and responsibilities of school districts for students with disabilities. Section 4402(1)(b)(2) and (3) provides that the district committee or subcommittee on special education shall identify, review and evaluate each child thought to have a disability who resides within the district and make recommendations to the child's parent or person in parental relation relating to appropriate educational programs and placement for such child. Section 4402(2)(a) requires the board of education to furnish suitable educational opportunities for children with disabilities as described in Education Law section 4401(2).

Education Law section 4403(3) authorizes the Commissioner to promulgate regulations pertaining to the physical and educational needs of children with disabilities as the Commissioner shall deem to be in their best interests.

Education Law section 4404 establishes the appeal procedures for students with disabilities.

LEGISLATIVE OBJECTIVES:

The proposed amendment is consistent with the authority conferred by the above statutes, and is necessary to comply with the Individuals with Disabilities Education Act and its implementing federal regulations.

NEEDS AND BENEFITS:

The proposed amendment is necessary to conform the Commissioner's Regulations to the parental consent provisions of section 614(a) of Part B of the Individuals with Disabilities Education Act (IDEA) and 34 CFR 300.505, as clarified in recent guidance received from the U.S. Department of Education. The U.S. Department of Education has informed the State Education Department that Part B of the IDEA requires parental consent

for the initial provision of special education and related services and does not permit public agencies to use the IDEA due process hearing procedures to override a parental refusal to consent to the initial provision of special education and related services.

The proposed amendment is necessary to conform the Commissioner's Regulations to federal requirements by repealing provisions in section 200.5(b)(1)(ii) and (iii) that require, in the event that a parent does not grant consent for an initial provision of special education services within 30 days of a notice of recommendation, a board of education to initiate an impartial hearing to determine if the provision of special education services is warranted without parental consent.

COSTS:

(a) Costs to State government: None.

(b) Costs to local governments: None.

(c) Costs to private regulated parties: None.

(d) Costs to the State Education Department for implementation and continued administration of this rule: None.

The proposed amendment is necessary to conform the Commissioner's Regulations to the Individuals with Disabilities Education Act (IDEA) and its implementing federal regulations and does not impose any costs on the State, local governments, private regulated parties or the State Education Department. The State, school districts, Article 81 schools and other agencies providing special education services are required to comply with the IDEA as a condition to the receipt of federal funding under such Act. The proposed amendment merely conforms the Commissioner's Regulations to federal requirements by repealing provisions in section 200.5(b)(1)(ii) and (iii) that require, in the event that a parent does not grant consent for an initial provision of special education services within 30 days of a notice of recommendation, a board of education to initiate an impartial hearing to determine if the provision of special education services is warranted without parental consent.

PAPERWORK:

The proposed amendment does not impose any additional reporting or recordkeeping requirements.

LOCAL GOVERNMENT MANDATES:

The proposed amendment is necessary to conform the Commissioner's Regulations to the Individuals with Disabilities Education Act (IDEA) and its implementing federal regulations, and does not impose any additional program, service, duty or responsibility upon local governments. The State, school districts, Article 81 schools and other agencies providing special education services are required to comply with the IDEA as a condition to the receipt of federal funding under such Act. The proposed amendment merely conforms the Commissioner's Regulations to federal requirements by repealing provisions in section 200.5(b)(1)(ii) and (iii) that require, in the event that a parent does not grant consent for an initial provision of special education services within 30 days of a notice of recommendation, a board of education to initiate an impartial hearing to determine if the provision of special education services is warranted without parental consent.

DUPLICATION:

The proposed repeal does not duplicate any existing State or federal statute or regulation and is necessary to comply with federal requirements under the IDEA.

ALTERNATIVES:

There are no alternatives to the proposed amendment. The United States Department of Education has advised the State Education Department that it must revise the Commissioner's regulations to be in compliance with the IDEA.

FEDERAL STANDARDS:

The proposed amendment is necessary to conform the Commissioner's Regulations to the parental consent provisions of section 614(a) of Part B of the Individuals with Disabilities Education Act (IDEA) and 34 CFR 300.505, as clarified in recent guidance received from the U.S. Department of Education.

COMPLIANCE SCHEDULE:

It is anticipated that regulated parties will be able to achieve compliance with the proposed amendment by its effective date.

Regulatory Flexibility Analysis

Small Businesses:

The proposed amendment is necessary to conform the Commissioner's Regulations with the Individuals with Disabilities Education Act (IDEA) and its implementing federal regulations, which prohibit a school district from initiating an impartial hearing if a parent does not provide consent for the initial provision of special education services.

The proposed amendment applies to school districts, Article 81 schools and State agencies that operate an education program for students with disabilities and does not impose any adverse economic impact, reporting, recordkeeping or other compliance requirements on small businesses. Because it is evident from the nature of the proposed amendment that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

Local Governments:

EFFECT OF RULE:

The proposed amendment applies to each school district that operates an education program for students with disabilities.

COMPLIANCE REQUIREMENTS:

The proposed amendment is necessary to conform the Commissioner's Regulations to the parental consent provisions of section 614(a) of Part B of the Individuals with Disabilities Education Act (IDEA) and 34 CFR 300.505, as clarified in recent guidance received from the U.S. Department of Education. The State, school districts, Article 81 schools and other agencies providing special education services are required to comply with the IDEA as a condition to the receipt of federal funding under such Act. The proposed amendment does not impose any compliance requirements on school districts beyond those imposed by the federal statute and regulations. The proposed amendment merely conforms the Commissioner's Regulations to federal requirements by repealing provisions in section 200.5(b)(1)(ii) and (iii) that require, in the event that a parent does not grant consent for an initial provision of special education services within 30 days of a notice of recommendation, a board of education to initiate an impartial hearing to determine if the provision of special education services is warranted without parental consent.

PROFESSIONAL SERVICES:

The proposed amendment will not impose any additional professional service requirements on school districts.

COMPLIANCE COSTS:

The proposed amendment is necessary to conform the Commissioner's Regulations to the Individuals with Disabilities Education Act (IDEA) and its implementing federal regulations and will not impose any costs on school districts. The State, school districts, Article 81 schools and other agencies providing special education services are required to comply with the IDEA as a condition to the receipt of federal funding under such Act. The proposed amendment merely conforms the Commissioner's Regulations to federal requirements by repealing provisions in section 200.5(b)(1)(ii) and (iii) that require, in the event that a parent does not grant consent for an initial provision of special education services within 30 days of a notice of recommendation, a board of education to initiate an impartial hearing to determine if the provision of special education services is warranted without parental consent.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment will not impose any new technological requirements on school districts. Since there are no additional costs, these proposed amendments are economically feasible.

MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to conform the Commissioner's Regulations to the parental consent provisions of section 614(a) of Part B of the Individuals with Disabilities Education Act (IDEA) and 34 CFR 300.505, as clarified in recent guidance received from the U.S. Department of Education. The U.S. Department of Education has informed the State Education Department that Part B of the IDEA requires parental consent for the initial provision of special education and related services and does not permit public agencies to use the IDEA due process hearing procedures to override a parental refusal to consent to the initial provision of special education and related services.

The proposed amendment is necessary to conform the Commissioner's Regulations to federal requirements by repealing provisions in section 200.5(b)(1)(ii) and (iii) that require, in the event that a parent does not grant consent for an initial provision of special education services within 30 days of a notice of recommendation, a board of education to initiate an impartial hearing to determine if the provision of special education services is warranted without parental consent. The proposed amendment has been drafted to meet federal statutory and regulatory requirements without imposing additional requirements on school districts. Because these federal requirements directly apply to every school district in the State, it is not possible to establish different standards or to exempt them from the requirements of the proposed amendment.

LOCAL GOVERNMENT PARTICIPATION:

District, community and school superintendents will be invited to provide comments on the proposed regulations. Their input will be considered in the drafting of any revisions to the proposed amendments.

Rural Area Flexibility Analysis

TYPES AND ESTIMATED NUMBERS OF RURAL AREAS:

The proposed amendment applies to all public school districts, Article 81 schools and other State agency programs that operate special education programs, including those located in the 44 rural counties with less that 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 persons per square mile or less.

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

The proposed amendment is necessary to conform the Commissioner's Regulations to the Individuals with Disabilities Education Act (IDEA) and its implementing federal regulations. The State, school districts, Article 81 schools and other agencies providing special education services are required to comply with the IDEA as a condition to the receipt of federal funding under such Act.

The proposed amendment does not impose any compliance requirements or professional service requirements beyond those imposed by the federal statute and regulations. The proposed amendment merely conforms the Commissioner's Regulations to federal requirements by repealing provisions in section 200.5(b)(1)(ii) and (iii) that require, in the event that a parent does not grant consent for an initial provision of special education services within 30 days of a notice of recommendation, a board of education to initiate an impartial hearing to determine if the provision of special education services is warranted without parental consent.

COSTS:

The proposed amendment is necessary to conform the Commissioner's Regulations to the Individuals with Disabilities Education Act (IDEA) and its implementing federal regulations and will not impose any costs on school districts and other entities in rural areas. The State, school districts, Article 81 schools and other agencies providing special education services are required to comply with the IDEA as a condition to the receipt of federal funding under such Act. The proposed amendment merely conforms the Commissioner's Regulations to federal requirements by repealing provisions in section 200.5(b)(1)(ii) and (iii) that require, in the event that a parent does not grant consent for an initial provision of special education services within 30 days of a notice of recommendation, a board of education to initiate an impartial hearing to determine if the provision of special education services is warranted without parental consent.

MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to conform the Commissioner's Regulations to the parental consent provisions of section 614(a) of Part B of the Individuals with Disabilities Education Act (IDEA) and 34 CFR 300.505, as clarified in recent guidance received from the U.S. Department of Education. The U.S. Department of Education has informed the State Education Department that Part B of the IDEA requires parental consent for the initial provision of special education and related services and does not permit public agencies to use the IDEA due process hearing procedures to override a parental refusal to consent to the initial provision of special education and related services.

The proposed amendment is necessary to conform the Commissioner's Regulations to federal requirements by repealing provisions in section 200.5(b)(1)(ii) and (iii) that require, in the event that a parent does not grant consent for an initial provision of special education services within 30 days of a notice of recommendation, a board of education to initiate an impartial hearing to determine if the provision of special education services is warranted without parental consent. The proposed amendment has been drafted to meet federal statutory and regulatory requirements without imposing additional requirements on school districts. Because the federal requirements apply to all public school districts, Article 81 schools and other State agency programs that operate special education programs in the State, it is not possible to establish different standards for entities in rural areas or to exempt them from the requirements of the proposed amendment.

RURAL AREA PARTICIPATION:

Comments on the proposed amendment will be solicited from the Department's Rural Advisory Committee, whose membership includes school districts located in rural areas.

Job Impact Statement

The proposed amendment applies to school districts, Article 81 schools and State agencies that operate an education program for students with disabilities and is necessary to conform the Commissioner's Regulations with the Individuals with Disabilities Education Act (IDEA) and its implementing federal regulations, which prohibit a school district from initiating an impartial hearing if a parent does not provide consent for the initial provision of special education services.

The proposed amendment will not have an adverse impact on jobs and employment opportunities in New York State. Because it is evident from the nature of the proposed amendment that it will not affect job and employment opportunities, no affirmative steps were needed to ascertain that fact and none were take. Accordingly, a job impact statement is not required, and one has not been prepared.

EMERGENCY RULE MAKING

No Child Left Behind Act of 2001—Persistently Dangerous Schools

I.D. No. EDU-26-03-00024-E
Filing No. 1025
Filing date: Sept. 12, 2003
Effective date: Sept. 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 120.5 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101 (not subdivided), 207 (not subdivided), 215 (not subdivided), 305(1) and (2), 2802(7) and 3713(1) and (2)

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

Specific reasons underlying the finding of necessity: The proposed amendment is necessary to ensure State and local educational agency (LEA) compliance with the federal No Child Left Behind Act of 2001(NCLB), Pub. L. 107-110, by establishing criteria relating to the identification and designation of persistently dangerous public schools. The State and LEAs are required to comply with the requirements of the NCLB as a condition to their receipt of federal Title I ESEA funds.

Section 120.5 establishes procedures to ensure that LEAs implement provisions allowing any student who attends a persistently dangerous public elementary or secondary school or who is a victim of a violent criminal offense, to attend a safe public school within the LEA to the extent required by the unsafe school choice provisions of NCLB section 9532. In order to successfully carry out these procedures consistent with State and federal requirements, additional time is needed to notify LEAs that their schools have been identified for potential designation as persistently dangerous, to allow these LEAs to present evidence as to why the identified schools should not be designated, and to notify LEAs of the final determination concerning the persistently dangerous designation. In addition, supplemental information from the Uniform Violent Incident Reporting System for the current school year is needed in order to make the final determination. The proposed amendment to section 120.5 provides for this additional time and information, and will ensure final implementation of the required state policy related to the Unsafe School Choice Option contained in the NCLB.

The proposed rule was adopted as an emergency measure, effective June 17, 2003, at the June 16-17, 2003 meeting of the Board of Regents, and will expire on September 14, 2003, 90 days after its filing with the Department of State. The proposed rule is to be adopted as a permanent rule at the September 10-12, 2003 Regents meeting, which is the first meeting scheduled after expiration of the 45-day public comment period provided for in State Administrative Procedure Act section 202(1)(a). However, pursuant to SAPA section 202(5), the permanent adoption cannot become effective until after its publication in the *State Register* on October 2, 2003. A lapse in the rule's effective date could result in the State's noncompliance with federal requirements under the No Child Left Behind Act of 2001 and affect State and LEA funding under federal Title I of the ESEA .

A second emergency adoption is therefore necessary to ensure that the rule remains continuously in effect until the effective date of its adoption as a permanent rule.

Emergency action to adopt the proposed rule is necessary for the preservation of the general welfare to ensure that the amendments to section 120.5 of the Commissioner's Regulations that were adopted at the June 2003 Regents meeting, relating to the identification of persistently dangerous schools under the No Child Left Behind Act of 2001, remain continuously in effect until the effective date of their adoption as a perma-

nent rule, and thus ensure State and local educational agency compliance with the federal No Child Left Behind Act of 2001.

Subject: No Child Left Behind Act (NCLB) - persistently dangerous schools.

Purpose: To establish criteria relating to the identification and designation of persistently dangerous public schools.

Text of emergency rule: Paragraphs (1), (2) and (3) of subdivision (a) of section 120.5 of the Regulations of the Commissioner of Education are amended, effective September 12, 2003, as follows:

(1) [Commencing] *On or before July 1 of each year commencing* in 2003, the commissioner shall annually notify the local educational agencies of those schools which the information described in this subdivision indicate may be persistently dangerous public elementary and secondary schools.

(2) Upon notification that a school has been identified for potential designation as a persistently dangerous public elementary or secondary school, the local educational agency shall be given the opportunity to present evidence to the commissioner that conditions in the school do not unreasonably threaten the safety of students, that it has taken appropriate action or actions to improve safety at the school, [or] *and* any other such evidence in support of its position that the school should not be designated as persistently dangerous. *The commissioner shall request local educational agencies to submit, by a date prescribed by the commissioner, data for the current school year that is reportable under the uniform violent incident reporting system and is deemed necessary to make a final determination that a school should be designated as persistently dangerous. If a local educational agency fails to submit such data by such date, such final determination shall be based on data on file with the commissioner.*

(3) The commissioner shall consider any evidence presented to him pursuant to paragraph (2) of this subdivision and shall notify the local educational agency no later than [July] *August* 1 immediately following his initial notification *of the final determination on* whether the school has been designated as a persistently dangerous public elementary or secondary school.

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 emergency proposed rule making, I.D. No. EDU-26-03-00024-EP, Issue of July 2, 2003. The emergency rule will expire December 12, 2003.

Text of emergency 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

STATUTORY AUTHORITY:

Education Law section 101 continues the existence of the Education Department, with the Board of Regents as its head, and authorizes the Regents to appoint the Commissioner as chief administrative officer of the Department, which is charged with the general management and supervision of public schools and the educational work of the State.

Education Law section 207 authorizes the Regents and Commissioner to adopt rules and regulations implementing State law regarding education.

Education Law section 215 provides the Commissioner with authority to require schools to submit reports containing such information as the Commissioner may prescribe.

Education Law section 305(1) designates the Commissioner as chief executive officer of the State system of education and the Regents, and authorizes the Commissioner to enforce laws relating to the educational system and to execute the Regents educational policies. Section 305(2) authorizes the Commissioner to have general supervision over schools subject to the Education Law.

Education Law section 2802(7) requires the Commissioner to annually determine which public schools are persistently dangerous in accordance with regulations developed in consultation with a representative sample of local educational agencies (LEAs) and based upon data submitted through the Uniform Violent Incident Reporting System over a period prescribed in the regulations. The amendment authorizes the Commissioner to adopt regulations to ensure LEAs implement provisions allowing any student attending a persistently dangerous public elementary or secondary school, as so determined, or who is a victim of a violent criminal offense, to attend a safe public school within the LEA to the extent required by section 9532 of the federal No Child Left Behind Act of 2001 (NCLB), Public Law 107-110.

Education Law section 3713(1) and (2) authorizes the State and school districts to accept federal law making appropriations for educational purposes and authorizes the Commissioner to cooperate with federal agencies to implement such law.

LEGISLATIVE OBJECTIVES:

The proposed amendment is consistent with the authority conferred by the above statutes, and is necessary to ensure State compliance with the NCLB.

NEEDS AND BENEFITS:

The proposed amendment is necessary to ensure State and local educational agency (LEA) compliance with the NCLB by establishing criteria relating to the identification and designation of persistently dangerous public schools. The State and LEAs are required to comply with the requirements of the NCLB as a condition to their receipt of federal Title I ESEA funds.

Section 120.5 establishes procedures to ensure that LEAs implement provisions allowing any student who attends a persistently dangerous public elementary or secondary school or who is a victim of a violent criminal offense, to attend a safe public school within the LEA to the extent required by the unsafe school choice provisions of NCLB section 9532. In order to successfully carry out these procedures consistent with State and federal requirements, additional time is needed to notify LEAs that their schools have been identified for potential designation as persistently dangerous, to allow these LEAs to present evidence as to why the identified schools should not be designated, and to notify LEAs of the final determination concerning the persistently dangerous designation. In addition, supplemental information from the Uniform Violent Incident Reporting System for the current school year is needed in order to make the final determination. The proposed amendment to section 120.5 will provide for this additional time and information, and it will enable the Department to submit a required quarterly report to the U.S. Department of Education by June 30, 2003 which confirms that appropriate steps have been taken to accomplish final implementation of the required state policy related to the Unsafe School Choice Option contained in the NCLB.

COSTS:

Cost to the State: None. The proposed amendment is necessary to conform the Commissioner's Regulations to the requirements of the NCLB. The State is required to comply with the NCLB as a condition to its receipt of federal funding under Title I of the ESEA, as amended. The amendment will not impose any costs on the State beyond those imposed by State and federal statutes.

Costs to local government: None. The proposed amendment is necessary to conform the Commissioner's Regulations to the requirements of the NCLB. LEAs, including school districts, BOCES and charter schools, are required to comply with the NCLB as a condition to their receipt of federal funding under Title I of the ESEA, as amended. The proposed amendment will not impose any costs on these entities beyond those imposed by State and federal statutes.

Cost to private regulated parties: None. The rule is not applicable to private parties.

Cost to regulating agency for implementation and continued administration of this rule: None. The rule is necessary to conform the Commissioner's Regulations to the NCLB. The State is required to comply with the NCLB as a condition to its receipt of federal funding under Title I of the ESEA, as amended. The rule will not impose any additional costs on the Department beyond those imposed by State and federal statutes.

LOCAL GOVERNMENT MANDATES:

The proposed amendment is necessary to establish criteria and procedures to conform to the provisions of the NCLB relating to the identification and designation of persistently dangerous schools. LEAs, including school districts, BOCES and charter schools, are required to comply with the NCLB as a condition to receipt of federal funding under Title I of the ESEA, as amended. The amendment will not impose any additional program, service, duty or responsibility beyond those imposed by State and federal statutes.

The proposed amendment to section 120.5(a) provides that on or before July 1 of each year commencing in 2003, the Commissioner shall annually notify LEAs of those schools which may be persistently dangerous public elementary and secondary schools. Upon notification that a school has been identified for potential designation as a persistently dangerous school, the LEA shall be given the opportunity to present evidence to the Commissioner that conditions in the school do not unreasonably threaten the safety of students, that it has taken appropriate action or actions to improve safety at the school, and any other such evidence in support of its position that the school should not be designated as persistently dangerous. The Commissioner shall request LEAs to submit, by a date prescribed by the Commissioner, data for the current school year that is reportable under

the Uniform Violent Incident Reporting System and is deemed necessary to make a final determination that a school should be designated as persistently dangerous. If an LEA fails to submit such data by such date, such final determination shall be based on data on file with the Commissioner. The Commissioner shall notify the LEA no later than August 1 immediately following his initial notification of the final determination on whether the school has been designated as a persistently dangerous public elementary or secondary school.

PAPERWORK:

The Commissioner shall request LEAs to submit, by a date prescribed by the Commissioner, data for the current school year that is reportable under the Uniform Violent Incident Reporting System and is deemed necessary to make a final determination that a school should be designated as persistently dangerous. If an LEA fails to submit such data by such date, such final determination shall be based on data on file with the Commissioner.

DUPLICATION:

The proposed amendment does not duplicate, overlap or conflict with State and federal rules or requirements, and is necessary to conform the Commissioner's Regulations to the NCLB.

ALTERNATIVES:

There were no significant alternatives to the proposed amendment, which is necessary to conform the Commissioner's Regulations to the NCLB.

FEDERAL STANDARDS:

The amendment does not exceed any minimum standards of the federal government for the same or similar subject areas. The amendment will ensure State and LEA compliance with the NCLB.

COMPLIANCE SCHEDULE:

It is anticipated that LEAs can achieve compliance with the proposed amendment by its effective date. With respect to this year's designation, notification would be provided to an LEA on or before July 1, 2003, that one or more of its schools has been identified for potential designation as a persistently dangerous school. The LEA would be given an opportunity to present evidence that the school should not be designated. In addition, the Commissioner shall request LEAs to submit current school year data that is reportable under the Uniform Violent Incident Reporting System and is deemed necessary to make a final determination with respect to such designation. The Commissioner shall notify the LEA no later than August 1, 2003 of the final determination.

Regulatory Flexibility Analysis

Small Businesses:

The proposed amendment establishes criteria relating to the identification and designation of persistently dangerous public schools to ensure State and local educational agency (LEA) compliance with the federal No Child Left Behind Act of 2001 (NCLB). The proposed amendment does not impose any economic impact, or other compliance requirements on small businesses. Because it is evident from the nature of the proposed amendment that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

Local Government:

EFFECT OF RULE:

The proposed amendment generally applies to each local educational agency (LEA) as defined in section 9101(26) of the No Child Left Behind Act of 2001 (NCLB), including school districts, boards of cooperative educational services (BOCES) and charter schools.

COMPLIANCE REQUIREMENTS:

The proposed amendment is necessary to ensure State and local educational agency (LEA) compliance with the NCLB by establishing criteria relating to the identification and designation of persistently dangerous public schools. The State and LEAs are required to comply with the requirements of the NCLB as a condition to their receipt of federal Title I ESEA funds.

Section 120.5 establishes procedures to ensure that LEAs implement provisions allowing any student who attends a persistently dangerous public elementary or secondary school or who is a victim of a violent criminal offense, to attend a safe public school within the LEA to the extent required by the unsafe school choice provisions of NCLB section 9532.

The proposed amendment to section 120.5(a) provides that on or before July 1 of each year commencing in 2003, the Commissioner shall annually notify LEAs of those schools which may be persistently dangerous public elementary and secondary schools. Upon notification that a school has been identified for potential designation as a persistently dangerous school, the LEA shall be given the opportunity to present evidence to the Commissioner that conditions in the school do not unreasonably threaten the safety of students, that it has taken appropriate action or actions to improve safety at the school, and any other such evidence in support of its position that the school should not be designated as persistently dangerous. The Commissioner shall request LEAs to submit, by a date prescribed by the Commissioner, data for the current school year that is reportable under the Uniform Violent Incident Reporting System and is deemed necessary to make a final determination that a school should be designated as persistently dangerous. If an LEA fails to submit such data by such date, such final determination shall be based on data on file with the Commissioner. The Commissioner shall notify the LEA no later than August 1 immediately following his initial notification of the final determination on whether the school has been designated as a persistently dangerous public elementary or secondary school.

PROFESSIONAL SERVICES:

The proposed amendment does not impose any additional professional services requirements on school districts, BOCES or charter schools.

COMPLIANCE COSTS:

The proposed amendment is necessary to conform the Commissioner's Regulations to the requirements of the NCLB, relating to the identification and designation of persistently dangerous schools. The State and LEAs, including school districts, BOCES and charter schools, are required to comply with the NCLB as a condition to their receipt of federal funding under Title I of the ESEA, as amended. The proposed amendment will not impose any costs on these entities beyond those imposed by State and federal statutes.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment does not impose any new technological requirements on school districts, BOCES and charter schools. Economic feasibility is addressed under the Costs section above.

MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to conform the Commissioner's Regulations to the requirements of the NCLB, relating to the identification and designation of persistently dangerous schools. The State and LEAs, including school districts, BOCES and charter schools, are required to comply with the NCLB as a condition to their receipt of federal funding under Title I of the ESEA, as amended. The proposed amendment does not impose any additional costs or compliance requirements upon school districts, BOCES or charter schools beyond those imposed by federal and State statutes. The proposed amendment has been carefully drafted to meet these specific federal and State requirements.

LOCAL GOVERNMENT PARTICIPATION:

Comments on the proposed amendment were solicited from school districts through the offices of the district superintendents of each supervisory district in the State. Comments were also solicited from charter school principals. Copies of the proposed amendment were provided to the State Committee of Practitioners (COP), which consists of teachers, parents, district and building-level administrators, members of local school boards, and pupil personnel services staff, who are representative of all constituencies from various geographical locations across the State. The COP includes teachers and paraprofessionals from around the State representing a variety of grade levels and subject areas, directors of teacher-preparation institutions, officials and educators representing the New York City School District, several other urban and rural school systems, nonpublic schools, parent advocacy groups, teacher union representatives and community-based organizations.

Rural Area Flexibility Analysis

TYPES AND ESTIMATED NUMBERS OF RURAL AREAS:

The proposed amendment establishes criteria relating to the identification and designation of persistently dangerous public schools to ensure State and local educational agency (LEA) compliance with the federal No Child Left Behind Act of 2001 (NCLB). The proposed amendment generally applies to each school district, board of cooperative educational services (BOCES) and charter school in the State, including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less.

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

The proposed amendment is necessary to ensure State and local educational agency (LEA) compliance with the NCLB by establishing criteria relating to the identification and designation of persistently dangerous public schools. The State and LEAs are required to comply with the

requirements of the NCLB as a condition to their receipt of federal Title I ESEA funds.

Section 120.5 establishes procedures to ensure that LEAs implement provisions allowing any student who attends a persistently dangerous public elementary or secondary school or who is a victim of a violent criminal offense, to attend a safe public school within the LEA to the extent required by the unsafe school choice provisions of NCLB section 9532.

The proposed amendment to section 120.5(a) provides that on or before July 1 of each year commencing in 2003, the Commissioner shall annually notify LEAs of those schools which may be persistently dangerous public elementary and secondary schools. Upon notification that a school has been identified for potential designation as a persistently dangerous school, the LEA shall be given the opportunity to present evidence to the Commissioner that conditions in the school do not unreasonably threaten the safety of students, that it has taken appropriate action or actions to improve safety at the school, and any other such evidence in support of its position that the school should not be designated as persistently dangerous. The Commissioner shall request LEAs to submit, by a date prescribed by the Commissioner, data for the current school year that is reportable under the Uniform Violent Incident Reporting System and is deemed necessary to make a final determination that a school should be designated as persistently dangerous. If an LEA fails to submit such data by such date, such final determination shall be based on data on file with the Commissioner. The Commissioner shall notify the LEA no later than August 1 immediately following his initial notification of the final determination on whether the school has been designated as a persistently dangerous public elementary or secondary school.

The proposed amendment does not impose any additional professional services requirements on school districts, BOCES or charter schools.

COSTS:

The proposed amendment is necessary to conform the Commissioner's Regulations to the requirements of the NCLB, relating to the identification and designation of persistently dangerous schools. The State and LEAs, including school districts, BOCES and charter schools, are required to comply with the NCLB as a condition to their receipt of federal funding under Title I of the ESEA, as amended. The proposed amendment will not impose any costs on these entities beyond those imposed by State and federal statutes.

MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to conform the Commissioner's Regulations to the requirements of the NCLB, relating to the identification and designation of persistently dangerous schools. The State and LEAs, including school districts, BOCES and charter schools, are required to comply with the NCLB as a condition to their receipt of federal funding under Title I of the ESEA, as amended. The proposed amendment does not impose any additional costs or compliance requirements upon school districts, BOCES or charter schools beyond those imposed by federal and State statutes. The proposed amendment has been carefully drafted to meet these specific federal and State requirements.

RURAL AREA PARTICIPATION:

Comments on the proposed amendment were solicited from the Department's Rural Advisory Committee, whose membership includes schools located in rural areas. In addition, copies of the proposed rule will be provided to each charter school. Copies of the proposed rule were also provided to the State Committee of Practitioners (COP), which consists of teachers, parents, district and building-level administrators, members of local school boards, and pupil personnel services staff, who are representative of all constituencies from various geographical locations across the State. The COP includes teachers and paraprofessionals from around the State representing a variety of grade levels and subject areas, directors of teacher-preparation institutions, officials and educators representing the New York City School District, several other urban and rural school systems, nonpublic schools, parent advocacy groups, teacher union representatives and community-based organizations.

Job Impact Statement

The proposed amendment is necessary to conform section 120.5(a) of the Commissioner's Regulations, relating to the identification and designation of persistently dangerous public schools, to ensure State and local educational agency (LEA) compliance with the federal No Child Left Behind Act of 2001 (NCLB), Pub. L. 107-110.

The proposed amendment applies to school districts, boards of cooperative educational services (BOCES) and charter schools. Local educational agencies, including school districts, BOCES and charter schools, are required to comply with the requirements of the NCLB as a condition to their receipt of federal funding under Title I of the Elementary and Secondary Education Act of 1965, as amended.

The proposed amendment will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the amendment that it will have a positive impact, or no impact, on jobs or employment opportunities, no further steps were needed to ascertain those facts and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Assessment of Public Comment

The agency received no public comment.

EMERGENCY RULE MAKING

School Bus Monitors and Attendants

I.D. No. EDU-34-03-00009-E
Filing No. 1027
Filing date: Sept. 12, 2003
Effective date: Sept. 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 156.3(c) of Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided) and 3624 (not subdivided); Vehicle and Traffic Law, section 1229-d(3); and L. 2003, ch. 159

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

Specific reasons underlying the finding of necessity: The proposed amendment is needed to conform the Commissioner's Regulations to the provisions of Vehicle and Traffic Law (VTL) section 1229-d(3), as amended by Chapter 159 of the Laws of 2003.

Vehicle and Traffic Law (VTL) section 1229-d(3), as added by Chapter 472 of the Laws of 2002, requires the Commissioner of Education to promulgate regulations requiring that school bus attendants, as defined in VTL section 1229-d(1), who serve pupils with a disabling condition, receive school bus safety training and instruction relating to their special needs. Such safety training shall include techniques for assisting disabled students in entering and exiting the school bus, and instruction in cardiopulmonary resuscitation (CPR), as well as any additional first aid or health emergency skills as deemed necessary and appropriate by the Commissioner. In addition, such attendants shall demonstrate the ability to perform procedures necessary in emergency situations as deemed appropriate by the Commissioner. These requirements were incorporated into section 156.3(c) of the Commissioner's Regulations and adopted at the June 16-17, 2003 meeting of the Board of Regents, effective July 10, 2003. Chapter 159 of the Laws of 2003, which was signed by the Governor on July 22, 2003, amended subdivision (3) of VTL section 1229-d. The statute provides that it shall take effect on the same date as section 1 of Chapter 472 of the Laws of 2002 (July 1, 2003). Consistent with the statute, as amended, section 156.3(c)(4) has been revised to provide that the CPR instruction shall be given where such skills are required as part of the individualized education plan prepared for the student, and to further provide that any person employed as a school bus attendant serving pupils with a disabling condition on January 1, 2004 shall comply with VTL section 1229-d(3) by July 1, 2004 and that any person hired after January 1, 2004 shall complete training, instruction and testing prior to assuming their duties as a school bus attendant serving pupils with a disabling condition.

Emergency action to adopt the proposed amendment is necessary for the preservation of the general welfare in order to immediately conform the Commissioner's Regulations with the provisions of Vehicle and Traffic Law (VTL) section 1229-d(3), as amended by Chapter 159 of the Laws of 2003, so that individuals hired as school bus attendants may obtain instruction, training and certification consistent with statutory requirements.

It is anticipated that the proposed amendment will be presented to the Board of Regents for adoption as a permanent rule at the November 2003 meeting of the Board of Regents, which is the first scheduled meeting after expiration of the 45-day public comment period mandated by the State Administrative Procedure Act.

Subject: Requirements for school bus monitors and attendants.

Purpose: To clarify the training and testing requirements for school bus monitors and attendants.

Text of emergency rule: 1. Paragraph (4) of subdivision (c) of section 156.3 of the Regulations of the Commissioner of Education is amended, effective September 12, 2003, as follows:

(4) Required certifications. [Each attendant employed by a school district, board of cooperative educational services or contractor on July 1, 2003 shall have until July 1, 2004 to obtain training and certification in cardiopulmonary resuscitation. Individuals hired after July 1, 2003 must obtain training and certification prior to assuming their duties as a school bus attendant. Thereafter, current certification in cardiopulmonary resuscitation must be maintained.] *Any person employed by a school district, board of cooperative educational services or pupil transportation contractor as a school bus attendant serving pupils with a disabling condition on January 1, 2004, shall have until July 1, 2004 to obtain training and certification in cardiopulmonary resuscitation where such skills are required as part of the individualized education plan prepared for the student. Any such person hired after January 1, 2004 shall, prior to assuming their duties as a school bus attendant, obtain training and certification in cardiopulmonary resuscitation where such skills are required as part of the individualized education plan prepared for the student.* School districts, boards of cooperative educational services or contractors may require monitors or attendants to maintain certification in first aid.

2. Paragraph (5) of subdivision (c) of section 156.3 of the Regulations of the Commissioner of Education is amended, effective September 12, 2003, as follows:

(5) Pre-Service, safety training, and refresher training. *Except as otherwise provided in this paragraph,* [Each] *each* school bus monitor or attendant employed by a board of education, board of cooperative educational services, or pupil transportation contractor on July 1, 2003 shall comply with the training requirements of this paragraph no later than July 1, 2004. Individuals hired after July 1, 2003 shall comply with such requirements before assuming their duties on a school bus.

(i) *Pre-service instruction.* All school bus monitors or attendants shall receive 3 hours of pre-service instruction as prescribed by the commissioner upon recommendation of the commissioner's School Bus Driver Instructor Advisory Committee, which shall include, but is not limited to, [instruction relating to special needs transportation,] school bus safety practices, child management techniques, and the proper techniques for assisting children [and special needs children] to safely embark and disembark a school bus. *In addition to such instruction, any person employed on January 1, 2004 as a school bus monitor, or as a school bus attendant serving pupils with a disabling condition, shall, by July 1, 2004, receive instruction as prescribed by the commissioner upon recommendation of the commissioner's School Bus Driver Instructor Advisory Committee relating to special needs transportation, including, but not limited to, the proper techniques for assisting disabled students in entering and exiting the school bus. Any person hired after January 1, 2004 shall complete such special needs instruction prior to assuming their duties as a school bus monitor or as a school bus attendant.*

(ii) A certified school bus driver instructor's physical presence shall not be required during training conducted upon initial employment of a school bus monitor or attendant by a board of education or transportation contractor, provided that such training is conducted under the general supervision of such certified instructor.

(iii) Specialized training. Each school bus monitor or attendant hired after July 1, 2003 shall complete within their first year of employment a Basic Course of Instruction for Monitors and Attendants. Multiple curricula may be approved for use by the commissioner. Such courses shall provide not less than 10 hours of instruction on a range of topics prescribed by the commissioner upon recommendation of the commissioner's School Bus Driver Instructor Advisory Committee.

(iv) All school bus monitors and attendants shall receive 2 two-hour refresher training sessions annually at sessions conducted between July 1st and the first day of school and between December 1st and March 1st of each school year.

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. EDU-34-03-00009-P, Issue of August 27, 2003. The emergency rule will expire December 10, 2003.

Text of emergency 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

STATUTORY AUTHORITY:

Education Law section 207 empowers the Board of Regents and the Commissioner of Education to adopt rules and regulations to carry out the laws of the State regarding education and the functions and duties conferred on the State Education Department by law.

Vehicle and Traffic Law (VTL) section 1229-d(3), as added by Chapter 472 of the Laws of 2002, requires the Commissioner of Education to promulgate regulations requiring that school bus attendants, as defined in VTL section 1229-d(1), who serve pupils with a disabling condition, receive school bus safety training and instruction relating to their special needs. Such safety training shall include techniques for assisting disabled students in entering and exiting the school bus, and instruction in cardiopulmonary resuscitation (CPR), as well as any additional first aid or health emergency skills as deemed necessary and appropriate by the Commissioner. In addition, such attendants shall demonstrate the ability to perform procedures necessary in emergency situations as deemed appropriate by the Commissioner. Vehicle and Traffic Law (VTL) section 1229-d(3), as amended by Chapter 159 of the Laws of 2003, provides that the CPR instruction shall be given where such skills are required as part of the individualized education plan prepared for the student, and further provides that any person employed as a school bus attendant serving pupils with a disabling condition on January 1, 2004 shall comply with VTL section 1229-d(3) by July 1, 2004 and that any person hired after January 1, 2004 shall complete training, instruction and testing prior to assuming their duties as a school bus attendant serving pupils with a disabling condition.

LEGISLATIVE OBJECTIVES:

The proposed amendment is necessary to conform the Commissioner's Regulations to the provisions of Vehicle and Traffic Law (VTL) section 1229-d(3), as amended by Chapter 159 of the Laws of 2003, with respect to training, instruction and certification requirements for attendants serving pupils with a disabling condition.

NEEDS AND BENEFITS:

The proposed amendment is needed to conform the Commissioner's Regulations to the provisions of Vehicle and Traffic Law (VTL) section 1229-d(3), as amended by Chapter 159 of the Laws of 2003. Consistent with the statute, section 156.3(c)(4) has been revised to provide that CPR instruction shall be given where such skills are required as part of the individualized education plan prepared for the student, and to further provide that any person employed as a school bus attendant serving pupils with a disabling condition on January 1, 2004 shall comply with VTL section 1229-d(3) by July 1, 2004 and that any person hired after January 1, 2004 shall complete training, instruction and testing prior to assuming their duties as a school bus attendant serving pupils with a disabling condition.

COSTS:

The proposed amendment is necessary to implement Vehicle and Traffic Law (VTL) section 1229-d(3), as amended by Chapter 159 of the Laws of 2003, and does not impose any additional costs beyond those inherent in the statute.

(a) Costs to State government: None.

(b) Costs to local government: None.

(c) Costs to private regulated parties: None.

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

LOCAL GOVERNMENT MANDATES:

The proposed amendment is necessary to conform the Commissioner's Regulations to Vehicle and Traffic Law (VTL) section 1229-d(3), as amended by Chapter 159 of the Laws of 2003, and does not impose any additional program, service duty or responsibility on local governments beyond those imposed by the applicable statutes.

Any person employed by a school district, board of cooperative educational services (BOCES) or pupil transportation contractor as a school bus attendant serving pupils with a disabling condition on January 1, 2004, shall have until July 1, 2004 to obtain training and certification in cardiopulmonary resuscitation (CPR) where such skills are required as part of the individualized education plan (IEP) prepared for the student. Any person hired after January 1, 2004 shall, prior to assuming their duties as a school bus attendant, obtain training and certification in CPR where such skills are required as part of the IEP.

Any person employed on January 1, 2004 as a school bus monitor, or as a school bus attendant serving pupils with a disabling condition, shall, by July 1, 2004, receive instruction as prescribed by the Commissioner upon recommendation of the School Bus Driver Instructor Advisory Committee relating to special needs transportation, including, but not limited to, the proper techniques for assisting disabled students in entering and exiting the

school bus. Any person hired after January 1, 2004 shall complete such special needs instruction prior to assuming their duties as a school bus monitor or as a school bus attendant.

PAPERWORK:

The proposed amendment conforms the Commissioner's Regulations to Vehicle and Traffic Law (VTL) section 1229-d(3), as amended by Chapter 159 of the Laws of 2003, and does not impose any new reporting or recordkeeping requirements beyond that already imposed by the statutes.

DUPLICATION:

The proposed amendment is necessary to implement Vehicle and Traffic Law (VTL) section 1229-d(3), as amended by Chapter 159 of the Laws of 2003, and will not duplicate any other requirement in State or federal law.

ALTERNATIVES:

The proposed amendment conforms the Commissioner's Regulations to Vehicle and Traffic Law (VTL) section 1229-d(3), as amended by Chapter 159 of the Laws of 2003. There are no significant alternatives for meeting the statutory requirements and none were considered.

FEDERAL STANDARDS:

The proposed amendment relates to State standards for school bus monitors and attendants and does not exceed any minimal Federal standards.

COMPLIANCE SCHEDULE:

The proposed amendment conforms the Commissioner's Regulations to Vehicle and Traffic Law (VTL) section 1229-d(3), as amended by Chapter 159 of the Laws of 2003. It is anticipated that regulated parties can achieve compliance with the proposed amendment by its effective date.

Regulatory Flexibility Analysis

EFFECT OF RULE:

The proposed amendment applies to all public school districts, boards of cooperative educational services (BOCES) and privately owned school bus contractors under contract with a school district or BOCES for the provision of pupil transportation services.

COMPLIANCE REQUIREMENTS:

The proposed amendment is necessary to conform the Commissioner's Regulations to Vehicle and Traffic Law (VTL) section 1229-d(3), as amended by Chapter 159 of the Laws of 2003, and does not impose any new reporting or recordkeeping requirements, other than those already imposed by law.

Any person employed by a school district, BOCES or pupil transportation contractor as a school bus attendant serving pupils with a disabling condition on January 1, 2004, shall have until July 1, 2004 to obtain training and certification in cardiopulmonary resuscitation (CPR) where such skills are required as part of the individualized education plan (IEP) prepared for the student. Any person hired after January 1, 2004 shall, prior to assuming their duties as a school bus attendant, obtain training and certification in CPR where such skills are required as part of the IEP.

Any person employed on January 1, 2004 as a school bus monitor, or as a school bus attendant serving pupils with a disabling condition, shall, by July 1, 2004, receive instruction as prescribed by the Commissioner upon recommendation of the School Bus Driver Instructor Advisory Committee relating to special needs transportation, including, but not limited to, the proper techniques for assisting disabled students in entering and exiting the school bus. Any person hired after January 1, 2004 shall complete such special needs instruction prior to assuming their duties as a school bus monitor or as a school bus attendant.

PROFESSIONAL SERVICES:

The proposed amendment imposes no additional professional service requirements on local governments, other than those already required by law.

COMPLIANCE COSTS:

The proposed amendment is necessary to implement Vehicle and Traffic Law (VTL) section 1229-d(3), as amended by Chapter 159 of the Laws of 2003, and does not impose any additional costs beyond those inherent in the statutes. The amendment of qualifications and standards for school bus monitors and attendants will not result in an increase in cost to localities or in State Aid for pupil transportation. There will be no additional cost of the proposed amendment on private parties. Many private contractors exceed the requirements of the amendment and are already requiring all school bus attendants to obtain certification in CPR.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY

The proposed amendment does not impose any new technological requirements on small businesses or local government. Economic feasibility is addressed above under Compliance Costs.

MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to conform the Commissioner's Regulations with Vehicle and Traffic Law (VTL) section 1229-d(3), as amended by Chapter 159 of the Laws of 2003, and will not have an adverse impact on school districts, boards of cooperative education services (BOCES) or private pupil transportation contractors. School pupil transportation and small business associations have been given the opportunity to provide suggestions and raise issues concerning the statutes and the proposed regulations.

SMALL BUSINESS PARTICIPATION:

Staff has contacted the New York School Bus Contractors Association in order to provide small businesses with an opportunity to participate in the rule making process. The association made suggestions and raised important issues concerning the testing and training requirements for school bus monitors and attendants. Their suggestions and concerns have been taken into account and incorporated into the final proposal.

LOCAL GOVERNMENT PARTICIPATION:

Staff from the State Education Department have met with members of the Commissioner's School Bus Driver Instructor Advisory Committee, and members of the New York Association for Pupil Transportation in order to provide local government representatives with an opportunity to participate in the rule making process. The committee and association have made suggestions and raised important issues concerning the testing and training requirements for school bus monitors and attendants. Their suggestions and concerns have been taken into account and incorporated into the final proposal.

Rural Area Flexibility Analysis

TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment applies to all school districts, boards of cooperative educational services (BOCES), and private school bus contractors in the State, including the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less.

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

The proposed amendment is necessary to conform the Commissioner's Regulations to Vehicle and Traffic Law (VTL) section 1229-d(3), as amended by Chapter 159 of the Laws of 2003, and does not impose any new reporting or recordkeeping requirements, other than those already imposed by law.

Any person employed by a school district, BOCES or pupil transportation contractor as a school bus attendant serving pupils with a disabling condition on January 1, 2004, shall have until July 1, 2004 to obtain training and certification in cardiopulmonary resuscitation (CPR) where such skills are required as part of the individualized education plan (IEP) prepared for the student. Any person hired after January 1, 2004 shall, prior to assuming their duties as a school bus attendant, obtain training and certification in CPR where such skills are required as part of the IEP.

Any person employed on January 1, 2004 as a school bus monitor, or as a school bus attendant serving pupils with a disabling condition, shall, by July 1, 2004, receive instruction as prescribed by the Commissioner upon recommendation of the School Bus Driver Instructor Advisory Committee relating to special needs transportation, including, but not limited to, the proper techniques for assisting disabled students in entering and exiting the school bus. Any person hired after January 1, 2004 shall complete such special needs instruction prior to assuming their duties as a school bus monitor or as a school bus attendant.

The proposed amendment proposes no additional professional service requirements other than those already required by law.

COSTS:

The proposed amendment is necessary to implement Vehicle and Traffic Law (VTL) section 1229-d(3), as amended by Chapter 159 of the Laws of 2003, and does not impose any additional costs beyond those inherent in the statutes.

There should be no additional costs to rural school districts as a result of the proposed changes. The proposed amendment lessens the number of school bus attendants who are required to obtain and maintain certification in CPR, and thus lessens the cost to rural school districts and the state. It also provides more time before which school districts will be required to begin complying with the regulations.

The proposed amendment will lessen the cost of compliance to private parties. Only those school bus attendants, who are required by a child's IEP, will be mandated to obtain certification in CPR. Also, private contractors working for public school districts or boards of cooperative educa-

tional services will have additional time before they will be required to begin complying with the regulations.

MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to conform the Commissioner's Regulations with Vehicle and Traffic Law (VTL) section 1229-d(3), as amended by Chapter 159 of the Laws of 2003, and will not have an adverse impact on school districts, boards of cooperative education services (BOCES) or private pupil transportation contractors. The amount and degree of cost savings will vary among school districts across the state. The savings may accrue to a larger degree for rural districts, which have fewer children with handicapping conditions that may require the specialized skill of CPR. School district and small business associations have been given the opportunity to provide suggestions and raise issues concerning the statutes and the proposed regulations.

RURAL AREA PARTICIPATION:

Copies of the proposed amendment were provided for review and comment to the Department's Rural Advisory Committee, whose memberships include schools located in rural areas.

Job Impact Statement

The proposed amendment is necessary to conform the Commissioner's Regulations to the provisions of Vehicle and Traffic Law (VTL) section 1229-d(3), as amended by Chapter 159 of the Laws of 2003, relating to the qualifications, testing and training requirements for school bus monitors and attendants. The proposed amendment prescribes requirements for those individuals who are already employed, or who seek to become employed, as monitors and attendants, but it will not affect the number of jobs or employment opportunities available in such occupations. Because it is evident from the nature of the rule that it will have no impact on jobs or employment opportunities, no further steps were needed to ascertain those facts and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

NOTICE OF ADOPTION

Parental Consent for Special Education Services

I.D. No. EDU-23-03-00006-A
Filing No. 1029
Filing date: Sept. 12, 2003
Effective date: Oct. 2, 2003

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

Action taken: Amendment of section 200.5 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101 (not subdivided), 207 (not subdivided), 305(1), (2) and (20), 3713(1) and (2), 4402(1)(b)(2), (3) and (2)(a), 4403(3) and 4404(1)

Subject: Parental consent for special education services.

Purpose: To conform the commissioner's regulations to the Federal Individuals with Disabilities Education Act and its implementing regulations by repealing the requirement that a school district initiate an impartial hearing when a parent does not provide consent for the initial provision of special education services.

Text or summary was published in the notice of proposed rule making, I.D. No. EDU-23-03-00006-P, Issue of June 11, 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 June 11, 2003, the State Education Department received the following comments.

COMMENT:

One comment was received which supported the proposed amendments, stating that parents should not be forced through an impartial hearing to have special education services provided to their children and that their first contacts with the educational system need to be positive.

DEPARTMENT RESPONSE:

The comment was supportive and therefore no changes to the proposed amendments are recommended.

COMMENT:

There has been confusion as to whether a parent can pick and choose those services which the parent wishes to have provided, and also whether the parent can subsequently elect to give written consent to have those services provided to which consent initially was not given. Section 300.505 of the federal Regulations to the Individuals with Disabilities Education Act (IDEA) states that a school district may not use a parent's refusal to consent to one service or activity to deny the parent or child any other service, benefit, or activity. To preclude any confusion or uncertainty, the proposed amendment should be revised to make clear whether the parent can also give written consent to the initial provision of some of the recommended special education services while withholding consent from others.

DEPARTMENT RESPONSE:

No revisions to the proposed regulation have been made since the requested clarification goes beyond the scope of the proposed regulatory amendment, as required by the U.S. Department of Education, relating to the initiation of an impartial hearing. However, the Department will further review the issues presented in the comment to determine whether they need to be addressed in regulation or guidance.

NOTICE OF ADOPTION

Licensure of Psychologists

I.D. No. EDU-24-03-00004-A
Filing No. 1023
Filing date: Sept. 12, 2003
Effective date: Oct. 2, 2003

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

Action taken: Amendment of sections 52.10, 72.1(c), 72.2(b)-(c) and 72.6; repeal of section 72.4; and addition of new section 72.4 to Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided), 210 (not subdivided), 6506(1), 6507(2)(a) and (4)(a), 7601-a(1) and (2), 7603(2) and 7604(1) and (1-a)

Subject: Licensure of psychologists.

Purpose: To establish requirements for limited permits to practice psychology, remove outdated registration requirements for educational programs leading to licensure in this profession, delete a provision concerning professional study for admission to the licensure examination, and repeal the regulatory definition of the practice of psychology which is not established in statute.

Text or summary was published in the notice of proposed rule making, I.D. No. EDU-24-03-00004-P, Issue of June 18, 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

The proposed rule was published in the *State Register* on June 18, 2003. Below is a summary of written comment received by the State Education Department concerning the proposed rule making and the State Education Department's response to such comment.

COMMENT: We support the State Education Department's proposed amendment to section 52.10 and Part 72 of the Regulations of the Commissioner of Education. We agree that these changes are necessary and consistent with the intent of Chapter 676 of the Laws of 2002, which statutorily establishes psychology as a practice protected profession and establishes requirements for limited permits for persons gaining experience to meet the licensure requirements.

RESPONSE: No response to this positive comment is necessary.

NOTICE OF ADOPTION

No Child Left Behind Act of 2001—Persistently Dangerous Schools

I.D. No. EDU-26-03-00024-A
Filing No. 1026
Filing date: Sept. 12, 2003
Effective date: Oct. 2, 2003

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

Action taken: Amendment of section 120.5 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101 (not subdivided), 207 (not subdivided), 215 (not subdivided), 305(1) and (2), 2802(7) and 3713(1) and (2)

Subject: No Child Left Behind Act (NCLB)—persistently dangerous schools.

Purpose: To ensure State and local educational agency (LEA) compliance with the NCLB by establishing criteria relating to the identification and designation of persistently dangerous public schools.

Text or summary was published in the notice of emergency/proposed rule making, I.D. No. EDU-26-03-00024-EP, Issue of July 2, 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

The agency received no public comment.

NOTICE OF ADOPTION

Modified Temporary Licenses for Classroom Teaching

I.D. No. EDU-29-03-00009-A
Filing No. 1024
Filing date: Sept. 12, 2003
Effective date: Oct. 2, 2003

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

Action taken: Repeal of section 80-5.10 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided); 305(1), (2), and (7); 3004(1); 3006(1)(b)-(c) and (2)(a)(iii); 3009(1) and 3010 (not subdivided)

Subject: Modified temporary licenses for classroom teaching.

Purpose: To eliminate the current provision for the issuance of temporary licenses and to add a new provision to establish the requirements for the issuance of modified temporary licenses, permitting uncertified teachers who meet prescribed requirements to teach in subject matter shortage areas in the schools of the State.

Text of final rule: Section 80-5.10 of the Regulations of the Commissioner of Education is repealed and a new section 80-5.10 is added, effective October 2, 2003, as follows:

80-5.10 Modified Temporary License.

(a) The Commissioner may issue a modified temporary license when the requirements of this section are met. Such modified temporary license shall be valid for up to one year, and shall be available and limited for use in the 2003-2004 and 2004-2005 school years only. Such modified temporary licenses may only be issued in certificate titles in the classroom teaching service with a demonstrated shortage of certified teachers as determined by the department and shall be limited to employment with the employing entity.

(b) Pursuant to section 3006 of the Education Law, the Commissioner may issue a modified temporary license, which permits an uncertified teacher to be employed by a board of education, board of cooperative educational services, county vocational education and extension board, or other entity required by law to employ certified teachers, when the following conditions are met:

(1) no certified and qualified teacher is available after extensive and documented recruitment; and

(2) the Chancellor, in the case of the City School District of the City of New York; or the superintendent, in the case of other employing boards; or the chief education officer, in the case of another entity required by law to employ certified teachers, has submitted for approval an application for a modified temporary license, accompanied by the fee prescribed in section 3006 of the Education Law, which includes the following:

(i) the employing entity's justification for the employment of the uncertified person;

(ii) evidence that the candidate has achieved a satisfactory level of performance on the New York State Teacher Certification Examination liberal arts and sciences test;

(iii) until February 1, 2004, evidence that the uncertified person has the minimum degree level required for the corresponding provisional certificate, and after February 1, 2004, evidence that the uncertified person has the minimum degree level required for the corresponding initial certificate;

(iv) until February 1, 2004, evidence that the uncertified person has completed at least 27 semester hours of coursework required in the content core and/or pedagogical core for the provisional certificate in the title of the modified temporary license sought, and after February 1, 2004, evidence that the uncertified person has completed at least 27 semester hours of coursework required in the content core and/or pedagogical core for the initial certificate in the title of the modified temporary license sought;

(v) official transcripts of all collegiate study completed to date by the uncertified teacher; and

(vi) a certification by the Chancellor, in the case of the City School District of the City of New York; or by the superintendent, in the case of other employing boards; or by the chief education officer, in the case of another entity required by law to employ certified teachers, of the following facts:

(a) that no certified and qualified teacher is available after extensive and documented recruitment;

(b) for candidates that are currently or were previously employed by the employing entity as a teacher, that the candidate has a record of satisfactory service;

(c) for candidates that are not currently or were not previously employed by the employing entity as a teacher, that the candidate has been subject to a rigorous interview and screening process;

(d) that the candidate will not be assigned or otherwise permitted to teach in a building that is a School Under Registration Review, as defined in section 100.2(p) of this Title, or that is a School in School Improvement Status or School in Corrective Action Status, as defined in Part 120 of this Title, unless the candidate is currently employed in such building as a teacher and has rendered satisfactory service there as a teacher;

(e) that the candidate will not be assigned to a position supported by Title 1 funds in violation of section 1119 of the No Child Left Behind Act of 2001 or 34 CFR 200.55.

(c) After approval of the application, the department shall transmit the modified temporary license to the employing entity.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 80-5.10(b)(2)(vi)(*e*).

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 in the *State Register* on July 23, 2003, the following nonsubstantial revision was made to the proposed rule:

Section 80-5.10(b)(2)(vi)(*e*) was revised to clarify the regulation by correcting a typographical error in the citation to the No Child Left Behind Act of 2001, from "section 119" to "section 1119".

The above revision to the proposed rule does 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 July 23, 2003, a nonsubstantial revision was made to the proposed rule as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith.

This revision to the proposed rule does not require any changes to the previously published Regulatory Flexibility Analysis for Small Businesses and Local Government.

Rural Area Flexibility Analysis

Since publication of the Notice of Proposed Rule Making in the *State Register* on July 23, 2003, a nonsubstantial revision was made to the proposed rule as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith.

This revision to the proposed rule does 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 July 23, 2003, a nonsubstantial revision was made to the proposed rule as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith.

The proposed rule, as so revised, would permit uncertified teachers who meet prescribed requirements to teach in subject matter shortage areas in the schools of the State. The candidate for the modified temporary license would have to meet educational, assessment, and other prescribed requirements. The modified temporary license would permit the candidate

to teach for a one-year period, upon documentation that no certified teacher is available for employment in that position. The amendment, as revised, creates a time-limited mechanism to meet the critical need for classroom teachers in demonstrated shortage areas, by employing candidates who have not yet completed all of the requirements for a regular teaching certificate but who have demonstrated significant progress in meeting those requirements.

The amendment, as revised, is needed to meet the critical need for classroom teachers in subject shortage areas. As the proposed amendment establishes requirements for employment under a modified temporary license, it will have no impact on the number jobs or number of employment opportunities in New York State in teaching. It will expand the pool of potential candidate who may be employed as classroom teachers in the schools of the State.

Because it is evident from the nature of the rule, as revised, that it could only have a positive impact or no impact on jobs and employment opportunities, 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 agency received no public comment.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Continuing Education Requirements for Licensed Land Surveyors

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

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

Proposed action: 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)-(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 set forth 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 proposed rule: 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.

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: Johanna Duncan-Poitier, Deputy Commissioner, Office of the Professions, Education Department, 2M West Wing Education Bldg., 89 Washington Ave., Albany, NY 12234, (518) 474-3862, e-mail: opdepcom@mail.nysed.gov

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

Section 207 of the Education Law grants general rule making authority to the Board of Regents to carry into effect the laws and policies of the State relating to education.

Subdivision (3) of section 212 of the Education Law authorizes the State Education Department to determine and set fees for certifications and permits.

Subdivision (1) of section 6502 of the Education Law requires that a professional licensee must register with the State Education Department in order to practice in this State.

Section 6504 of the Education Law authorizes the Board of Regents to supervise the admission to and regulation of the practice of the professions.

Paragraph (a) of subdivision (2) of section 6507 of the Education Law authorizes the Commissioner of Education to promulgate regulations in administering the admission to and practice of the professions.

Subdivision (1) of section 6508 of the Education Law authorizes the state boards for the professions to assist the Regents and the Department in matters of professional licensure and practice.

Paragraph (a) of subdivision (1) of section 7212 of the Education Law requires licensed land surveyors to complete mandatory continuing education as a condition for registration to practice in New York State and provides an exception to licensees with a conditional registration certificate.

Paragraph (b) of subdivision (1) of section 7212 of the Education Law authorizes the State Education Department to adjust the continuing education requirement in certain cases.

Paragraph (c) of subdivision (1) of section 7212 of the Education Law provides an exemption from the continuing education requirement for licensees not engaged in the practice of land surveying and directs the State Education Department to establish continuing education requirements for licensees reentering the profession.

Paragraph (d) of subdivision (1) of section 7212 of the Education Law, as added by Chapter 410 of the Laws of 2003, allows licensed land surveyors to be exempt from the mandatory continuing education requirement for the triennial registration period during which they are first licensed.

Subdivision (2) of section 7212 of the Education Law provides that a licensed land surveyor must complete the mandatory continuing education requirements to be registered to practice in New York State, and establishes the continuing education hour requirement and a proration formula for certain licensees.

Subdivision (3) of section 7212 of the Education Law authorizes the State Education Department to issue conditional registrations for licensed land surveyors who do not meet the regular continuing education requirements, to establish requirements for such licensees under conditional registration, and to charge a fee for such conditional registration.

Subdivision (4) of section 7212 of the Education Law defines acceptable continuing education as courses of learning and other activities which contribute to the profession or practice of land surveying and which meet standards prescribed in the Regulations of the Commissioner of Education.

Subdivision (5) of section 7212 of the Education Law requires licensed land surveyors to maintain adequate documentation of compliance with the continuing education requirements and provide such documentation at the request of the State Education Department.

Subdivision (6) of section 7212 of the Education Law authorizes the State Education Department to charge licensed land surveyors a mandatory continuing education fee.

Section (2) of Chapter 135 of the Laws of 2002 authorizes the State Education Department to promulgate regulations necessary to implement the mandatory continuing education requirements for licensed land surveyors prescribed in that Chapter law.

Section (1) of Chapter 410 of the Laws of 2003 renumbers section 7211 of the Education Law, as added by Chapter 135 of the Laws of 2002, as section 7212.

2. LEGISLATIVE OBJECTIVES:

The proposed regulation carries out the intent of the aforementioned statute in that it will, as directed by statute, establish standards relating to mandatory continuing education for licensed land surveyors. Specifically, the regulations would establish appropriate standards for what constitutes acceptable continuing education, educational requirements when there is a lapse in practice, requirements for licensees under conditional registration, recordkeeping requirements applicable to licensees, and standards for the approval of sponsors of continuing education to licensed land surveyors.

3. NEEDS AND BENEFITS:

The purpose of the proposed regulation is to set forth 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 continuing education. The proposed regulation is needed to clarify and implement the requirements of 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.

As required by statute, the proposed regulation is also needed to establish continuing education requirements when there is a lapse in practice, requirements for licensees under conditional registration, and standards for the approval of sponsors of continuing education to licensed land surveyors. In addition, the regulation is needed to establish a fee for the review by the State Education Department of sponsors of courses of learning or self-study programs in order to defray the cost of such review.

4. COSTS:

(a) Costs to State government. The proposed regulation implements statutory requirements and establishes standards as directed by statute. The regulation will not impose any additional cost on State government, over and above the cost imposed by the statutory requirements.

(b) Cost to local government. None.

(c) Cost to private regulated parties. The proposed regulation does not impose additional costs on licensed land surveyors beyond those imposed by statute. Statutory provisions impose a mandatory continuing education fee of $45 for licensed land surveyors at each triennial registration and require that licensed land surveyors complete a prescribed number of hours of acceptable continuing education.

The proposed regulation establishes a $900 fee for sponsors reviewed by the State Education Department for approval to offer continuing education in the form of courses of learning or self-study programs for a three-year term.

(d) Cost to the regulatory agency. As stated above in Costs to State government, the proposed amendment does not impose costs on the State Education Department beyond those imposed by statute.

5. LOCAL GOVERNMENT MANDATES:

The proposed regulation implements the requirements of section 7212 of the Education Law relating to continuing education requirements for licensed land surveyors. It does not impose any program, service, duty, or responsibility upon local governments.

6. PAPERWORK:

The proposed regulation requires each licensee to maintain or ensure access to, for six years, a record of completed continuing education which includes: the type of learning activity, title of the course if a course, subject of the continuing education, the number of hours completed, the sponsor's name and any identifying number (if applicable), attendance verification if a course, participation verification if another educational activity, and the date and location of the continuing education. In addition, the regulation requires sponsors of continuing education to licensed land surveyors, reviewed for approval by the State Education Department, to maintain a record for at least six years which includes: the name and curriculum vitae of the faculty, a record of attendance of licensed land surveyors in the course if a course, a record of participation of a licensed professional in the self-study program if a self-study program, an outline of the course or program, date and location of the course or program, and the number of hours for completion of the course or program.

7. DUPLICATION:

The proposed regulation does not duplicate other existing State or Federal requirements.

8. ALTERNATIVES:

There are no viable alternatives to the proposed regulation and none were considered. The proposed regulation implements statutory requirements.

9. FEDERAL STANDARDS:

There are no Federal standards for the continuing education of licensed land surveyors.

10. COMPLIANCE SCHEDULE:

The proposed regulation implements and clarifies statutory requirements. Applicants must comply with the regulation on its effective date. No additional period of time is necessary to enable regulated parties to comply.

Regulatory Flexibility Analysis

(a) Small Businesses:

1. EFFECT OF RULE:

The proposed rule relates to mandatory continuing education for licensed land surveyors. This continuing education will be provided by sponsors approved by the State Education Department, some of which are expected to be small businesses. The State Education Department does not

know the exact number of sponsors that will be small businesses, but estimates that number using the methodology below.

Individuals licensed in public accountancy have been subject to mandatory continuing education requirements since 1985, and sponsors of such continuing education must be approved by the State Education Department, after a State Education Department review. In accounting, about 800 sponsors of continuing education are approved by the State Education Department. There are about five percent as many licensed land surveyors (1,704) as individuals licensed in public accountancy (34,638) in this State. Using that percentage, we calculate that there will be a need for about 40 sponsors of continuing education to licensed land surveyors. Of these, based upon a survey of the sponsors in accounting, the Department estimates that about 75 percent or 30 will be small businesses.

The proposed regulation has a provision that permits a sponsor to be deemed approved by the State Education Department, if it is approved by another prescribed organization that approves continuing education for licensed land surveyors. For such sponsors there are no compliance requirements in the regulation. The Department expects that a majority of the 30 sponsor/small businesses will be deemed approved by virtue of their being approved by another organization that approves continuing education for licensed land surveyors. Based upon the Department's experience in other licensed professions, which have a similar sponsor approval procedures (dentistry, speech-language pathology, ophthalmic dispensing) only about 10 sponsors will seek approval through a State Education Department review, of which only about eight will be small businesses ($.75 \times 10$).

2. COMPLIANCE REQUIREMENTS:

The regulation contains no compliance requirements for sponsors that are deemed approved through the approval of other organizations that approve continuing education for licensed land surveyors.

There are compliance requirements for sponsors seeking approval through a State Education Department review. Every three years, organizations desiring to offer continuing education to licensed land surveyors based upon a review by the State Education Department must submit an application for advance approval as a sponsor at least 90 days prior to the date for the commencement of the continuing education. The applicants must document in the application: curricular areas of offerings, its organizational status as an educational entity or expertise in the professional area, the qualifications of course instructors, method for assessing the learning of participants, and recordkeeping procedures. Applicants would be approved to offer continuing education to licensed land surveyors for a three-year term.

3. PROFESSIONAL SERVICES:

No professional services are expected to be required by small businesses to comply with the proposed regulation. The regular staff of small businesses will be able to complete the application needed for the review by the State Education Department.

4. COMPLIANCE COSTS:

An organization seeking approval as a sponsor of continuing education to licensed land surveyors through a State Education Department review would be required to pay the State Education Department a fee of $900 to defray the cost of its review. Such fee would be paid once every three years, upon submission of the organization's application. Therefore, the annualized cost is $300.

The Department estimates that it would require a staff member to spend about eight hours to complete the application. Based on an hourly rate of $37 per hour (including fringe benefits), we estimate that the cost of completing the application to be $296. An application would have to be completed once every three years. Therefore, the annualized cost of completing the application is estimated to be $98.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed regulation will not impose any technological requirements on regulated parties. See above Compliance Costs for the economic impact of the regulation.

6. MINIMIZING ADVERSE IMPACT:

The Department believes that the standards for sponsor review by the State Education Department are reasonable, and that uniform standards should apply, regardless of the size of the sponsoring organization, in order to ensure the quality of the continuing education.

7. SMALL BUSINESS PARTICIPATION:

Members of the State Board for Engineering and Land Surveying, many of whom have experience in a small business environment, provided input in the development of the proposed regulation. In addition, staff of the State Education Department have worked with the New York State Association of Professional Land Surveyors by disseminating information to this organization and seeking input concerning the proposed regulation. This organization includes members who own and operate small businesses.

(b) Local Governments:

The proposed regulation establishes continuing education requirements for licensed land surveyors and standards for sponsors of such continuing education. It will not impose any reporting, recordkeeping, or other compliance requirements, or have any adverse economic impact on local governments. Because it is evident from the nature of the proposed rule that it does not affect local governments, no further steps were needed to ascertain that fact and none were taken. Accordingly a regulatory flexibility analysis for local governments is not required and one has not been prepared.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed regulation will apply to the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less. All 1,704 licensed land surveyors who are registered to practice land surveying in New York would be subject to the requirements of the proposed regulation. Of these, 1,011 reported that their permanent address of record is in a rural county.

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

As required by section 7212 of the Education Law, the proposed regulation requires licensed land surveyors, including those that reside or work in rural areas, to complete a prescribed number of hours of acceptable continuing education to be registered to practice in New York State. The proposed regulation prescribes the learning activities that may be credited to meeting the continuing education requirement and the subjects for that continuing education. The regulation requires licensees to certify to meeting the requirement upon applying for renewal of registration to practice in New York State. The proposed regulation requires each licensee to maintain prescribed information concerning completed acceptable continuing education.

The proposed regulation also establishes standards for the Department's review of sponsors desiring to offer acceptable continuing education in the form of courses of learning or self- study programs, including sponsors that may be located in rural areas. The regulation requires such sponsors to maintain specified records related to the offering of the courses of learning and self-study programs for a six-year period from the date of completion of the coursework.

The proposed regulation does not impose a need for professional services other than educational services to meet the continuing education requirements.

3. COSTS:

The proposed regulation does not impose additional costs on licensed land surveyors beyond the costs imposed by statute. However, the regulation does establish a fee of $900 for entities reviewed by the State Education Department to become an approved sponsor of continuing education to licensed land surveyors for a three-year term.

4. MINIMIZING ADVERSE IMPACT:

The proposed regulation implements and clarifies the continuing education requirements for licensed land surveyors found in section 7212 of the Education Law. The statutory requirements do not make exceptions for individuals who live or work in rural areas. The Department has determined that the proposed regulation's requirements should apply to all licensed land surveyors, regardless of their geographic location, to help ensure continuing competency across the State. The Department has also determined that uniform standards for the Department's review of sponsors are necessary to ensure quality offerings in all parts of the State. Because of the nature of the proposed regulation, alternative approaches for rural areas were not considered.

5. RURAL AREAS PARTICIPATION:

Comments on the proposed regulations were solicited from statewide organizations representing all parties having an interest in the practice of land surveying. Included in this group were the State Board for Engineering and Land Surveying and professional associations representing the land surveying profession. These groups have members who live or work in rural areas. Also, the Department solicited comment from the colleges and universities in the State that offer land surveying programs, including those located in rural areas. Each organization has been provided notice of the proposed rule making and an opportunity to comment.

Job Impact Statement

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 li-

censed land surveyors registered to practice in New York State. The proposed regulation 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, 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.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Impartial Hearing Officer Determinations for Students with Disabilities

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

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

Proposed action: Amendment of 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: State level review of impartial hearing officer determinations regarding services for students with disabilities.

Purpose: To clarify procedures for practice on State level review of determinations for students with disabilities.

Substance of proposed rule: The State Education Department proposes to amend Part 279 of the Regulations of the Commissioner, effective January 1, 2004. The following is a summary of the substantive provisions of the proposed rule.

Section 279.2 is amended to revise the form for the Notice of intention to seek review to conform to the revised filing requirements under section 279.9, as renumbered; to change the location of filing from the Office of Counsel to the Office of State Review; to require that the notice of intention to seek review be served not less than 10 days before service of a copy of the petition for review and within 25 days from the date of the decision (instead of 30 days after receipt of the decision); to provide that the petition for review shall be served upon the school district within 35 days from the date of the decision (instead of 40 days after receipt of the decision); and to provide that, if the decision has been served by mail, the date of mailing and the four days subsequent thereto shall be excluded in computing the 25-or 35-day period.

Section 279.3, relating to the form for the Notice with petition, is revised to reflect that an answer is to be filed with the Office of State Review.

Section 279.4 is revised to provide that a petition for review must clearly indicate the reasons for challenging the impartial hearing officer's decision, identifying the findings, conclusions and orders to which exceptions are taken; that it must be filed with the Office of State Review; and that filing of a petition for review or a cross- appeal by facsimile transmission is not permitted.

Section 279.5 is revised to provide that an answer must be filed with the Office of State Review; and that filing of an answer by facsimile transmission is not permitted.

Section 279.6 is revised to provide that the filing of additional pleadings by facsimile transmission is not permitted.

A new section 279.7, relating to verification requirements, is added.

A new section 279.8, relating to pleadings and memoranda of law, is added to establish uniformity of form for pleadings and memoranda of law, including maximum page length requirements; and to require that the petition, answer, reply and memoranda of law shall each reference the record on appeal, identifying the page number in the hearing decision and transcript, the exhibit number or letter, and the exhibit page number.

The existing section 279.7, relating to the hearing record, is renumbered as section 279.9, and revised to specify that the board of education shall file the decision of the impartial hearing officer, a bound copy of the written hearing transcript, including a word index for the written transcript, as well as an electronic transcript, and the original exhibits and an index to the exhibits, together with the petition or answer submitted on behalf of the board, with the Office of State Review; and to provide that a State Review Officer may dismiss, at his or her discretion, an appeal by the board when a complete hearing record is not filed within 10 days after the date of service of the notice of intention to seek review.

The existing section 279.8, relating to rules of practice, is renumbered as section 279.10, and a new subdivision (e) is added to clarify procedures for requesting extensions of time in which to file an answer or reply.

The existing section 279.9, relating to computation of days within which service must be made, is renumbered as section 279.11 and revised to provide that if the last day of service of the notice of intention to seek review and petition for review, an answer or a response to an answer falls on a Saturday or Sunday, service may be made on the following Monday, and if the last day for such service falls on a legal holiday, service may be made on the following business day.

The existing section 279.10, relating to the decision of the state review officer, is renumbered as section 279.12. A new subdivision (b) is added to provide that the timelines in which the State Review Officer must issue a decision may be extended, upon consent of both petitioner and respondent, once for a period not to exceed 60 days from the date the decision is due for the purpose of allowing the State Review Officer sufficient time to review an extensive record on appeal; that the timeline for issuing a decision may also be extended by the Office of State Review for a period of time equal to the additional time that the Office of State Review has granted for the filing of an answer and reply; and that, in appeals in which the petitioner is the board of education, the timeline may also be extended for the period of time during which the hearing record on appeal is not complete. A new subdivision (c) is also added to provide that the Office of State Review shall mail the decision of the State Review Officer to counsel for petitioner and respondent, parties appearing pre se, and the superintendent or the superintendent's designee; and that the superintendent or designee shall forward a copy of the decision as soon as practicable to the principal and chairperson of the committee on special education.

A new section 279.13, relating to limitation of time for initiation of appeal, is added to clarify that a State Review Officer may dismiss *sua sponte* a late petition for review and may excuse a failure to timely file a petition for review within the time specified for good cause shown. The reasons for such failure shall be set forth in the petition.

A new section 279.14 is added to provide that the Office of State Review Staff may schedule and direct the attorneys for the parties, and any unrepresented party to participate in a pre-review telephone conference with staff counsel, to consider the possibilities of settlement, to simplify the issues, to resolve procedural problems, or to discuss any matters which may aid in the expeditious disposition of the appeal. In the absence of good cause, the failure of a petitioner's attorney, or of an unrepresented petitioner, to attend and participate in a scheduled pre-review conference shall result in dismissal of the petitioner by the State Review Officer.

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: Kathy A. Ahearn, Counsel and Deputy Commissioner for Legal Affairs, Education Department, Rm. 148, Albany, NY 12234, (518) 474-6400

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

Regulatory Impact Statement

STATUTORY AUTHORITY:

Education Law section 101 continues the existence of the Education Department, with the Board of Regents as its head, and authorizes the Regents to appoint the Commissioner as chief administrative officer of the Department, which is charged with the general management and supervision of public schools and the educational work of the State.

Education Law section 207 provides the Regents with authority to establish the educational policies of the State and to adopt rules to carry

into effect such policies and the powers and duties of the Department under the laws relating to education.

Education Law section 311 authorizes the Commissioner to regulate the practice of appeals from actions of local school officials brought pursuant to Education Law section 310.

Education Law section 4403(1) and (3) provide the Department with general authority to adopt regulations concerning the provision of a free appropriate public education to students with disabilities.

Education Law section 4404(2) provides for the review of determinations of impartial hearing officers regarding services for students with disabilities by a State Review Officer (SRO), and directs the Commissioner to adopt regulations governing the practice and procedures to be followed in proceedings before such Officer.

Education Law section 4410(13) authorizes the Commissioner to adopt regulations to implement the provisions of that statute, concerning special education services to preschool students with disabilities.

LEGISLATIVE OBJECTIVES:

The proposed amendment modifies the procedures concerning appeals of impartial hearing officers to a State Review Officer, pursuant to the authority conferred on the Commissioner by the aforementioned statutes to regulate the practice and procedures to be followed in proceedings before SROs.

NEEDS AND BENEFITS:

The proposed amendment is designed to expedite and otherwise facilitate the processing of petitions for review to State Review Officers.

The revisions to 279.2 and 279.7 direct that original hearing exhibits be filed with the Office of State Review (OSR). The filing of copies of exhibits often results in the submission of unreadable, poor quality copies and delays the review process as time is expended to obtain readable exhibits.

The revisions to 279.2(b) and (c) will facilitate a faster review of the petition on review by clarifying when the timeline for filing a notice of intention to seek review and petition for review starts.

The revisions to 279.3, 279.4, and 279.7 change the location of the filing of pleadings, legal memoranda, and hearing record from the Department's Office of Counsel to the Office of State Review. Filing directly with the OSR will decrease intake processing time and reduce the costs incurred in transporting the documents from one office to the other.

The revisions to 279.4 require more specificity in the contents of the petition in identifying the reasons for the appeal. This will facilitate faster review by clarifying the basis for the appeal.

The revisions to 279.8 change the requirements of the form of pleadings and memoranda submitted to the OSR so that the documents filed will be more easily readable, of reasonable length, and clearer in identifying the basis in the record for their arguments. This will facilitate a faster review by the OSR . The changes loosely mirror Federal court local rules for the Northern District of New York. Currently, petitions or memoranda of have no restriction in terms of number of pages and OSR has received documents that are unduly long, poorly formatted, or unclear in referencing the record.

The revisions to 279.9 require that hearing transcripts be in written as well as electronic form, and contain a word index, and that the board of education certify that the record submitted on appeal is complete. This will facilitate a faster review of transcripts with the addition of a word index, and reduce delays that currently arise when districts submit incomplete records.

The revisions to 279.10, regarding extensions of time to answer or reply, will clarify the procedures and timelines for requesting extensions of time in which to file documents, and thereby facilitate a faster review because less time will be spent by OSR staff responding to technical assistance practice requests from attorneys seeking information regarding extensions of time.

The revisions allow for a reasonable extension of time, with the consent of the parties, for the SRO to complete a review of an extensive record on appeal. Currently, Federal regulations permit either party to request, and the SRO to grant, an extension of time in which to complete a review. This amendment will clarify when it is appropriate for the OSR to seek consent of, and request by, one of the parties for an extension of time.

The revisions incorporate current practice whereby the parties agree to give the SRO an extension of time in which to conduct a review when a party request an extension of time to submit a pleading during which time the record is not complete and "perfected" for SRO review.

The revisions add a provision whereby the SRO's time for conducting a review is extended for the period of time in which a petitioner board of education has failed to timely submit a complete record. It further provides that such a delay in submission may result in dismissal of the petitioner when the board is the petitioner. Currently, reviews are delayed when petitioner boards of education fail to submit complete records thereby requiring the SRO to wait until the record is complete to review the petition. The option of dismissing a petition will likely induce boards of education attorneys to comply with current filing regulations.

The addition of 279.11 will clarify the computation timelines for filing notice of intention and petition for review when the last day for filing falls on a weekend or holiday, and will facilitate a faster review by the SRO because less time will be spent reviewing arguments raised over computation of timelines.

The addition of 297.12 will require that a superintendent be mailed a copy of the SRO decision and that the superintendent, in turn, forward a copy to the relevant school principal and CSE chairperson involved in the IEP dispute. This will ensure that the decision of the SRO is communicated to school personnel directly responsible for implementing IDEA and Article 89 to the particular student involved in the dispute, and will benefit all parties, by increasing the likelihood that any failures or successes in complying with IDEA and Article 89 will be communicated to the parties most able to immediately correct mistakes or continue good practices. Currently, parties at the local level may not be advised of outcomes of SRO decisions and costly mistakes may be repeated involving the same child in the dispute or other similarly situated children.

The addition of 279.13 will specifically reference in Part 279 the timelines found in 275.16, relating to the filing of a petition for review. Moving the timeline provisions directly into Part 279 will benefit practitioners and facilitate a faster review by the OSR due to likely increase in compliance with filing procedures.

The addition of 279.14 will allow OSR staff to conduct a "pre-review" telephone conference with the parties for the purpose of expediting the review process. It is expected that at the conference will facilitate the following: clarification of issues on appeal and relief sought; agreements on stipulated facts and legal issues; and settlement discussions when appropriate.

COSTS:

Costs to State government: None.

Costs to local governments: Additional costs may be incurred in producing transcripts that are bound and word indexed. Most districts already comply in practice with this proposed requirement; therefore the impact will be limited. Furthermore, telephone calls to a sampling of stenographer offices reveals that there is no charge, or minimal cost ($15.00 per day), for written hearing transcripts to be bound and contain a word index, and provided in an electronic format. In addition, possible mailing costs of copies of the SRO's decision to a principal and Committee on Special Education chairperson may arise, although the proposed section 279.12(c) does not require mailing but merely provides that the superintendent shall forward a copy as soon as practicable to such individuals. Overall, it is expected that costs will be minimal and subsumed in the overall savings accruing to local school districts as discussed below.

Costs to private regulated parties: None.

Costs to the regulating agency for implementation and continued administration of the rule: None.

The proposed amendment will reduce costs to State government, local government, private regulated parties and the State Education Department by reducing litigation costs associated with producing and filing of lengthy pleadings and memorandum of law by limiting the length of such documents (*i.e.* copying, mailing, and attorney fee costs). The 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 of the parties spend on raising and arguing timeline issues unnecessarily before the SRO. Reducing the issues to appeal will likely reduce litigation costs further. The sending of the SRO decision to the superintendent, principal and CSE chairperson involved in the dispute with a parent will likely significantly reduce costs because of a decreased likelihood of repeating past mistakes, or of parents receiving more services than required by law.

The Department will likely reduce its costs by having appeals filed directly with the OSR and foregoing the cost of having appeals filed at the Office of Counsel and transferred to OSR, as is the current practice. Also, with 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, the OSR will likely be able 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 overall costs.

LOCAL GOVERNMENT MANDATES:

279.9, as revised, requires a board of education involved in an appeal to the SRO to file with the Office of State Review the decision of the impartial hearing officer, a bound copy of the written transcript before the impartial hearing officer, including a word index for the written transcript, as well as an electronic transcript, and the original exhibits accepted into evidence at the hearing and an index to the exhibits, together with the petition or answer submitted on behalf of such board. The board of education shall also submit a certification that the record submitted is the complete hearing record.

279.12(c), as revised, requires the superintendent or the superintendent's designee to forward a copy of the SRO decision as soon as practicable to the particular principal and chairperson of the committee on special education.

PAPERWORK:

The proposed amendment imposes no additional reporting requirements, forms or other paperwork. It will reduce paperwork associated with the prosecution or defense of appeals of determinations of impartial hearing officers.

DUPLICATION:

The proposed amendment is consistent with Federal and State requirements concerning the provision of special education services to students with disabilities and does not duplicate, overlap or conflict with such requirements.

ALTERNATIVES:

There were no significant alternatives and none were considered.

FEDERAL STANDARDS:

The proposed amendment does not exceed any minimum standards of the Federal government for the same or similar subject areas.

COMPLIANCE SCHEDULE:

It is anticipated that regulated persons will be able to comply with the proposed amendment by its effective date.

Regulatory Flexibility Analysis

Small Businesses:

The proposed amendment relates to appeal procedures for State-level review of determinations of impartial hearing officers in hearings relating to the provision of special education to students with disabilities by school districts. The rule does not apply to small businesses since they are not parties to such hearings. The amendment will not impose additional reporting, recordkeeping or other compliance requirements on small businesses, nor will it have any adverse economic impact on small businesses. Because it is evident from the nature of the rule that it does not apply to small businesses, no further steps were needed to ascertain that fact and none were taken. Therefore, a regulatory flexibility analysis for small businesses is not required, and one has not been prepared.

Local Governments:

EFFECT OF RULE:

The proposed amendment is applicable to all public school districts in the State.

COMPLIANCE REQUIREMENTS:

The proposed amendment relates to appeal procedures for State-level review of determinations of impartial hearing officers in hearings relating to the provision of special education to students with disabilities by school districts, and is designed to expedite and otherwise facilitate the processing of petitions for review to State Review Officers. Overall, it will reduce paperwork associated with the prosecution or defense of appeals of determinations of impartial hearing officers.

279.9, as revised, requires a board of education involved in an appeal to an SRO to file with the Office of State Review the decision of the impartial hearing officer, a bound copy of the written transcript before the impartial hearing officer, including a word index for the written transcript, as well as an electronic transcript, and the original exhibits accepted into evidence at the hearing and an index to the exhibits, together with the petition or answer submitted on behalf of such board. The board of education shall also submit a certification that the record submitted is the complete hearing record.

279.12(c), as revised, requires the superintendent or the superintendent's designee to forward a copy of the SRO decision as soon as practicable to the particular principal and chairperson of the committee on special education.

PROFESSIONAL SERVICES:

The proposed amendment will not increase the level of professional services needed by local governments to comply with its requirements. Furthermore, by clarifying matters concerning petition content, procedures for cross-appeals and for appeals initiated by a board of education, the proposed amendment will reduce the need for professional services.

COMPLIANCE COSTS:

The proposed amendment will reduce costs to State government, local government, private regulated parties and the State Education Department by reducing litigation costs associated with producing and filing of lengthy pleadings and memorandum of law by limiting the length of such documents (i.e. copying, mailing, and attorney fee costs). The 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 of the parties spend on raising and arguing timeline issues unnecessarily before the SRO. Reducing the issues to appeal will likely reduce litigation costs further. The sending of an SRO decision to the superintendent, principal and CSE chairperson involved in the dispute with a parent will likely significantly reduce costs because of a decreased likelihood of repeating past mistakes, or of parents receiving more services than required by law.

The Department will likely reduce its costs by having appeals filed directly with the OSR and foregoing the cost of having appeals filed at the Office of Counsel and transferred to OSR, as is the current practice. Also, with 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, the OSR will likely be able 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 overall costs.

Additional costs may be incurred by school districts in producing transcripts that are bound and word indexed. Most districts already comply in practice with this proposed requirement; therefore the impact will be limited. Furthermore, telephone calls to a sampling of stenographer offices reveals that there is no charge, or minimal cost ($15.00 per day), for written hearing transcripts to be bound and contain a word index, and provided in an electronic format. In addition, possible mailing costs of copies of the SRO's decision to a principal and Committee on Special Education chairperson may arise, although the proposed section 279.12(c) does not require mailing but merely provides that the superintendent shall forward a copy as soon as practicable to such individuals. Overall, it is expected that costs will be minimal and subsumed in the overall savings accruing to local school districts as discussed above.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment does not impose any additional technological requirements on local governments. Economic feasibility is addressed under the compliance costs section above.

MINIMIZING ADVERSE IMPACT:

The proposed amendment relates to appeal procedures for State-level review of determinations of impartial hearing officers in hearings relating to the provision of special education to students with disabilities by school districts, and is designed to expedite and otherwise facilitate the processing of petitions for review to State Review Officers. It will reduce costs and paperwork associated with the prosecution or defense of appeals of determinations of impartial hearing officers, as discussed in the Compliance Cost section. The proposed amendment has been carefully drafted to meet Federal and State statutory requirements and Regents policy, while minimizing impact on school districts.

LOCAL GOVERNMENT PARTICIPATION:

Comments on the proposed amendment were solicited from school districts through the offices of the district superintendents of each supervisory district in the State.

Rural Area Flexibility Analysis

TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment is applicable to all public school districts in the State, including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less.

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

The proposed amendment relates to appeal procedures for State-level review of determinations of impartial hearing officers in hearings relating to the provision of special education to students with disabilities by school districts, and is designed to expedite and otherwise facilitate the processing of petitions for review to State Review Officers. Overall, it will reduce paperwork associated with the prosecution or defense of appeals of determinations of impartial hearing officers.

279.9, as revised, requires a board of education involved in an appeal to an SRO to file with the Office of State Review the decision of the impartial hearing officer, a bound copy of the written transcript before the impartial hearing officer, including a word index for the written transcript, as well as an electronic transcript, and the original exhibits accepted into evidence at the hearing and an index to the exhibits, together with the petition or answer submitted on behalf of such board. The board of education shall also submit a certification that the record submitted is the complete hearing record.

279.12(c), as revised, requires the superintendent or the superintendent's designee to forward a copy of the SRO decision as soon as practicable to the particular principal and chairperson of the committee on special education.

The proposed amendment will not increase the level of professional services needed by entities in rural areas to comply with its requirements. By clarifying matters concerning petition content, procedures for cross-appeals and appeals by the board of education, the proposed amendment will reduce the need for professional services.

COMPLIANCE COSTS:

The proposed amendment will reduce costs to school districts, including those in rural areas, by reducing litigation costs associated with producing and filing of lengthy pleadings and memorandum of law by limiting the length of such documents (i.e. copying, mailing, and attorney fee costs). The 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 of the parties spend on raising and arguing timeline issues unnecessarily before the SRO. Reducing the issues to appeal will likely reduce litigation costs further. The sending of an SRO decision to the superintendent, principal and CSE chairperson involved in the dispute with a parent will likely significantly reduce costs because of a decreased likelihood of repeating past mistakes, or of parents receiving more services than required by law.

The Department will likely reduce its costs by having appeals filed directly with the OSR and foregoing the cost of having appeals filed at the Office of Counsel and transferred to OSR, as is the current practice. Also, with 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, the OSR will likely be able 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 overall costs.

Additional costs may be incurred to school districts, including those in rural areas, in producing transcripts that are bound and word indexed. Most districts already comply in practice with this proposed requirement; therefore the impact will be limited. Furthermore, telephone calls to a sampling of stenographer offices reveals that there is no charge, or minimal cost ($15.00 per day), for written hearing transcripts to be bound and contain a word index, and provided in an electronic format. In addition, possible mailing costs of copies of the SRO's decision to a principal and Committee on Special Education chairperson may arise, although the proposed section 279.12(c) does not require mailing but merely provides that the superintendent shall forward a copy as soon as practicable to such individuals. Overall, it is expected that costs will be minimal and subsumed in the overall savings accruing to local school districts as discussed above.

MINIMIZING ADVERSE IMPACT:

The proposed amendment relates to appeal procedures for State-level review of determinations of impartial hearing officers in hearings relating to the provision of special education to students with disabilities by school districts, and is designed to expedite and otherwise facilitate the processing of petitions for review to State Review Officers. It will reduce costs and paperwork associated with the prosecution or defense of appeals of determinations of impartial hearing officers, as discussed in the Compliance Cost section. The proposed amendment has been carefully drafted to meet Federal and State statutory requirements and Regents policy, while minimizing impact on school districts. Since these requirements must of necessity apply to school districts State-wide, it was not possible to establish different compliance and reporting requirements for school districts located in rural areas, or exempt them from the provisions of the proposed amendment.

RURAL AREA PARTICIPATION:

Comments on the proposed amendment were solicited from the Department's Rural Advisory Committee, whose membership includes school districts located in rural areas.

Job Impact Statement

The proposed amendment relates to appeal procedures for State-level review of determinations of impartial hearing officers in hearings relating to the provision of special education to students with disabilities by school districts and will not have a substantial adverse impact on jobs and employment opportunities. Because it is evident from the nature of the rule that it will not affect job and employment opportunities, 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.

Department of Environmental Conservation

NOTICE OF CONTINUATION
NO HEARING(S) SCHEDULED

Architectural Coatings VOC Limits

I.D. No. ENV-11-03-00016-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. ENV-11-03-00016-P was published in the *State Register* on March 19, 2003.

Subject: Architectural coatings volatile organic compound (VOC) limits.

Purpose: To control emissions of the ozone precursors, VOCs, so that New York State may attain ozone National Ambient Air Quality Standards (NAAQS).

Substance of rule: The Department is revising Part 205 "AIM Coatings" to regulate the VOC content limit of 52 AIM coating categories. The rule will apply to any person who supplies, sells, offers for sale, or manufactures any architectural coating for use within the State of New York, as well as any person who applies or solicits the application of any AIM coating within the State of New York on or after January 1, 2005. Revised Part 205 will impose new requirements for painting practices, rust preventative coatings, container labeling requirements for "industrial maintenance coatings," "clear brushing laquers," "rust preventative coatings," "specialty primers, sealers, and undercoaters," "quick dry enamels," and "non-flat- high gloss coatings." In addition, the rule will include new reporting requirements for manufacturers of AIM coatings that contain perchloroethylene, methylene chloride and recycled coatings and require all manufacturers to maintain records five years and make them available to the Department within 90 days upon request. Revised Part 205 will maintain container labeling and thinning requirements as well as the "most restrictive limit" provision that requires the product to meet the strictest limit applicable. As a regulatory flexibility measure, the rule includes a limited exemption for small AIM coatings manufacturers. Finally, the rule specifies what test methods may be used to determine compliance. Revised Part 205 will not apply to any architectural coating that is sold in a container with a volume of one liter (1.057 quart) or less.

Changes to rule: Nonsubstantive changes were made to 6 NYCRR Part 200 to include the most recent dates of incorporation by reference materials. Nonsubstantive changes were made to 6 NYCRR Part 205 in order to correct typographical errors, to clarify text, to change CAS to the word colorant, and to add the section 205.8 severability. The effect of the regulation remains the same.

Expiration date: May 1, 2004.

Text of proposed rule and changes, if any, may be obtained from: Daniel S. Brinsko, Department of Environmental Conservation, Division of Air Resources, 625 Broadway, Albany, NY 12233, (518) 402-8396, e-mail: dsbrinsk@gw.dec.state.ny.us

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

Department of Health

EMERGENCY RULE MAKING

Environmental Laboratory Standards

I.D. No. HLT-39-03-00004-E
Filing No. 1020
Filing date: Sept. 11, 2003
Effective date: Sept. 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 55-2.12 and 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; record keeping 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 December 9, 2003.

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 ap-

propriate 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 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-cameras 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.

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 requisites 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 record-keeping 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 for 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- cameras 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.

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; 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 record-keeping 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 for 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- cameras 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.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Smoking Cessation Products

I.D. No. HLT-39-03-00003-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 85.21 of Title 10 NYCRR and section 505.3 of Title 18 NYCRR.

Statutory authority: Social Services Law, section 365-a(4)

Subject: Smoking cessation products.

Purpose: To add over-the-counter (OTC) smoking cessation products to the list of Medicaid reimbursable OTC products.

Text of proposed rule: A new subdivision (t) is added to section 85.21 of Part 85 of 10 NYCRR to read as follows:

85.21 Establishment of list of reimbursable, nonprescription drugs. Pursuant to section 365-a of the Social Services Law, nonprescription drugs included in the therapeutic categories listed in this section may be reimbursed in the New York State Medical Assistance Program.

*****

(t) Smoking Cessation

The first sentence of paragraph (3) of subdivision (f) of section 505.3 of 18 NYCRR is hereby amended to read as follows:

(3) Payment will only be made for nonprescription drugs listed in [Part 528 of this Title] *10 NYCRR section 85.21*.

*****

Text of proposed 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

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:

The authority for the amendment of this regulation is contained in Section 365-a(4) of Social Services Law which allows the Commissioner of the New York State Department of Health (DOH), by regulation, to specify certain non-prescription drugs to be reimbursed as an item of medical assistance.

Legislative Objective:

The legislative objective of this authority is to provide Medicaid reimbursement for medically necessary care, services, and supplies.

Needs and Benefits:

Governor Pataki and Commissioner of Health Novello have acknowledged that curtailing tobacco use is a matter of public health and have made a strong commitment to support New Yorkers' efforts to quit smoking. As a result, the Medicaid Program began coverage of prescription smoking cessation agents October 1, 1999. Since that time drug manufacturers have changed the prescription status of the majority of these products, especially nicotine replacement patches, so that they are now available only as over-the-counter (OTC) items. These amendments are needed for Medicaid recipients who are being treated with these smoking cessation and nicotine replacement products to get Medicaid coverage of these OTC products. Interruption of Medicaid coverage would be particularly threatening to Medicaid recipients who have initiated treatment successfully with prescription versions of these products and who may find them unavailable now that they have been converted to OTC products. Failure to continue smoking cessation therapy brings the high risk of resumption of tobacco use.

Numerous studies have shown the health risks associated with cigarette smoking including higher incidences of lung cancer, asthma, and heart-related diseases such as coronary artery disease. The Commissioner has determined that an interruption in patient treatment and the health risk of non-coverage of these products poses an immediate health risk to the Medicaid population. As a result, it is the Department's commitment to make OTC smoking cessation products immediately available to the Medicaid population.

COSTS:

Costs for the Implementation of, and Continuing Compliance with, this Regulation to Regulated Entity:

This amendment will not increase costs to the regulated parties. It will increase revenues to providers to the extent that Medicaid will provide reimbursement for products not currently covered by the Medicaid Program, such as nicotine replacement gum.

Costs to State and Local Government:

The only cost to State and Local Government is associated with Medicaid reimbursement of OTC agents in the form of State and local shares. For SFY 00-01, State share amounted to $312,596 and the local share was $312,596.

Costs to the Department of Health:

There will be no additional costs to DOH for implementation of this rule.

Local Government Mandates:

This amendment will not impose any program service, duty or responsibility upon any county, city, town, village, school district, fire district, or other special district, other than that described in "Costs to State and local Government."

Paperwork:

This amendment will not impose any additional paperwork requirements.

Duplication:

This regulation does not duplicate, overlap or conflict with any other state or federal law or regulations.

Alternatives:

The Department has examined and supports other methods of smoking cessation activities and has provided smoking cessation resource information to our Medicaid providers and local tobacco coalitions. However, many of these resources include the use of smoking cessation products as an integral part of a successful smoking cessation regimen. The Department has covered these products on a prescription basis but now needs to cover the OTC as soon as possible so that Medicaid recipients will not suffer any lapse in treatment.

The Department recognizes that other changes need to be made to regulations governing Medicaid coverage of prescription and OTC drugs and is committed to a full review and revision of these regulations to reflect current practices. However, due to the immediate need to cover OTC smoking cessation products, that action will take place following the filing of this amendment.

Federal Standards:

This amendment does not exceed any minimum standards of the federal government for the same or similar subject areas.

Compliance Schedule:

The proposed amendment will become effective on the date of filing.

Regulatory Flexibility Analysis

Effect on Small Businesses and Local Governments:

This amendment affects 4085 pharmacies actively enrolled in the Medicaid Program. This amendment will allow pharmacies to receive Medicaid reimbursement for over-the-counter (OTC) smoking cessation agents. The cost of providing OTC tobacco cessation products is provided in the following table. This data represent gross amounts unless otherwise noted.

Smoking Cessation Products	Fiscal Year 00-01*	Fiscal Year 01-02**
All Agents-Prescription and OTC	$5,138,892	$3,885,960
Prescription Agents	$3,888,508	$2,971,488
OTC Agents	$1,250,384	$914,472
	$312,596 (58 county share)	

* Data Source DOH/OMM Audit, Fiscal & Program Planning Data Mart (5/15/2001)

** Data from 4/1/01 through 11/30/01

Fifty-eight (58) local social services districts administer the Medicaid Program in New York State and share in the cost of services provided to eligible recipients who receive Medicaid through their districts. For SFY 00-01, the local share for OTC smoking cessation products was $312,596.

Compliance Requirements:

This amendment does not impose new reporting, record keeping or other compliance requirements on small businesses or local governments.

Professional Services:

No new professional services are required as a result of this proposed action.

Compliance Costs:

There are no initial capital costs of compliance with this rule. The Department has provided data regarding the increase in gross pharmacy expenditures in the above table. The local government share of is also detailed in the above table.

Economic and Technological Feasibility:

The slight increase in Medicaid pharmacy costs associated with OTC smoking cessation products is offset by the long term savings in decreased hospital stays and other health care costs related to smoking and its secondary effects.

The proposed amendment will not change the way provider's bill for services or affect the way the local districts contribute their local share of Medicaid expenses for pharmacy. Therefore, there is no concern about the technological feasibility of this amendment.

Minimizing Adverse Economic Impact:

This regulation has no specific impact on small businesses other than to allow Medicaid reimbursement to pharmacies for OTC smoking cessation products. This should be seen by those pharmacies as a benefit. The slight increase in Medicaid costs to local governments as a result of the proposed rule should ultimately be offset by long term savings on healthcare associated with smoking related illnesses in the Medicaid population. Both the Governor and the Commissioner have made public statements regarding their commitment to helping Medicaid eligible individuals to quit smoking.

Opportunity for Small Business and Local Government Participation:

The Department has discussed this proposed rule with representatives of the Pharmacists' Society of the State of New York and has presented it to the Department's Pharmacy Advisory Committee (composed of pharmacists actively participating in the Medicaid program) and the Department's Medical Advisory Committee (composed of physicians actively participating in the Medicaid program). Information regarding the rule finalization was sent to all local districts and the Office of Medicaid Management did not receive any comments.

Rural Area Flexibility Analysis

No Rural Area Flexibility Analysis is required because the proposed rule, which merely adds over the counter smoking cessation products to the list of products covered by Medicaid, does not impose an adverse impact on rural areas and will not impose reporting, record keeping or other compliance requirements on public or private entities in rural areas. This finding is based on the fact that almost all of the products being added to the list of covered OTC products have previously been covered as prescription items.

Job Impact Statement

The Department has determined that this rule will not have a substantial adverse impact on jobs or employment opportunities. This rule makes available Medicaid reimbursement for over the counter smoking cessation products which were previously available by prescription only. No impact on employment is anticipated.

Insurance Department

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Accounting Calculations for Reinsurance Transactions

I.D. No. INS-39-03-00006-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 127 (Regulation No. 102) of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201 and 301

Subject: Accounting calculations for reinsurance transactions by authorized life insurers and certain other authorized insurers.

Purpose: To delete references to specific citations in the 1992 annual statement.

Text of proposed rule: Section 127.2(a)(8)(iii) of Part 127 is amended to read as follows:

(iii) when assets are held by the ceding insurer pursuant to subparagraph (ii) of this paragraph, the associated formula for determining the reserve interest rate adjustment must reflect the ceding insurer's investment earnings and incorporate all realized and unrealized gains and losses reflected in its statutory statement. The following is an acceptable formula:

$$\text{Rate} = \frac{2(I + CG)}{X + Y - I - CG}$$

Where:

I is the net investment income [(exhibit 2, line 16, column 7)] *earned*, CG is capital gains less capital losses [(exhibit 4, line 10, column 6)]

X is the current year cash and invested assets [(page 2, line 10A, column 1)] plus investment income due and accrued [(page 2, line 16, column 1)] less borrowed money [(page 3, line 22, column 1)]

Y is the same as X but for the prior year

Section 127.5 of Part 127 is repealed.

Text of proposed rule and any required statements and analyses may be obtained from: Terri Marchon, Public Affairs, Insurance Department,

25 Beaver St., New York, NY 10004, (212) 480-2283, e-mail: tmarchon@ins.state.ny.us

Data, views or arguments may be submitted to: John Gemma, Insurance Department, 25 Beaver St., New York, NY 10004, (212) 480-5276, e-mail: jgemma@ins.state.ny.us

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 agency has determined that no person is likely to object to the rule as written since the only change being made is to delete obsolete references to specific citations in the 1992 annual statement. The references to the 1992 annual statement were useful and convenient for readers when Regulation No. 102 (Part 127) was adopted in 1993. However, at this time the 1992 annual statement is not readily available to readers of the regulation and, in addition, the comparable citations in the statements have changed since 1992. Therefore, the deletion of the 1992 references will eliminate confusion.

Job Impact Statement

The proposed rule change will have no impact on jobs and employment opportunities in New York State. The amendment merely deletes obsolete references to specific citations in the 1992 annual statement. The 1992 annual statement is not readily available to readers of the regulation at this time and the comparable citations have changed since 1992.

Office of Mental Retardation and Developmental Disabilities

EMERGENCY RULE MAKING

Health Care Decisions Act for Persons with Mental Retardation

I.D. No. MRD-39-03-00005-E
Filing No. 1022
Filing date: Sept. 12, 2003
Effective date: Sept. 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: Regulations to implement the Health Care Decisions Act for Persons with Mental Retardation.

Purpose: To establish a process for OMRDD to determine whether physicians and psychologists are qualified to make decisions or provide consultation to the attending physician.

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 decisions (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 December 10, 2003.

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, and OMRDD received one comment in response. The commenter wrote on behalf of the Mental Hygiene Legal Service (MHLS). The writer asked that the regulations specifically provide that the MHLS be given, upon request, the qualifications of any clinicians on a list of approved clinicians maintained by OMRDD. OMRDD does not believe that this provision should be in regulation. Instead, it has addressed the issue administratively.

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 June 13, 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 Surragate'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

Reimbursement of HCBS Waiver Services

I.D. No. MRD-28-03-00010-A

Filing No. 1035

Filing date: Sept. 16, 2003

Effective date: Oct. 1, 2003

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

Action taken: Amendment of section 635-10.5 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 13.07, 13.09 and 43.02

Subject: Reimbursement of HCBS waiver services.

Purpose: To establish a unit of service and method for calculating the price of HCBS waiver hourly respite services provided in free-standing respite centers.

Text or summary was published in the notice of proposed rule making, I.D. No. MRD-28-03-00010-P, Issue of July 16, 2003.

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

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.

Assessment of Public Comment

The agency received no public comment.

Department of Motor Vehicles

NOTICE OF ADOPTION

Traffic Violation Bureau Regulations

I.D. No. MTV-29-03-00010-A

Filing No. 1037

Filing date: Sept. 16, 2003

Effective date: Oct. 1, 2003

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

Action taken: Amendment of section 123.4(a) of Title 15 NYCRR.

Statutory authority: Vehicle and Traffic Law, sections 215(a), 225(3) and 226(1)(b)

Subject: TVB regulation.

Purpose: To increase statutory fines for certain Vehicle and Traffic Law violations.

Text of final rule: Subdivision (a) of Part 123.4 is amended to read as follows:

(a) When a motorist pleads guilty by mail or in person at a bureau hearing office, he or she is required to pay the appropriate fine as follows:

(1) [$50] *$75* for a first red light violation, except that such fine shall be [$100] *$150* in the City of New York where such violation occurred on or after [August 25, 1995] *May 15, 2003*;

(2) [$100] *$150* for a second red light violation committed within a period of 18 months, except that such fine shall be [$200] *$300* in the City of New York where such violation occurred on or after [August 25, 1995] *May 15, 2003*;

(3) [$250] *$375* for a third red light violation committed within a period of 18 months, except that such fine shall be [$500] *$750* in [theistic] *the City* of New York where such violation occurred on or after [August 25, 1995] *May 15, 2003*;

(4) [$30] *$45* for all speed offenses where the charge is driving 10 miles per hour or less above the speed limit;

(5) [$60] *$90* for all speeding offenses where the charge is driving at least 11 miles per hour but not more than 30 miles per hour above the speed limit;

(6) $50 for operating an [unregistered or] uninspected vehicle[, or for unlicensed operation], unless the violation is based upon a certificate of inspection[, registration or license] which has been expired for 60 days or less, in which case the fine shall be $25;

(7) $30 for any equipment violation; [or]

(8) $75 for operating an unregistered vehicle, or for unlicensed operation, unless the violation is based upon a registration or license which has been expired for 60 days or less, in which case the fine shall be $40; or

[(8)] *(9)* $40 for any other traffic infraction, except where otherwise specified by statute.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 123.4(a)(6).

Text of rule and any required statements and analyses may be obtained from: Ida Traschen, Associate 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

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

A revised Job Impact Statement is not submitted because the non-substantive changes made with this adoption do not affect job creation or development in New York State. Since a Regulatory Impact Statement, a Rural Area Flexibility Analysis, and a Regulatory Flexibility Analysis for Small Businesses and Local Governments were not submitted with the proposed consensus rule, no revisions need to be submitted with this revised rule.

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Notification to Motorcyclists

I.D. No. MTV-29-03-00011-A

Filing No. 1036

Filing date: Sept. 16, 2003

Effective date: Oct. 1, 2003

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

Action taken: Amendment of section 134.11(d) of Title 15 NYCRR.

Statutory authority: Vehicle and Traffic Law, sections 215(a), 318(4), 318(9) and 319(5)

Subject: Insurance company notification to motorcyclists.

Purpose: To revise notice insurance companies must send to insureds who own motorcycles.

Text or summary was published in the notice of proposed rule making, I.D. No. MTV-29-03-00011-P, Issue of July 23, 2003.

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

Text of rule and any required statements and analyses may be obtained from: Ida Traschen, Associate 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

Assessment of Public Comment

The agency received no public comment.

Public Service Commission

EMERGENCY RULE MAKING

Pump Station Replacement by Rainbow Water Company

I.D. No. PSC-39-03-00001-EA
Filing date: Sept. 10, 2003
Effective date: Sept. 10, 2003

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

Action taken: The commission, on Sept. 10, 2003, adopted an order authorizing the issuance of debt and approval of a surcharge to replace Rainbow Water Company, Inc's pump station.

Statutory authority: Public Service Law, sections 89-f and 89-c(10)

Finding of necessity for emergency rule: Preservation of public health, public safety and general welfare.

Specific reasons underlying the finding of necessity: Immediate issuance of debt and approval of a surcharge is necessary to enable Rainbow Water Company, Inc. to construct a new pump station to supply customers with safe and adequate water service.

Subject: Issuance of debt and approval of a surcharge to repay the loan.

Purpose: To approve the emergency financing for the construction of a new pump station.

Substance of emergency rule: The Commission authorized the issuance of emergency debt and permanent financing through the New York State Environment Facilities Corporation for the construction of Rainbow Water Company, Inc.'s new pump station to provide safe and adequate water service to customers, subject to the terms and conditions set forth in the Order.

The agency adopted the provisions of this emergency rule as a permanent rule, pursuant to section 202(6)(c) of the State Administrative Procedure Act because the purposes of the emergency measure would be frustrated if subsequent notice procedures were required.

Text of emergency rule may be obtained from: Margaret Maguire, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-3204

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.
(03-W-1026SA1)

NOTICE OF ADOPTION

Calculation of Franchise Fees by Cablevision Systems Westchester Corp.

I.D. No. PSC-18-03-00005-A
Filing date: Sept. 16, 2003
Effective date: Sept. 16, 2003

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

Action taken: The commission, on July 23, 2003, adopted an order in Case 97-V-0585 approving a request by Cablevision Systems Westchester Corp. for a waiver of section 595.1(o)(2) of Title 9 NYCRR pertaining to the calculation of franchise fees.

Statutory authority: Public Service Law, section 216(1)

Subject: Waiver of 9 NYCRR section 595.1(o)(2).

Purpose: To grant the waiver.

Substance of final rule: The Commission granted Cablevision Systems Westchester Corp. a waiver of Section 595.1(o)(2) relating to the manner of calculation of franchise fees in the Town of Bedford, Westchester County, subject to the terms and conditions set forth in the order.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment
An assessment of public comment is 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.
(97-V-0585SA1)

NOTICE OF ADOPTION

Calculation of Franchise Fees by CSC Acquisition-MA, Inc.

I.D. No. PSC-18-03-00006-A
Filing date: Sept. 16, 2003
Effective date: Sept. 16, 2003

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

Action taken: The commission, on July 23, 2003, adopted an order in Case 98-V-0090 approving a request by CSC Acquisition-MA, Inc. for a waiver of section 595.1(o)(2) of Title 9 NYCRR pertaining to the calculation of franchise fees.

Statutory authority: Public Service Law, section 216(1)

Subject: Waiver of 9 NYCRR section 595.1(o)(2).

Purpose: To grant the waiver.

Substance of final rule: The Commission granted CSC Acquisition-MA, Inc. a waiver of Section 595.1(o)(2) relating to the manner of calculation of franchise fees in the Village of Port Chester, Westchester County, subject to the terms and conditions set forth in the order.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment
An assessment of public comment is 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.
(98-V-0090SA1)

NOTICE OF ADOPTION

Calculation of Franchise Fees by Cablevision of Rockland/ Ramapo, Inc. and the Village of Upper Nyack

I.D. No. PSC-18-03-00008-A
Filing date: Sept. 16, 2003
Effective date: Sept. 16, 2003

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

Action taken: The commission, on July 23, 2003, adopted an order in Case 03-V-0184 approving a request by Cablevision of Rockland/Ramapo, Inc. for a waiver of section 595.1(o)(2) of Title 9 NYCRR pertaining to the calculation of franchise fees.

Statutory authority: Public Service Law, section 216(1)

Subject: Waiver of 9 NYCRR section 595.1(o)(2).

Purpose: To grant the waiver.

Substance of final rule: The Commission granted Cablevision of Rockland/Ramapo, Inc. a waiver of Section 595.1(o)(2) relating to the manner of calculation of franchise fees in the Village of Upper Nyack, Rockland County, subject to the terms and conditions set forth in the order.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment
An assessment of public comment is 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.

(03-V-0184SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Interconnection Agreement between Verizon New York Inc. and DFT Local Service Corporation d/b/a DFT Select One

I.D. No. PSC-39-03-00009-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 DFT Local Service Corporation d/b/a DFT Select One for approval of an interconnection agreement executed on July 5, 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 DFT Local Service Corporation d/b/a DFT Select One have reached a negotiated agreement whereby Verizon New York Inc. and DFT Local Service Corporation d/b/a DFT Select One 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. Brilling, 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-1233SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Interconnection Agreement between Verizon New York Inc. and XO New York, Inc.

I.D. No. PSC-39-03-00010-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 XO New York, Inc. for approval of an interconnection agreement executed on July 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 XO New York, Inc. have reached a negotiated agreement whereby Verizon New York Inc. and XO New York, Inc. 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. Brilling, 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-1234SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Interconnection Agreement between Citizens Telecommunications Company of New York, Inc. d/b/a Frontier Citizens Communications of New York and Time Warner Telecom-NY, L.P.

I.D. No. PSC-39-03-00011-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 Citizens Telecommunications Company of New York, Inc. d/b/a Frontier Citizens Communications of New York and Time Warner Telecom-NY, L.P. for approval of a mutual traffic exchange agreement executed on June 5, 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: Citizens Telecommunications Company of New York, Inc. d/b/a Frontier Citizens Communications of New York and Time Warner Telecom-NY, L.P. have reached a negotiated agreement whereby Citizens Telecommunications Company of New York, Inc. d/b/a Frontier Citizens Communications of New York and Time Warner Telecom-NY, L.P. will interconnect their networks at mutually agreed upon points of interconnection to exchange local traffic.

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. Brilling, 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-1273SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Small Commercial Direct Load Control Pilot Program by Consolidated Edison Company of New York, Inc.

I.D. No. PSC-39-03-00012-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 petition filed by Consolidated Edison Company of New York, Inc. to proceed to phase II of its Small Commercial Direct Load Control Pilot Program.

Statutory authority: Public Service Law, section 66(12)

Subject: Small Commercial Direct Load Control Pilot Program.

Purpose: To proceed with phase II.

Substance of proposed rule: Consolidated Edison Company of New York, Inc. filed a petition for approval to proceed with Phase II of its small commercial direct load control pilot program. Phase II targets 2,500 small

business customers (≤50kW) in Brooklyn/Queens with direct load control technology for central air-conditioning. The estimated cost of Phase II is $2.0 million, which is proposed to be recovered via the Monthly Adjustment Clause in addition to foregone delivery service revenues, and the estimated peak load reduction is 2.5. kW per thermostat installed and 6.2 MW overall.

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. Brilling, 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.

(00-E-2054SA31)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Complaint by State University of New York (SUNY) Regarding a NYSEG Operating Agreement

I.D. No. PSC-39-03-00013-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 a complaint filed by the State University of New York (SUNY) regarding an operating agreement with New York State Electric and Gas Corporation (NYSEG) for operations of SUNY as a direct customer on NYSEG's system.

Statutory authority: Public Service Law, sections 65 and 66

Subject: SUNY's complaint concerning the contents and requirements of a NYSEG operating agreement.

Purpose: To consider the complaints raised by SUNY, to the contents and requirements of a NYSEG operating agreement.

Substance of proposed rule: The Public Service Commission is considering a complaint filed by the State University of New York (SUNY) regarding an Operating Agreement with New York State Electric and Gas Corporation (NYSEG) for operations of SUNY as a direct customer on NYSEG's system.

Among the issues to be considered are the contractual time limits contained in the Operating Agreement, the assignability of the Agreement, and certain warrantees required in the Agreement to be given by the State.

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. Brilling, 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-1275SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Mini Rate Increase by Village of Philadelphia

I.D. No. PSC-39-03-00014-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 Village of Philadelphia to make various changes to the rates, charges, rules and regulations contained in its tariff schedule, P.S.C. No. 1—Electricity, to become effective Dec. 1, 2003.

Statutory authority: Public Service Law, section 66(12)

Subject: Mini rate increase.

Purpose: To increase annual electric revenues by approximately $45,125 or 8.3%.

Substance of proposed rule: The Village of Philadelphia proposes to increase its annual electric revenues by approximately $45,125 or 8.3% to become effective December 1, 2003. The increase will be applied equally to all service classes.

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. Brilling, 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-1283SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Minor Rate Increase by Woodhull Municipal Gas Company

I.D. No. PSC-39-03-00015-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 Woodhull Municipal Gas Company to make various changes in the rates, charges, rules and regulations contained in its schedule for gas service—P.S.C. No. 2.

Statutory authority: Public Service Law, section 66(12)

Subject: Minor gas rate increase.

Purpose: To increase annual gas revenues by approximately $9,780.

Substance of proposed rule: Woodhull Municipal Gas Company proposes to increase its annual gas revenues by approximately $9,780. The company proposes to increase the minimum charge for S.C. No. 1—All Purposes from $4.80 to $10.00 per month.

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. Brilling, 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-G-1043SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Modifications to Performance Targets by Niagara Mohawk Power Corporation

I.D. No. PSC-39-03-00016-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 by Niagara Mohawk Power Corporation to make modifications to certain performance targets in

its Service Quality Assurance Program that was approved by the commission in Opinion No. 01-6.

Statutory authority: Public Service Law, sections 5(2) and 66(1)

Subject: Performance targets of Niagara Mohawk Power Corporation's Service Quality Assurance Program.

Purpose: To approve modifications.

Substance of proposed rule: The New York State Public Service Commission is considering whether to approve, in whole or in part, reject or modify a proposal by Niagara Mohawk Power Corporation to change certain performance standards that are included in its Service Quality Assurance Program that was approved by the Commission in Opinion No. 01-6.

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. Brilling, 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.

(01-M-0075SA19)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Calculation of Franchise Fees by Cablevision Systems Long Island Corp.

I.D. No. PSC-39-03-00017-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 petition by Cablevision Systems Long Island Corp. for a waiver of section 595.1(o)(2) of Title 9 NYCRR pertaining to the manner of calculation of franchise fees.

Statutory authority: Public Service Law, section 216(1)

Subject: Waiver of 9 NYCRR section 595.1(o)(2).

Purpose: To allow Cablevision Systems Long Island Corp. and the Village of Massapequa Park to exclude the amount of the franchise fees collected from subscribers from inclusion in the company's calculation of gross receipts.

Substance of proposed rule: The Public Service Commission is considering whether to approve or reject, in whole or in part, a petition by Cablevision Systems Long Island Corp. for a waiver of section 595.1(o)(2) pertaining to the manner of calculation of franchise fees in the Village of Massapequa Park (Nassau County). Section 595.1(o)(2) requires franchise contract language to express franchise fees as a percentage of gross revenues derived from the operation of the cable system. Gross revenues are defined in the referenced section as "all revenues required to be reported to the commission...pursuant to 9 NYCRR Part 599". Section 595.1(o)(2) permits exclusions from that revenue base, but requires that such base include all "revenues received directly from subscribers for any cable services purchased by subscribers on a regular, recurring monthly basis". Franchise fee collections fall within these definitions of gross revenues. Therefore, a waiver of rules is required to permit exclusion of franchise fee collections from calculation of gross revenues.

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. Brilling, 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.

(00-V-0618SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Calculation of Franchise Fees by Cablevision of Wappingers Falls, Inc.

I.D. No. PSC-39-03-00018-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 petition by Cablevision of Wappingers Falls, Inc. for a waiver of section 595.1(o)(2) of Title 9 NYCRR pertaining to the manner of calculation of franchise fees.

Statutory authority: Public Service Law, section 216(1)

Subject: Waiver of 9 NYCRR section 595.1(o)(2).

Purpose: To allow Cablevision of Wappingers Falls, Inc. and the Town of Haverstraw to agree to exclude the amount of the franchise fees collected from subscribers from inclusion in the company's calculation of gross receipts.

Substance of proposed rule: The Public Service Commission is considering whether to approve or reject, in whole or in part, a petition by Cablevision of Wappingers Falls, Inc. for a waiver of section 595.1(o)(2) pertaining to the manner of calculation of franchise fees in the Town of Haverstraw (Rockland County). Section 595.1(o)(2) requires franchise contract language to express franchise fees as a percentage of gross revenues derived from the operation of the cable system. Gross revenues are defined in the referenced section as "all revenues required to be reported to the commission...pursuant to 9 NYCRR Part 599". Section 595.1(o)(2) permits exclusions from that revenue base, but requires that such base include all "revenues received directly from subscribers for any cable services purchased by subscribers on a regular, recurring monthly basis". Franchise fee collections fall within these definitions of gross revenues. Therefore, a waiver of rules is required to permit exclusion of franchise fee collections from calculation of gross revenues.

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. Brilling, 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.

(02-V-0058SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Transfer of Assets by Time Warner Cable, Inc.

I.D. No. PSC-39-03-00019-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 reviewing a petition of Time Warner Cable, Inc. (TWC) requesting the transfer of certain franchises and the partnership interests in Time Warner Entertainment Company, L.P. (TWE) and Time Warner Entertainment-Advance/Newhouse Partnership (TWEAN), to its wholly owned subsidiary Time Warner NY Cable, Inc. (TWNYC). The subject cable franchised systems operate in the Liberty and New York City divisions.

Statutory authority: Public Service Law, section 222

Subject: Transfer of certain cable franchises, facilities and State certificates of confirmation of Time Warner Cable, Inc. (TWC) in New York State and the partnership interests in Time Warner Entertainment Company, L.P. (TWE) and the partnership interest in Time Warner Entertain-

ment-Advance/Newhouse Partnership (TWEAN) held by TWC to Time Warner NY Cable, Inc. (TWNYC) a wholly owned subsidiary of TWC.

Purpose: To allow Time Warner NY Cable, Inc. (TWNYC) to require the transfer of assets and the control of certain cable system franchises, facilities, partnership interests in Time Warner Entertainment Company, L.P. (TWE) and Time Warner Entertainment-Advance/Newhouse Partnership (TWEAN) and State certificate of confirmation from Time Warner Cable, Inc. (TWC).

Substance of proposed rule: The Public Service Commission is considering the transfer of certain cable systems, franchises, facilities and State certificates of confirmation of Time Warner Entertainment Company L.P. (TWE) and Time Warner Entertainment-Advance/Newhouse Partnership (TWEAN), to its wholly owned subsidiary Time Warner NY Cable, Inc. (TWNYC).

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. Brilling, 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-V-1237SA1)

Department of State

EMERGENCY RULE MAKING

Cease and Desist Zone for Real Estate Brokers and Salespersons

I.D. No. DOS-39-03-00002-E
Filing No. 1011
Filing date: Sept. 11, 2003
Effective date: Sept. 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 for real estate brokers and salespersons.

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:	*Expiration date:*
County of Kings (Brooklyn)	*November 30, 2007*

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 prolongation 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 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 December 9, 2003.

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%	2,372
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 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 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.

NOTICE OF ADOPTION

Landings at Required Exit Doors

I.D. No. DOS-26-03-00016-A
Filing No. 1033
Filing date: Sept. 15, 2003
Effective date: Oct. 1, 2003

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

Action taken: Addition of section 1220.3 to Title 19 NYCRR.

Statutory authority: Executive Law, sections 377 and 378

Subject: Landings at required exit doors.

Purpose: To amend the Uniform Fire Prevention and Building Code.

Text or summary was published in the notice of proposed rule making, I.D. No. DOS-26-03-00016-P, Issue of July 2, 2003.

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

Text of rule and any required statements and analyses may be obtained from: Ronald Piester, Department of State, Division of Code Enforcement and Administration, 41 State St., Albany, NY 12231, (518) 474-4073, e-mail: rpiester@dos.state.ny.us

Additional matter required by statute:

Subdivision 15 of Executive Law § 378 provides that no change to the Uniform Fire Prevention and Building Code ("Uniform Code") shall become effective until at least ninety days after the date on which notice of the change has been published in the *State Register*. However, the statute provides that a change may become effective on an earlier date if the State Fire Prevention and Building Code Council finds that the change to the Uniform Code will not impose any additional compliance requirements on any person.

In voting to adopt the proposed rule making to add section 1220.3 to Title 19 of the Official Compilation of Codes, Rules, and Regulations of the State of New York, the Code Council finds that such change will not impose any additional compliance requirements on any person. The Council therefore directs that the rule making be effective upon publication of the notice of adoption in the *State Register*. The rule making amends the Uniform Code to add a provision that revises the code's requirement pertaining to the maximum distance between the top of a threshold at an exterior exit doorway and the surface of an exterior landing. Currently, the maximum distance may be no more than 1½ inches. The new provision allows the distance between the top of the threshold and the adjacent landing to be no more than 8¼ inches. The rule making does not impose additional compliance requirements on regulated parties. Instead it provides a choice previously unavailable by expanding the manner in which regulated parties may achieve compliance with the code's requirement. If they wish, regulated parties may continue to construct thresholds and exterior landings with a difference in height of no more than 1½ inches.

While pursuing adoption of this rule making on a permanent basis, the Code Council adopted the rule on an emergency basis. Consequently, 19 NYCRR 1220.3 is already in effect. Adoption on a permanent basis with an effective date coinciding with publication of the notice of adoption in the *State Register* will not impose any additional compliance requirements on any person.

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Dampproofing and Waterproofing of Foundation Walls

I.D. No. DOS-26-03-00025-A
Filing No. 1034
Filing date: Sept. 15, 2003
Effective date: Oct. 1, 2003

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

Action taken: Addition of section 1220.4 to Title 19 NYCRR.

Statutory authority: Executive Law, sections 377 and 378

Subject: Dampproofing and waterproofing of foundation walls.

Purpose: To amend the Uniform Fire Prevention and Building Code.

Text or summary was published in the notice of proposed rule making, I.D. No. DOS-26-03-00025-P, Issue of July 2, 2003.

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

Text of rule and any required statements and analyses may be obtained from: Ronald Piester, Department of State, Division of Code Enforcement and Administration, 41 State St., Albany, NY 12231, (518) 474-4073, e-mail: rpiester@dos.state.ny.us

Additional matter required by statute: Subdivision 15 of Executive Law § 378 provides that no change to the Uniform Fire Prevention and Building Code ("Uniform Code") shall become effective until at least ninety days after the date on which notice of the change has been published in the *State Register*. However, the statute provides that a change may become effective on an earlier date if the State Fire Prevention and Building Code Council finds that the change to the Uniform Code will not impose any additional compliance requirements on any person.

In voting to adopt the proposed rule making to add section 1220.4 to Title 19 of the Official Compilation of Codes, Rules, and Regulations of the State of New York, the Code Council finds that such change will not impose any additional compliance requirements on any person. The Council therefore directs that the rule making be effective upon publication of

the notice of adoption in the *State Register*. The rule making amends the Uniform Code to revise the code's requirements regarding the dampproofing and waterproofing of concrete and masonry foundation walls in one- and two-family homes and in attached town houses. Currently, section R406.1 of the Residential Code of New York State (a part of the Uniform Code) requires that the exterior surface of a masonry foundation wall must be prepared for the application of dampproofing or waterproofing material with an additional layer of portland cement parging. The new provisions adopted by this rule making relieve regulated parties from the requirement to apply the cement parging when the dampproofing or waterproofing material is specified for direct application to the masonry wall in accordance with manufacturer's installation instructions. Similarly, the new provisions added to the Uniform Code will provide an exception to the code's requirement that concrete and masonry walls in areas where a high water table or other severe soil-water conditions exist must be waterproofed. Where foundation drainage is installed in accordance with section R405 of the Residential Code, dampproofing in lieu of waterproofing will be an acceptable alternative.

The rule making does not impose additional compliance requirements on regulated parties. Instead it provides alternatives previously unavailable by expanding the manner in which regulated parties may achieve compliance with the code's requirements. If they so desire, regulated parties may continue to conform to the requirements of the Uniform Code pertaining to the dampproofing and waterproofing of foundation walls as they existed prior to the adoption of this rule making.

While pursuing adoption of this rule making on a permanent basis, the Code Council adopted the rule on an emergency basis. Consequently, 19 NYCRR 1220.4 is already in effect. Adoption on a permanent basis with an effective date coinciding with publication of the notice of adoption in the *State Register* will not impose any additional compliance requirements on any person.

Assessment of Public Comment

The agency received no public comment.

Office of Temporary and Disability Assistance

NOTICE OF CONTINUATION NO HEARING(S) SCHEDULED

Families in Transition Act

I.D. No. TDA-15-03-00003-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. TDA-15-03-00003-P was published in the *State Register* on April 16, 2003.

Subject: Families in Transition Act.

Purpose: To permit the continuation of public assistance eligibility for a child whose adult relative caretaker has died until arrangements are completed for the addition of the child to another public assistance household, reclassification of the case, foster care or other appropriate financial support for the child.

Substance of rule: The proposed amendments, which implement the Families in Transition Act (Chapter 477 of the Laws of 2000), provide that for the month of and for a three month transition period immediately following the month of the death of the adult caretaker of a minor child, the case household size must remain at the same household count as if the deceased household member were still receiving assistance in the household. The public assistance grant for the transitioning case must continue in the amount equal to the grant that was provided prior to the death of the adult caretaker, unless the child becomes ineligible for assistance because of a move out of State or placement into foster care.

Changes to rule: No substantive changes.

Expiration date: April 15, 2004.

Text of proposed rule and changes, if any, may be obtained from: Ronald Speier, Office of Temporary and Disability Assistance, 40 N. Pearl St., Albany, NY 12243, (518) 474-6573

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