

# 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; or EA for an Emergency Rule Making that is permanent and does not expire 90 days after filing.)

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

---

---

## Department of Audit and Control

---

---

### NOTICE OF ADOPTION

#### Filing of Abandoned Property Reports

**I.D. No.** AAC-46-06-00008-A  
**Filing No.** 43  
**Filing date:** Jan. 10, 2007  
**Effective date:** Jan. 31, 2007

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

**Action taken:** Amendment of section 123.1 and repeal of sections 123.2 and 123.6 of Title 2 NYCRR.

**Statutory authority:** Abandoned Property Law, section 1414

**Subject:** Filing of abandoned property records.

**Purpose:** To repeal the use of magnetic cartridges for reporting purposes.

**Text or summary was published** in the notice of proposed rule making, I.D. No. AAC-46-06-00008-P, Issue of November 15, 2006.

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

**Text of rule and any required statements and analyses may be obtained from:** Wendy H. Reeder, Office of the State Comptroller, 110 State St., 14th Fl., Albany, NY 12236, (518) 474-5714, e-mail: wreeder@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-46-06-00003-A  
**Filing No.** 46  
**Filing date:** Jan. 10, 2007  
**Effective date:** Jan. 31, 2007

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 Executive Department.

**Text was published in the notice of proposed rule making,** I.D. No. CVS-46-06-00003-P, Issue of November 15, 2006.

**Final rule compared with proposed rule:** No changes.

**Text of rule may be obtained from:** Stella Chen Harding, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6205, e-mail: stella.harding@cs.state.ny.us

#### **Assessment of Public Comment**

The agency received no public comment.

### NOTICE OF ADOPTION

#### Jurisdictional Classification

**I.D. No.** CVS-46-06-00004-A  
**Filing No.** 45  
**Filing date:** Jan. 10, 2007  
**Effective date:** Jan. 31, 2007

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 positions in the non-competitive class in the Executive Department.

**Text was published in the notice of proposed rule making,** I.D. No. CVS-46-06-00004-P, Issue of November 15, 2006.

**Final rule compared with proposed rule:** No changes.

**Text of rule may be obtained from:** Stella Chen Harding, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6205, e-mail: stella.harding@cs.state.ny.us

#### **Assessment of Public Comment**

The agency received no public comment.

## NOTICE OF ADOPTION

**Jurisdictional Classification****I.D. No.** CVS-46-06-00005-A**Filing No.** 44**Filing date:** Jan. 10, 2007**Effective date:** Jan. 31, 2007

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 positions in the non-competitive class in the Executive Department.**Text was published in the notice of proposed rule making, I.D. No.** CVS-46-06-00005-P, Issue of November 15, 2006.**Final rule compared with proposed rule:** No changes.**Text of rule may be obtained from:** Stella Chen Harding, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6205, e-mail: stella.harding@cs.state.ny.us**Assessment of Public Comment**

The agency received no public comment.

## NOTICE OF ADOPTION

**Jurisdictional Classification****I.D. No.** CVS-46-06-00006-A**Filing No.** 47**Filing date:** Jan. 10, 2007**Effective date:** Jan. 31, 2007

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 a position in the non-competitive class in the Executive Department.**Text was published in the notice of proposed rule making, I.D. No.** CVS-46-06-00006-P, Issue of November 15, 2006**Final rule compared with proposed rule:** No changes.**Text of rule may be obtained from:** Stella Chen Harding, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6205, e-mail: stella.harding@cs.state.ny.us**Assessment of Public Comment**

The agency received no public comment.

---



---

## Department of Economic Development

---



---

### EMERGENCY RULE MAKING

**Empire State Film Production Tax Credit Program****I.D. No.** EDV-05-07-00008-E**Filing No.** 49**Filing date:** Jan. 11, 2007**Effective date:** Jan. 11, 2007

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

**Action taken:** Addition of Part 170 to Title 5 NYCRR.**Statutory authority:** L. 2004, ch. 60**Finding of necessity for emergency rule:** Preservation of general welfare.

**Specific reasons underlying the finding of necessity:** As a matter of public policy, the Legislature has determined that a tax credit to eligible qualified film production companies would provide incentive for films to be produced in New York State and thereby help stimulate the State's economy. The rule is necessary because section 7(c) of the chapter 60 of the Laws of 2004 mandate the department to promulgate regulations for the program to establish procedures for the allocation of tax credits and describing the application process, the due dates for the applications, the standards used to evaluate the applications and any other provisions deemed necessary and appropriate by October 31, 2004. Such legislation provides that, notwithstanding any other provisions to the contrary in the State Administrative Procedure Act, the rules and regulations may be adopted on an emergency basis.

**Subject:** Empire State Film Production Tax Credit Program.**Purpose:** To promulgate regulations for the program to establish procedures for the allocation of tax credits and describe the application process, the due dates for the applications, the standards used to evaluate the applications and any other provisions deemed necessary and appropriate. In addition, the proposed regulations clarify necessary definitions pertinent to the program.**Substance of emergency rule:** The empire state film production tax credit program generally provides film production companies with a tax credit equal to ten percent of qualified production costs incurred within New York State. Under the program an applicant may be eligible for a full benefit or partial benefit. If an applicant has 75% or more of their total production costs occur at a qualified New York facility and the production spends at least \$3 million during production, then the production qualifies for the full benefit which is a 10% tax credit on all qualified production expenditures. If 75% or more of total production costs occur at a qualified New York facility but the production spends less than \$3 million at the qualified facility, it must then shoot 75% or more of its location days in New York to qualify for the full 10% tax credit.

If 75% or more of a production total facility expenditures occur at a qualified facility but the production spends less than \$3 million and less than 75% of its total location shooting days are in New York, then the production qualifies for the 10% tax credit for expenditures at the qualified facility only.

This rule implements Chapter 60 of the Laws of 2004. Part 170 of Title 5 NYCRR is hereby created and is summarized as follows:

First, the rule makes clear that the Governor's Office for Motion Picture and Television development shall administer the empire state film production tax credit program. This proposed rule does not govern the New York City film production tax credit program – eligibility in either the state or city program does not guarantee eligibility or receipt of a credit in the other.

Second, eligibility in the program is established through the definition of authorized applicant. In order to be eligible to apply for the program, a business must be a qualified film production company or sole proprietor thereof that is scheduled to begin principal photography on a qualified film within 180 days after submitting its initial application to the Office and it must intend to shoot a portion of that photography on a stage at a qualified film production facility on a set or sets.

Third, a two part application process is created. An authorized applicant must complete an initial application, a document created by the Office which asks the applicant to project/estimate various expenditures at qualified film production facilities and shooting days in and outside of New York. The applicant must also meet with the Office to discuss the details of the application. The Office then reviews the initial application based on criteria set out in the proposed rule, including, the completeness of the application, whether or not it is premature (*i.e.*, incapable of photography starting within 180 days of the date of the application), and whether or not it meets the statutory requirements for qualification, including whether its projected qualified productions costs equal or exceed 75% of its total productions costs.

If the initial application is approved, the applicant (now referred to as an approved applicant) receives a certificate of conditional eligibility. This certificate assures the applicant that, pending successful completion of a final application, they are in line (though not guaranteed) to receive a tax credit. The certificate also contains the applicants' priority number, a number used by the Office to place the applicant in line for allocation of the tax credit purposes. Priority number is based on the applicant's effective date. Effective date is defined in the rule to mean the date the certification of conditional eligibility becomes effective. It is derived from the date the initial application is received by the Office. In the event an applicant does not begin principal and ongoing photography within 180 days of the

submission of their initial application, effective date may be recalculated to correspond to the date one hundred eighty days prior to the date the approved applicant submits a notification of commencement of principal and ongoing photography to the Office. If the application is disapproved, the applicant receives notice of its rejection from the program and may reapply at a later date.

Fourth, the rule requires the approved applicant notify the Office on the date principal and ongoing photography begins on their production and supply a sign-off budget at this point. This additional budget data helps the Office get a better sense of the production expenses the applicant has and ultimately helps the Office estimate the potential credit the applicant may later be entitled to.

Fifth, within 60 days after the completion of production of their qualified film, the approved applicant must submit a final application to the Office. The final application is similar to the initial application, though it now contains actual expenditure data as opposed to expenditure projections. The Office then considers certain criteria in its review to determine whether the final application should be approved. Much like the criteria used for the initial application, this includes analysis of whether the application is complete, whether applicant actually shot principal photography on stage at a qualified film production facility on a set or sets, whether a qualified film was completed, and whether the actual qualified production costs equal or exceed 75% of the actual production costs on the film, etc. The proposed rule allows the Office to request additional documentation, including receipts of qualified productions costs, to help the Office determine if the applicant meets the criteria. At this point, the applicant is either approved and issued a certificate of tax credit (stating the amount of tax credit they will be receiving) or provided a notice of disapproval.

Sixth, the proposed rule addresses the issue of the allocation of the empire state film production tax credits. The allocation is made in the order of priority based on the applicant's effective date. If an approved applicant's tax credit exceeds the amount of credits allowed in a given year, their credit will be allocated on a priority basis in the immediately succeeding calendar year. Also, the proposed rule makes explicit the fact that allocation and receipt of the tax credit are subject to availability of state funds for the program.

Seventh, the proposed rule requires applicants to maintain records of qualified production costs used to calculate their potential or actual benefit under the program for a period of 3 years. Such records may be requested by the Office upon reasonable notice.

Finally, the proposed rule creates an appeal process. Applicants who have had their initial or final applications disapproved, or who have a disagreement over the dollar amount of their tax credit have the right to appeal.

**This notice is intended** to serve only as a notice of emergency adoption. This agency does not intend to adopt the provisions of this emergency rule as a permanent rule. The rule will expire April 10, 2007.

**Text of emergency rule and any required statements and analyses may be obtained from:** Thomas P. Regan, Department of Economic Development, Counsel's Office, 30 S. Pearl St., Albany, NY 12245, (518) 292-5120, e-mail: tregan@empire.state.ny.us

#### **Regulatory Impact Statement**

##### **STATUTORY AUTHORITY:**

Section (7)(c) of Part P of Chapter 60 of the Laws of 2004 requires the Commissioner of Economic Development to promulgate rules and regulations by October 31, 2004 to establish procedures for the allocation of the empire state film production tax credit, including provisions describing the application process, the due dates for such applications, the standards used to evaluate the applications, and the documentation provided to taxpayers to substantiate to the State Department of Taxation and Finance the amount of the tax credit for the program itself. Such legislation provides that, notwithstanding any other provisions to the contrary in the State Administrative Procedure Act, the rules and regulations may be adopted on an emergency basis.

##### **LEGISLATIVE OBJECTIVES:**

The emergency rule is in accord with the public policy objectives the Legislature sought to advance by creating a tax credit program for the film industry. This program is an attempt to create an incentive for film industry to bring productions to New York State as opposed to other competitive markets, such as Toronto. It is the public policy of the State to offer a tax credit that will help provide incentive for the film industry to bring productions to the State. The proposed rule helps to further such objectives by establishing an application process for the program, clarifying portions of the Program through the creation of various definitions and describing the credit allocation process itself.

##### **NEEDS AND BENEFITS:**

The emergency rule is required to be promulgated by October 31, 2004 (see section 7(c) of Chapter 60 of the Laws of 2004). It is necessary to properly administer the tax credit program. The statute itself does not set out the specifics of the program; rather, it deals primarily with its creation and calculation of the actual tax credit. There are several administrative benefits that would be derived from this emergency rule making. First, the emergency rule establishes a clear and precise application process, complete with due process as there is an opportunity for applicants to appeal from denials of applications or a disagreement regarding the actual amount of the tax credit. Second, the emergency rule describes in detail the standards to be used to evaluate the initial and final applications created under this program. Third, it describes the documentation that will be provided to taxpayers to substantiate to the State Tax and Finance Department the amount of the tax credits allocation. Finally, it clarifies some existing definitions and creates several new definitions in order to help facilitate an effective and efficient administration of the program.

##### **COSTS:**

I. Costs to private regulated parties (the Business applicants): None. The proposed regulation will not impose any additional costs to the film industry.

II. Costs to the regulating agency for the implementation and continued administration of the rule: There could be additional costs to the Department of Economic Development associated with the proposed rule making as the Office may need an additional employee to help with the program's new created administrative process. Such costs are estimated to be \$40,000 to \$50,000 in annual salary for an employee's with a background in production accounting.

III. Costs to the State government: The program shall not allocate more than \$25 million in any calendar year. The program sunsets on January 1, 2008 so the overall cost to the State is \$100 million.

IV. Costs to local governments: None. The proposed regulation will not impose any additional costs to local government.

##### **LOCAL GOVERNMENT MANDATES:**

None.

##### **PAPERWORK:**

The emergency rule creates an application process for eligible applicants, including the creation of an initial and final application, certain tax certificates and forms relating to film expenditures.

##### **DUPLICATION:**

The proposed rule will not duplicate or exceed any other existing Federal or State statute or regulation.

##### **ALTERNATIVES:**

No alternatives were considered in regard to creating a new regulation in response to the statutory requirement. The Department of Economic Development, through its Governor's Office for Motion Picture and Television Development, did an extraordinary amount of outreach to various interested parties before submitting this emergency rule. For example, the Department met with seven representatives from episodic television, seven representatives from the independent film industry and seven representatives from large studio films to seek industry input. In addition, the Department met with three film industry accountants, five industry tax attorneys and approximately seven studio representatives to solicit their comments. Furthermore, the Department was in close contact with representatives from the State Tax and Finance Department and the New York City Office for Motion Pictures to coordinate the details of the emergency rule.

##### **FEDERAL STANDARDS:**

There are no federal standards in regard to the empire state film production tax credit program; it is purely a state program that offers a state tax credit to eligible applicants. Therefore, the proposed rule does not exceed any Federal standard.

##### **COMPLIANCE SCHEDULE:**

The effected State agencies (Economic Development) and the business applicants will be able to achieve compliance with the emergency regulation as soon as it is implemented. In terms of compliance schedule, the statute (Chapter 60 of the Laws of 2004) was signed into law on August 20, 2004. All film production expenditures that date back to this date will be eligible for inclusion in the tax credit calculation. The statute gave the Department until October 31, 2004 to promulgate regulations to implement the program. The program applies to taxable years beginning on or after January 1, 2004 and expires on December 31, 2011.

##### **Regulatory Flexibility Analysis**

Participation in the empire state film production tax credit program is entirely at the discretion of qualified film production companies. Neither Chapter 60 of the Laws of 2004 nor the proposed regulations impose any

obligation on any local government or business entity to participate in the program. The proposed regulation does not impose any adverse economic impact or their compliance requirements on small businesses or local governments. In fact, the proposed regulation may have a positive economic impact on small businesses due to the possibility that these businesses may enjoy a film production tax credit if they qualify for the program's tax credit.

Because it is evident from the nature of the proposed rule that it will have either no impact, or a positive impact, on small businesses and local government, no further affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small business and local government is not required and one has not been prepared.

#### **Rural Area Flexibility Analysis**

This program is open to participation from all qualified film production companies, which is defined by statute to include a corporation, partnership or sole proprietorship making and controlling a qualified film in New York. The location of the companies is irrelevant, so long as they meet the necessary qualifications of the definition. This program may impose responsibility on statewide businesses that are qualified film production companies, in that they must undertake an application process to receive the empire state film production tax credit. However, the proposed regulation will not have a substantial adverse economic impact on rural areas. Accordingly, a rural flexibility analysis is not required and one has not been prepared.

#### **Job Impact Statement**

The proposed regulation creates the application process for the empire state film production tax credit program. As a tax credit program, it is designed to positively impact the film industry doing business in New York State and have a positive impact on job creation. The proposed regulation will not have a substantial adverse impact on jobs and employment opportunities. Because it is evident from the nature of the proposed rule making that it will have either no impact, or a positive impact, on job and employment opportunities, no further 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.

---



---

## Education Department

---



---

### EMERGENCY RULE MAKING

#### **Behavioral Interventions**

**I.D. No.** EDU-28-06-00005-E

**Filing No.** 53

**Filing date:** Jan. 16, 2007

**Effective date:** Jan. 16, 2007

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

**Action taken:** Amendment of sections 19.5, 200.1, 200.4, 200.7 and 201.2 and addition of section 200.22 to Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207 (not subdivided), 210 (not subdivided), 305(1), (2) and (20), 4401(2), 4402(1), 4403(3) and 4410(13)

**Finding of necessity for emergency rule:** Preservation of public health and public safety.

**Specific reasons underlying the finding of necessity:** The purpose of the proposed rule is to establish standards for behavioral interventions, including a prohibition on the use of aversive interventions; to provide for a child-specific exception to the prohibition on the use of aversive interventions; and to establish standards for programs using aversive interventions.

Until the adoption of emergency regulations, effective June 23, 2006, neither New York State Education Law nor the Regulations of the Commissioner of Education prohibited the use of aversive interventions in school programs serving New York State students. Aversive interventions have the potential to affect the health and safety of children, yet there was a lack of a clear policy and no standards on their use in school programs. Through site visits, reports and complaints filed by parents, school districts

and others, the Department identified concerns with preschool programs serving children with disabilities that use aversive interventions such as sprays to the face and noxious tastes placed on the child's lips, and an out-of-state residential school serving more than 145 New York State students with disabilities that is using contingent food programs, mechanical restraints and electric shock interventions to modify students' behaviors. A recent site review of the out-of-state residential school identified significant concerns for the potential impact on the health and safety of New York's students placed at this school. Regulations are needed to limit the aversive interventions that inflict pain and discomfort to children and have the potential to result in physical injury and/or emotional harm. In those exceptional instances when a child displays such extreme self-injurious or aggressive behaviors as to warrant a form of punishment to intervene with the behavior, regulations are necessary to ensure that such interventions are used in accordance with the highest standards of oversight and monitoring and in accordance with research-based practices.

The proposed rule was adopted as an emergency measure at the June 2006 meeting of the Board of Regents, effective June 23, 2006, upon a finding by the Board of Regents that such action is necessary for the preservation of the public health and safety in order to minimize the risk of physical injury and/or emotional harm to students who are subject to aversive interventions that inflict pain or discomfort, by immediately establishing standards for the use of such interventions that will ensure they are used only when absolutely necessary and under conditions of minimal intensity and duration to accomplish their purpose. A Notice of Emergency Adoption and Proposed Rule Making was filed with the Department of State on June 23, 2006 and was published in the State Register on July 12, 2006. Subsequent emergency adoptions were taken at the September 11-12, 2006 and the October 23-24 Regents meetings to keep the rule continuously in effect until the effective date of the rule's adoption on a permanent basis.

The State Education Department received a substantial amount of public comment on the proposed rule making in response to its publication in the State Register, and from the three public hearings concerning the proposed rule that were conducted by the Department in August 2006. The proposed amendment was subsequently revised in response to the comments and a Notice of Revised Rule Making was published in the State Register on November 15, 2006. The proposed amendment, as revised, is being presented to the Board of Regents for adoption as a permanent rule at their January 8-9, 2007 meeting, which is the first scheduled meeting after expiration of the 30-day public comment period for revised rules established by the State Administrative Procedure Act (SAPA.)

However, pursuant to SAPA section 202(6)(b), the October 2006 emergency adoption will expire on January 15, 2007, sixty (60) days after the date of its filing with the Department of State. A fourth emergency action is necessary for the preservation of the public health and safety to minimize the risk of physical injury and/or emotional harm to students who are subject to aversive interventions that inflict pain or discomfort, by immediately establishing revised standards for the use of such interventions, made in response to public comment, that will ensure such interventions are used only when absolutely necessary and under conditions of minimal intensity and duration to accomplish their purpose, and to otherwise ensure that the rule's standards providing for the use of such interventions remain continuously in effect until the effective date of the rule's adoption on a permanent basis.

**Subject:** Behavioral interventions, including aversive interventions.

**Purpose:** To establish standards for behavioral interventions, including a prohibition on the use of aversive interventions; provide for a child-specific exception to the prohibition on the use of aversive interventions; and establish standards for programs using aversive interventions.

**Substance of emergency rule:** The Commissioner of Education proposes to amend section 19.5 of the Rules of the Board of Regents and sections 200.1, 200.4, 200.7 and 201.2 of the Regulations of the Commissioner of Education, and to add a new section 200.22 of the Commissioner's Regulations, effective January 16, 2007, relating to standards for behavioral interventions, including aversive interventions. The following is a summary of the substance of the proposed amendments.

Section 19.5(a)(1) of the Rules of the Board of Regents, as amended, provides that no teacher, administrator, officer, employee or agent of a school district in New York State (NYS), a board of cooperative educational services (BOCES), a charter school, a State-operated and State-supported school, an approved preschool program, an approved private school, an approved out-of-State day or residential school, or a registered nonpublic nursery, kindergarten, elementary or secondary school in this State, shall use corporal punishment against a pupil.

Section 19.5(b) of the Rules of the Board of Regents, as amended, establishes a prohibition on the use of aversive interventions, except as provided by a child-specific exception pursuant to proposed section 200.22(e) of the Commissioner's Regulations, and defines the term 'aversive intervention.'

Section 200.1(r) of the Commissioner's Regulations, as amended, revises the definition of functional behavioral assessment to cross reference the requirements in section 200.22(a).

Sections 200.1(III) and (mmm) of the Commissioner's Regulations, as added, provide, respectively, definitions of the terms 'aversive intervention' and 'behavioral intervention plan.'

Section 200.4(d)(3)(i) of the Commissioner's Regulations, as amended, provides that the CSE or CPSE shall, in developing a student's IEP, consider supports and strategies to address student behaviors that are consistent with the requirements in section 200.22.

Section 200.7(a)(2)(i)(f) of the Commissioner's Regulations, as added, provides that conditional approval of private schools to serve students with disabilities shall also be based on submission for approval of the school's procedures regarding behavioral interventions, including, if applicable, procedures for the use of aversive interventions.

Section 200.7(a)(3)(iv) of the Commissioner's Regulations, as amended, provides that a school may be removed from the list of approved schools five days after written notice by the commissioner indicating that there is a clear and present danger to the health or safety of students attending the school, and listing the dangerous conditions, including but not limited to, evidence that an approved private school is using aversive interventions to reduce or eliminate maladaptive behaviors of students without a child-specific exception provided pursuant to section 200.22(e) or that an approved private school is using aversive interventions in a manner inconsistent with the standards as established in section 200.22(f).

Section 200.7(b)(8) of the Commissioner's Regulations, as added, provides that except as provided in section 200.22(e), an approved private school, a State-operated school or a State-supported school is prohibited from using corporal punishment and aversive interventions to reduce or eliminate maladaptive behaviors of students; and prohibits an approved preschool program from using aversive interventions with preschool students with disabilities without exception.

Section 200.7(c)(6) of the Commissioner's Regulations, as added, requires a private school that proposes to use or continue to use aversive interventions in its program to submit its written policies and procedures on behavioral interventions to the Department; provides that only those programs with policies and procedures that are approved pursuant to section 200.22(f)(8) on or before June 30, 2007 shall be authorized to use such interventions with NYS students; and provides that failure to comply with the provisions of this paragraph may result in revocation of approval to accept new admissions of NYS students or termination of private school approval pursuant to section 200.7(a)(3).

Section 200.22 of the Commissioner's Regulations, as added, establishes program standards for behavioral interventions. This section further provides that for an education program operated pursuant to section 112 of the Education Law and Part 116 of the Regulations of the Commissioner of Education, if a provision of section 200.22 relating to use of time out rooms, emergency use of physical restraints, or aversive interventions conflicts with the rules of the respective State agency operating such program, the rules of such State agency shall prevail and the conflicting provision of section 200.22 shall not apply.

Section 200.22(a) establishes requirements for the conduct of a functional behavioral assessment to assess student behaviors.

Section 200.22(b) establishes requirements for behavioral interventions for students with disabilities.

Section 200.22(c) establishes requirements regarding the use of time out rooms.

Section 200.22(d) establishes requirements for the use of emergency interventions, including requirements to document the emergency intervention and notify the student's parent.

Section 200.22(e) establishes the process for a child-specific exception to the Regents prohibition on the use of aversive interventions. A child-specific exception may be granted for a school-age student, in accordance with the procedures outlined in the subdivision, only during the 2006-2007, 2007-2008 and 2008-2009 school years; provided that a student whose individualized education program (IEP) includes the use of aversive interventions as of June 30, 2009 may be granted a child-specific exception in each subsequent school year, unless the IEP is revised to no longer include such exception. No child-specific exception shall be granted for a preschool student. This subdivision also provides timelines and procedures

for an independent panel of experts appointed by the commissioner or commissioner's designee to make a recommendation to the CSE and to the Commissioner as to whether a child-specific exception is warranted.

Section 200.22(f)(1) sets forth applicability provisions for the requirements set forth in the subdivision.

Section 200.22(f)(2) establishes general requirements for programs that employ the use of aversive interventions.

Section 200.22(f)(3) requires each school that uses aversive interventions to establish a Human Rights Committee to monitor the school's behavior intervention program to ensure the protection of legal and human rights of individuals.

Section 200.22(f)(4) establishes supervision and training requirements for persons who use aversive interventions.

Section 200.22(f)(5) states that aversive interventions shall be provided only with the informed written consent of the parent and no parent shall be required by the program to remove the student from the program if he or she refuses consent for an aversive interventions.

Section 200.22(f)(6) requires the program to conduct quality assurance reviews of its use of aversive interventions, including a review of all incident reports relating to such interventions.

Section 200.22(f)(7) provides for ongoing monitoring of student progress in programs using aversive interventions; and requires a school district that places a student in such a program to: oversee the student's education and behavior program, including review of written progress monitoring and incident reports; conduct observations of, and, as appropriate, interviews with the student at least once every six months; regularly communicate with the student's parent; and convene a CSE meeting at least every six months to review the student's educational program and placement.

Section 200.22(f)(8) requires each school that proposes to use aversive interventions pursuant to the child-specific exception in 200.22(e) to submit its policies and procedures consistent with the standards in this section to the Department for approval prior to the use of aversive interventions; and only schools with policies and procedures approved by the Department on or before June 30, 2007 shall be authorized to use such interventions.

Section 201.2(a) proposes to amend the definition of behavioral intervention plan to add that the strategies must include positive behavioral supports and services to address the behavior.

**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-28-06-00005-EP, Issue of July 12, 2006. The emergency rule will expire March 16, 2007.

**Text of emergency rule and any required statements and analyses may be obtained from:** Anne Marie Koschnick, Legal Assistant, Office of Counsel, Education Department, State Education Bldg., Rm. 148, Albany, NY 12234, (518) 473-8296, e-mail: legal@mail.nysed.gov

#### **Regulatory Impact Statement**

##### **STATUTORY AUTHORITY:**

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

Section 210 authorizes the Regents to register institutions in terms of New York standards.

Section 305(1) and (2) provide the Commissioner, as chief executive officer of the State education system, with general supervision over schools and institutions subject to the provisions of education law, and responsibility for executing Regents policies. Section 305(20) authorizes the Commissioner with such powers and duties charged by the Regents.

Section 4401 authorizes the Commissioner to approve private day and residential programs to serve students with disabilities.

Section 4402 establishes school district duties for education of students with disabilities.

Section 4403 outlines Department and school district responsibilities concerning education programs and services to students with disabilities. Section 4403(3) authorizes the Department to adopt rules and regulations as the Commissioner deems in their best interests.

Section 4410 outlines education services and programs for preschool children with disabilities. Section 4410(13) authorizes the Commissioner to adopt regulations.

##### **LEGISLATIVE OBJECTIVES:**

The rule carries out the above objectives to ensure that students with disabilities are provided a free appropriate public education, including behavioral assessments and interventions consistent with federal law.

## NEEDS AND BENEFITS:

The rule is necessary to establish standards for behavioral interventions, including a prohibition on use of aversive interventions (AIs); to provide for a child specific exception; and to establish standards for programs using ABIs. The rule ensures that ABIs are used only when necessary; in accordance with research-based practices; under conditions of minimal intensity and duration to accomplish their purpose; and in accordance with the highest standards of oversight and monitoring.

The rule is, in part, based on the following studies.

“On the Status of Knowledge for Using Punishment: Implications for Treating Behavior Disorders,” Dorothea C. Lerman and Christina M. Vorndran, Louisiana State University and the Louisiana Center for Excellence in Autism (*Journal of Applied Behavior Analysis*, 2002, 35, 431-464). This report, highlighting research findings relating to use of punishment to treat problem behaviors, was considered in developing standards for ABIs, including that ABIs be combined with reinforcement procedures; include procedures for generalization and maintenance of behaviors and for fading ABI use; be limited to behaviors of greatest concern; apply the lowest intensity and duration; employ strategies that increase the effectiveness of mild levels of ABIs; and use alternative procedures other than increasing an ABI’s magnitude when an aversive fails to suppress a behavior over time. The report discussed ethical and practical issues surrounding use of punishers to change behaviors and side effects of punishment including collateral effects as emotional reactions, and increases in aggressive and/or escape behaviors. The criteria to be used by the independent panel is based, in part, upon information in this study that ABIs may be indicated when the variables maintaining a problem behavior cannot be identified; when problem behavior must be suppressed rapidly to prevent serious physical harm; or when other interventions have not reduced self-injurious behavior to clinically acceptable levels without use of punishment-based interventions.

“Establishing and Maintaining Treatment Effects with Less Intrusive Consequences Via a Paring Procedure”, Christina M. Vorndran and Dorothea C. Lerman, Louisiana State University (*Journal of Applied Behavior Analysis*, 2006, 39, 35-48) discussed the need to design interventions using punishment to be the least intrusive possible and to include strategies to improve an ABI’s effectiveness and acceptability. This study was considered in proposing standards that ABIs be implemented consistent with peer-reviewed research based practices; include individualized procedures for the generalization and maintenance of behaviors and for the fading of ABI use; and employ strategies to increase the effectiveness of mild levels of ABIs.

“Contingent Electric Shock (SIBIS) and a Conditioned Punisher Eliminate Severe Head Banging in a Preschool Child”, Sarah-Jeanne Salvy, James A. Mulick, Eric Butter, Rita Kahng Bartlett and Thomas R. Linscheid, (*Behavioral Interventions*, 2004, 19:59-72), published online in Wiley InterScience ([www.interscience.wiley.com](http://www.interscience.wiley.com)), which discussed strategies that increase the effectiveness of mild levels of ABIs, was considered in establishing standards for ABI use.

“School-wide Positive Behavior Support Implementer’s Blueprint and Self-Assessment” (Center on Positive Behavioral Interventions and Supports, University of Oregon, 2004), which discussed research findings relating to negative side effects associated with the exclusive use of punishing environments and consequences, and “Why Must Behavior Intervention Plans Be Based on Functional Assessments?”, G. Roy Mayer, California State University, Los Angeles, 1997 (published online at [www.calstatela.edu/academic/adm\\_coun/docs/501/funcart.html](http://www.calstatela.edu/academic/adm_coun/docs/501/funcart.html)) were considered in proposing standards for assessing and addressing collateral effects of the use of punishment. These studies identified that punishment-based interventions can lead to students engaging in aggressive and/or escape behaviors and foster development of negative attitudes toward self and school programs. Mayer’s article also identified that when reinforcement approaches are used to reduce behavior that match the function or reasons for the behavior, they are “just as effective as punishment approaches when used on self-injurious behavior of individuals with disabilities.” Mayer’s finding was considered in proposing the requirement that ABIs be combined with reinforcement procedures, as individually determined based on an assessment of the student’s reinforcement preferences.

“Physical Restraint in School”, Joseph B. Ryan and Reece L. Peterson, University of Nebraska-Lincoln, 2005, which discusses research, court and Office of Civil Rights rulings on individual rights of students, restraint procedures and professional training for emergency interventions, including the use of physical restraint in educational settings, was considered in proposing policy and standards for emergency physical restraint interventions.

“Functional Behavioral Assessment: Policy Development in Light of Emerging Research and Practice”, W. David Tilly, Joseph Kovaleski, Glen Dunlap, Timothy Knoster, Linda Bambara, Donald Kincaid, (March 24, 1998), developed at request of National Association of State Directors of Special Education (NASDSE) and “A Practical Guide to Functional Behavioral Assessment” Margaret E. Shippen, Robert G. Simpson and Steven A. Crites, (*Teaching Exceptional Children*, Vol. 35, No.5, pp.36-44, 2003, Council for Exceptional Children) were considered in the development of standards for functional behavioral assessments (FBAs) and behavioral intervention plans (BIPs).

## COSTS:

a. Costs to State government: See costs to the State Education Department.

b. Costs to local governments: None.

c. Costs to regulated parties: School districts may incur minimal costs to duplicate materials to submit an application for a child-specific exception and for required observations (estimated at \$200 per student) and CSE meetings at least every six months for students receiving aversive interventions (estimated at \$1,000 per student). Currently, it is estimated that less than 30 school districts in New York State have students placed in schools using aversive interventions and most of these have only one student where such a recommendation currently appears on the student’s IEP. Schools using aversive interventions may also incur additional administrative costs estimated at less than \$8,000 annually for implementing the proposed standards, including staff training and convening Human Rights Committee meetings at least quarterly (e.g. administrative oversight, duplication and meeting costs estimated at \$6,000 per year).

d. Costs to the State Education Department of implementation and continuing compliance: The cost of funding a three-member independent panel of experts to provide a recommendation regarding the need for a child-specific exception is estimated at approximately \$230,000 for the first year. This calculation was based on approximately 100 requests for child-specific exceptions, at an estimated cost of \$2,300 for each student. Additional costs for State administration and oversight of the child-specific exception, including duplication of materials for the panel are estimated at \$10,000 annually. The annual costs of the review panel are expected to be less in subsequent years and after July 1, 2009 should diminish significantly. These costs may be offset if the CSE determines that a student no longer requires aversive interventions since the cost for one student currently placed in an out-of-state residential school for aversive interventions ranges from \$281,180 to \$329,970 per year.

## LOCAL GOVERNMENT MANDATES:

Section 19.5(a) prohibits use of corporal punishment in school districts, BOCES, charter schools, State-operated or State supported schools, approved preschool programs, approved private schools, approved out-of-State day or residential schools, or in registered nonpublic nursery, kindergarten, elementary or secondary schools in the State.

Section 19.5(b) prohibits use of aversive interventions except pursuant to a child-specific exception pursuant to section 200.22(e) and (f).

Section 200.1(r) of the Commissioner’s Regulations, as amended, revises the definition of FBA to cross reference the requirements in section 200.22(a).

Section 200.4(d)(3)(i) requires a CSE, in developing a student’s IEP, to consider supports and strategies, including positive behavioral interventions, to address student behaviors that are consistent with program standards in section 200.22.

A CSE/CPSE shall conduct a FBA in accordance with section 200.22(a) and develop and implement a BIP in accordance with 200.22(b).

Each school, which uses a time out room as part of its behavior management approach, is subject to section 200.22(c) requirements.

Section 200.22(d) establishes requirements regarding emergency interventions. Section 200.22(e) provides that a child-specific exception to the prohibition of the use of aversive interventions may be granted for school-age students only during the 2006-2007, 2007-2008 and 2009-2010 school years; provided that a student whose IEP includes use of aversive interventions as of June 30, 2009 may be granted such exception in each subsequent school year, unless the IEP is revised to no longer include such exception. No child-specific exception shall be granted for a preschool student. Whenever a CSE is considering whether a child-specific exception is warranted, the school district shall submit an application to the Commissioner for referral to an independent panel of experts. The CSE shall, based on its consideration of the recommendation of the panel, determine whether the student’s IEP shall include a child-specific exception. The school district shall notify the Commissioner when such exemption has been included in the student’s IEP. An IEP providing such exemp-

tion shall identify the specific targeted behaviors, aversive interventions to be used, and aversive conditioning devices where the aversive interventions include use of such devices.

Public schools, BOCES, charter schools, approved private schools, State-operated or State-supported schools in NYS and approved out-of-State day or residential schools are subject to section 200.22(f) program standards for use of aversive interventions. Each school using aversive interventions shall establish a Human Rights Committee pursuant to section 200.22(f)(3) to monitor the program. Persons using aversive interventions shall be supervised and trained pursuant to section 200.22(f)(4). Pursuant to section 200.22(f)(5), aversive interventions shall be provided only with the parent's informed written consent and no parent shall be required by the program to remove the student from the program if the parent refuses consent. Use of aversive interventions is subject to quality assurance reviews pursuant to section 200.22(f)(6) and the program shall provide for ongoing monitoring of student progress pursuant to section 200.22(f)(7), including quarterly written progress reports. A school district placing a student in such program shall ensure the student's IEP and BIP are being implemented. The CSE shall convene at least every six months to review the student's educational program and placement, including review of written progress monitoring and incident reports, at least annual observations of, and, as appropriate, interviews with the student and regular communication with the parent. Each school proposing to use aversive interventions pursuant to a child-specific exception shall submit its policies and procedures consistent with section 200.22(f) to the Department for approval prior to use.

Section 201.2(a) proposes to amend the definition of BIP to add that the strategies must include positive behavioral supports and services to address the behavior.

#### PAPERWORK:

CSEs must compile and submit student record information and school districts must submit an application for the child-specific exception. Currently there are approximately 23 school districts that have students recommended for aversive interventions.

#### DUPLICATION:

The rule will not duplicate, overlap or conflict with any other State or federal statute or regulation.

#### ALTERNATIVES:

The Department considered other states' experiences with statutes and/or regulations prohibiting ABIs in school programs, including definitions, child-specific exceptions and standards; conducted a review of the research literature; and sought expertise of individuals with credentials in behavioral psychology. The Department considered a full prohibition on the use of ABIs, but determined there may be exceptional circumstances in which a student may be displaying behaviors that threaten the health or safety of the student for which ABIs may be warranted.

#### FEDERAL STANDARDS:

The rule does not exceed any minimum federal standards.

#### COMPLIANCE SCHEDULE:

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

#### **Regulatory Flexibility Analysis**

##### SMALL BUSINESSES:

The proposed rule is necessary to establish standards for behavioral interventions, including a prohibition on the use of aversive interventions for students with disabilities; to provide for a child specific exception to the prohibition on the use of aversive interventions; and to establish standards for programs using aversive interventions and do not impose any adverse economic impact, reporting, recordkeeping or any other compliance requirements on small businesses. Because it is evident from the nature of the rule that it does not affect small businesses, no affirmative steps are needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis is not required and one has not been prepared.

##### LOCAL GOVERNMENTS:

The proposed rule applies to all public school districts, boards of cooperative educational services (BOCES) and charter schools in this State. Currently, there are approximately 23 school districts that have students recommended for aversive interventions.

##### COMPLIANCE REQUIREMENTS:

Section 19.5(a) prohibits use of corporal punishment in school districts, BOCES, charter schools, State-operated or State supported schools, approved preschool programs, approved private schools, approved out-of-State day or residential schools, or in registered nonpublic nursery, kindergarten, elementary or secondary schools in the State.

Section 19.5(b) prohibits use of aversive interventions except pursuant to a child-specific exception pursuant to section 200.22(e) and (f).

Section 200.1(r) of the Commissioner's Regulations, as amended, revises the definition of FBA to cross reference the requirements in section 200.22(a).

Section 200.4(d)(3)(i) requires a CSE, in developing a student's IEP, to consider supports and strategies, including positive behavioral interventions, to address student behaviors that are consistent with program standards in section 200.22.

A CSE/CPSE shall conduct a FBA in accordance with section 200.22(a) and develop and implement a BIP in accordance with 200.22(b).

Each school, which uses a time out room as part of its behavior management approach, is subject to section 200.22(c) requirements.

Section 200.22(d) establishes requirements regarding emergency interventions.

Section 200.22(e) provides that a child-specific exception to the prohibition of the use of aversive interventions may be granted for school-age students only during the 2006-2007, 2007-2008 and 2009-2010 school years; provided that a student whose IEP includes use of aversive interventions as of June 30, 2009 may be granted such exception in each subsequent school year, unless the IEP is revised to no longer include such exception. No child-specific exception shall be granted for a preschool student. Whenever a CSE is considering whether a child-specific exception is warranted, the school district shall submit an application to the Commissioner for referral to an independent panel of experts. The CSE shall, based on its consideration of the recommendation of the panel, determine whether the student's IEP shall include a child-specific exception. The school district shall notify the Commissioner when such exemption has been included in the student's IEP. An IEP providing such exemption shall identify the specific targeted behaviors, aversive interventions to be used, and aversive conditioning devices where the aversive interventions include use of such devices.

Public schools, BOCES, charter schools, approved private schools, State-operated or State-supported schools in NYS and approved out-of-State day or residential schools are subject to section 200.22(f) program standards for use of aversive interventions. Each school using aversive interventions shall establish a Human Rights Committee pursuant to section 200.22(f)(3) to monitor the program. Persons using aversive interventions shall be supervised and trained pursuant to section 200.22(f)(4). Pursuant to section 200.22(f)(5), aversive interventions shall be provided only with the parent's informed written consent and no parent shall be required by the program to remove the student from the program if the parent refuses consent. Use of aversive interventions is subject to quality assurance reviews pursuant to section 200.22(f)(6) and the program shall provide for ongoing monitoring of student progress pursuant to section 200.22(f)(7), including quarterly written progress reports. A school district placing a student in such program shall ensure the student's IEP and BIP are being implemented. The CSE shall convene at least every six months to review the student's educational program and placement, including review of written progress monitoring and incident reports, at least annual observations of, and, as appropriate, interviews with the student and regular communication with the parent. Each school proposing to use aversive interventions pursuant to a child-specific exception shall submit its policies and procedures consistent with section 200.22(f) to the Department for approval prior to use.

Section 201.2(a) proposes to amend the definition of BIP to add that the strategies must include positive behavioral supports and services to address the behavior.

#### PROFESSIONAL SERVICES:

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

#### COMPLIANCE COSTS:

School districts may incur minimal costs to duplicate materials to submit an application for a child-specific exception and for required observations (estimated at a \$200 per student) and Committee on Special Education (CSE) meetings at least every six months for students receiving aversive behavioral interventions (estimated at \$1,000 per student). Currently, it is estimated that less than 30 school districts in New York State have students placed in schools using aversive interventions and most of these have only one student where such a recommendation currently appears on the student's individualized education program (IEP). Schools using aversive interventions may also incur additional administrative costs estimated at less than \$8,000 annually for implementing standards, including staff training (estimated at \$2,000 annually) and costs associated with convening Human Rights Committee meetings at least quarterly (e.g.,

administrative oversight, duplication and meeting costs estimated at \$6,000 per year).

#### ECONOMIC AND TECHNICAL FEASIBILITY:

The proposed rule does not impose any new technological requirements. Economic feasibility is addressed above under compliance costs.

#### MINIMIZING ADVERSE IMPACT:

The proposed rule is necessary to implement Regents policy to establish standards for behavioral interventions, including a prohibition on the use of aversive interventions; to provide for a child specific exception to the prohibition on the use of aversive interventions; and to establish standards for programs using aversive interventions. In developing the proposed amendment, the Department considered other states' experiences with statutes and/or regulations prohibiting aversive interventions in school programs, including definitions, child-specific exceptions and standards; conducted a review of the research literature; and sought the professional expertise of individuals with credentials in behavioral psychology. The Department considered a full prohibition on the use of aversive interventions, but determined that there may be exceptional circumstances in which a student may be displaying behaviors that threaten the health or safety of the student for which aversive interventions may be warranted. The proposed rule will ensure that aversive interventions are used only when necessary; in accordance with research-based practices and the highest standards of oversight and monitoring; under conditions of minimal intensity and duration to accomplish their purpose; and consistent with the requirements of the Individuals with Disabilities Education Act (IDEA).

#### LOCAL GOVERNMENT PARTICIPATION:

Copies of the proposed rule will be provided to District Superintendents with the request that they distribute it to school districts within their supervisory districts for review and comment. In addition, the State Education Department will schedule public hearings on the proposed amendments.

#### *Rural Area Flexibility Analysis*

##### TYPES AND ESTIMATED NUMBERS OF RURAL AREAS:

The rule will apply to all public school districts, boards of cooperative educational services (BOCES), charter schools, State-operated and State-supported schools, approved preschool programs, approved private schools, approved out-of-state day or residential schools, and registered nonpublic nursery, kindergarten, elementary or secondary schools in this State, including those in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with population density of 150 per square miles or less.

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

Section 19.5(a) prohibits use of corporal punishment in school districts, BOCES, charter schools, State-operated or State supported schools, approved preschool programs, approved private schools, approved out-of-State day or residential schools, or in registered nonpublic nursery, kindergarten, elementary or secondary schools in the State.

Section 19.5(b) prohibits use of aversive interventions except pursuant to a child-specific exception pursuant to section 200.22(e) and (f).

Section 200.1(r) of the Commissioner's Regulations, as amended, revises the definition of FBA to cross reference the requirements in section 200.22(a).

Section 200.4(d)(3)(i) requires a CSE, in developing a student's IEP, to consider supports and strategies, including positive behavioral interventions, to address student behaviors that are consistent with program standards in section 200.22.

A CSE/CPSE shall conduct a FBA in accordance with section 200.22(a) and develop and implement a BIP in accordance with 200.22(b).

Each school, which uses a time out room as part of its behavior management approach, is subject to section 200.22(c) requirements.

Section 200.22(d) establishes requirements regarding emergency interventions.

Section 200.22(e) provides that a child-specific exception to the prohibition of the use of aversive interventions may be granted for school-age students only during the 2006-2007, 2007-2008 and 2009-2010 school years; provided that a student whose IEP includes use of aversive interventions as of June 30, 2009 may be granted such exception in each subsequent school year, unless the IEP is revised to no longer include such exception. No child-specific exception shall be granted for a preschool student. Whenever a CSE is considering whether a child-specific exception is warranted, the school district shall submit an application to the Commissioner for referral to an independent panel of experts. The CSE shall, based on its consideration of the recommendation of the panel, determine whether the student's IEP shall include a child-specific excep-

tion. The school district shall notify the Commissioner when such exemption has been included in the student's IEP. An IEP providing such exemption shall identify the specific targeted behaviors, aversive interventions to be used, and aversive conditioning devices where the aversive interventions include use of such devices.

Public schools, BOCES, charter schools, approved private schools, State-operated or State-supported schools in NYS and approved out-of-State day or residential schools are subject to section 200.22(f) program standards for use of aversive interventions. Each school using aversive interventions shall establish a Human Rights Committee pursuant to section 200.22(f)(3) to monitor the program. Persons using aversive interventions shall be supervised and trained pursuant to section 200.22(f)(4). Pursuant to section 200.22(f)(5), aversive interventions shall be provided only with the parent's informed written consent and no parent shall be required by the program to remove the student from the program if the parent refuses consent. Use of aversive interventions is subject to quality assurance reviews pursuant to section 200.22(f)(6) and the program shall provide for ongoing monitoring of student progress pursuant to section 200.22(f)(7), including quarterly written progress reports. A school district placing a student in such program shall ensure the student's IEP and BIP are being implemented. The CSE shall convene at least every six months to review the student's educational program and placement, including review of written progress monitoring and incident reports, at least annual observations of, and, as appropriate, interviews with the student and regular communication with the parent. Each school proposing to use aversive interventions pursuant to a child-specific exception shall submit its policies and procedures consistent with section 200.22(f) to the Department for approval prior to use.

Section 201.2(a) proposes to amend the definition of BIP to add that the strategies must include positive behavioral supports and services to address the behavior.

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

#### COSTS:

School districts may incur minimal costs to duplicate materials to submit an application for a child-specific exception and for required observations (estimated at a \$200 per student) and Committee on Special Education (CSE) meetings at least every six months for students receiving aversive interventions (estimated at \$1,000 per student). Currently, it is estimated that less than 30 school districts in New York State have students placed in schools using aversive interventions and most of these have only one student where such a recommendation currently appears on the student's individualized education program (IEP). Schools using aversive interventions may also incur additional administrative costs estimated at less than \$8,000 annually for implementing standards, including staff training (estimated at \$2,000 annually) and costs associated with convening Human Rights Committee meetings at least quarterly (e.g., administrative oversight, duplication and meeting costs estimated at \$6,000 per year).

#### MINIMIZING ADVERSE IMPACT:

The proposed rule is necessary to implement Regents policy to establish standards for behavioral interventions, including a prohibition on the use of aversive interventions; to provide for a child specific exception to the prohibition on the use of aversive interventions; and to establish standards for programs using aversive interventions. In developing the proposed amendment, the Department considered other states' experiences with statutes and/or regulations prohibiting aversive interventions in school programs, including definitions, child-specific exceptions and standards; conducted a review of the research literature; and sought the professional expertise of individuals with credentials in behavioral psychology. The Department considered a full prohibition on the use of aversive interventions, but determined that there may be exceptional circumstances in which a student may be displaying behaviors that threaten the health or safety of the student for which aversive interventions may be warranted. The proposed rule will ensure that aversive interventions are used only when necessary; in accordance with research-based practices and the highest standards of oversight and monitoring; under conditions of minimal intensity and duration to accomplish their purpose; and consistent with the requirements of the Individuals with Disabilities Education Act (IDEA). The proposed amendments are necessary to ensure the health and safety of students. Since these requirements apply to all school districts, BOCES, charter schools, and other affected entities in the State, it is not possible to adopt different standards for entities located in rural areas.

#### RURAL AREA PARTICIPATION:

The proposed rule will be submitted for discussion and comment to the Department's Rural Education Advisory Committee that includes repre-

sentatives of school districts in rural areas. In addition, the State Education Department will schedule public hearings on the proposed amendments.

#### **Job Impact Statement**

The proposed rule is necessary in order to establish standards for behavioral interventions for students with disabilities, including a prohibition on the use of aversive behavioral interventions; to provide for a child specific exception to the prohibition on the use of aversive behavioral interventions; and to establish standards for programs using aversive behavioral interventions. These amendments will ensure that aversive behavioral interventions are used only when necessary; in accordance with research-based practices; under conditions of minimal intensity and duration to accomplish their purpose; and in accordance with the highest standards of oversight and monitoring. The proposed rule will not have a substantial 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.

#### **Assessment of Public Comment**

See Assessment of Public Comment in the Notice of Adoption, I.D. No. EDU-28-06-00005-A, printed in this issue of the *State Register*.

### NOTICE OF ADOPTION

#### **Licensure as a Clinical Laboratory Technologist**

**I.D. No.** EDU-21-06-00009-A

**Filing No.** 56

**Filing date:** Jan. 16, 2007

**Effective date:** Feb. 10, 2007

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

**Action taken:** Addition of Subparts 79-13, 79-14, and 79-15 to Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207 (not subdivided); 210 (not subdivided); 212(3); 6501 (not subdivided); 6504 (not subdivided); 6507(2)(a), (3)(a), and (4)(a); 6508(1); 8605(1)(b) and (c), and (2)(b) and (c); 8606(2) and (3); 8607(1) and (2); and 8608 (not subdivided)

**Subject:** Licensure as a clinical laboratory technologist and as a cytotechnologist and certification as a clinical laboratory technician.

**Purpose:** To implement the provisions of article 165 of the Education Law by establishing requirements for licensure as a clinical laboratory technologist or cytotechnologist and for certification as a clinical laboratory technician, requirements for limited permits in these fields, and standards for registered college programs for these professions.

**Text or summary was published** in the notice of proposed rule making, I.D. No. EDU-21-06-00009-P, Issue of May 24, 2006.

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

**Revised rule making(s) were previously published in the State Register on** August 16, 2006 and November 15, 2006.

**Text of rule and any required statements and analyses may be obtained from:** Anne Marie Koschnick, Legal Assistant, Office of Counsel, Education Department, State Education Bldg., Rm. 148, Albany, NY 12234, (518) 473-8296, e-mail: legal@mail.nysed.gov

#### **Assessment of Public Comment**

A Notice of Proposed Rule Making concerning this regulation was published in the State Register on May 24, 2006. A Notice of Emergency Adoption and Revised Rule Making was published on August 16, 2006. A second Notice of Emergency Adoption and Revised Rule Making was published on November 15, 2006. The following is a summary of comments received by the State Education Department (SED) since the publication of the Notice of Emergency Adoption and Revised Rule Making on November 15, 2006, and the Department's response to the comments.

**COMMENT:** The regulations do not recognize specialist technologists who work solely in specialized laboratories, even though every teaching hospital in New York State employs these specialists. The regulation must permit licensure in specialty clinical titles or the result will be an acute shortage of personnel and an inability to provide adequate clinical laboratory services.

**RESPONSE:** Article 165 of the Education Law establishes three new professions, clinical laboratory technology, cytotechnology, and clinical laboratory technician, and provides a general scope of practice for each profession. SED does not have statutory authority to establish specialist

fields within these licensed professions through regulation. The regulation does not prevent a licensed individual from specializing within the scope of practice of that profession.

**COMMENT:** The "grandparenting" provisions are onerous and unreasonably restrictive. The regulation should permit automatic licensure for all individuals working as qualified technicians and technologists as of September 30, 2006.

**RESPONSE:** The regulation implements statutory "grandparenting" provisions (Education Law section 8607). Such provisions do not provide for automatic licensure for those employed as laboratory technicians and technologists as of a certain date, and SED does not have statutory authority to establish such a provision in regulation. The statutory "grandparenting" provisions permit applicants to be licensed as a clinical laboratory technologist or certified as a clinical laboratory technician if they have at least five years of applicable experience prior to September 1, 2006, the effective date of the licensure law.

**COMMENT:** The regulation should be interpreted to allow any individual working as a technologist in a laboratory that is licensed by the New York State Department of Health (DOH) to obtain automatic licensure under the statutory provision that authorizes such licensure for persons previously qualified under other regulatory requirements for that license or its equivalent.

**RESPONSE:** The statutory "grandparenting" provisions at issue, Education Law section 8607 (1)(a)(iv), (b)(ii), and (c), require the individual to be "previously qualified under other regulatory requirements for the license or its equivalent." DOH licenses laboratories and does not license individuals as clinical laboratory technologists, cytotechnologists, or clinical laboratory technicians. Therefore, this "grandparenting" provision may not be used to automatically license individuals based solely on the fact that they are employed at a DOH licensed clinical laboratory on a particular date, as suggested by the comment. However, another statutory "grandparenting" provision permits applicants to be licensed as a clinical laboratory technologist or certified as a clinical laboratory technician if they have at least five years of applicable experience prior to September 1, 2006, the effective date of the licensure law, and this "grandparenting" provision is prescribed in the regulation.

**COMMENT:** The regulation should permit cytotechnologists to be licensed through a "grandparenting" provision based upon having at least five years of applicable experience prior to September 1, 2006, as permitted for clinical laboratory technologists and clinical laboratory technicians.

**RESPONSE:** The "grandparenting" provisions are established in Education Law section 8607. This statute does not establish a "grandparenting" provision for cytotechnologists, based upon having at least five years of applicable experience prior to September 1, 2006, as is provided for clinical laboratory technologists and clinical laboratory technicians. SED does not have the statutory authority to establish this "grandparenting" provision in regulation.

**COMMENT:** Existing preparation programs in the State are inadequate to meet the need for clinical laboratory technologists. SED should work with practitioners in the field to devise hospital-based training programs.

**RESPONSE:** The current regulation permits an applicant to complete a portion of the education requirement for licensure as a clinical laboratory technologist through an accredited hospital-based program. SED is working with degree-granting institutions to develop registered programs that lead to licensure through a partnership between degree-granting institutions and the hospital-based programs.

**COMMENT:** It is my understanding that the SED will permit an individual to be licensed as a clinical laboratory technologist under "grandparenting" provisions based solely upon experience as a clinical laboratory technician. This should be clarified in the regulation.

**RESPONSE:** The regulation implements the "grandparenting" provisions in Education Law section 8607. The regulation is clear and does not permit licensure as a clinical laboratory technologist based solely upon experience as a clinical laboratory technician. One "grandparenting" provision establishes the following licensure requirement: the applicant must be a certified clinical laboratory technician and by September 1, 2008 must both complete a prescribed baccalaureate degree program and have four years of experience as a clinical laboratory technician. Another "grandparenting" provision requires the applicant to have performed the duties of a clinical laboratory technologist for five-years, meaning 7,200 clock hours, prior to September 1, 2006, as verified in writing by the Director of the Clinical Laboratory. This provision would not permit licensure as a clinical laboratory technologist based upon performing the duties of a clinical laboratory technician.

COMMENT: The regulation should be clarified to permit clinical laboratory supervisory experience to be creditable for the five years of experience under the “grandparenting” provision.

RESPONSE: A regulatory change is unnecessary. Under the existing regulation, SED has accepted appropriate experience supervising the work of clinical laboratory technologists to meet the five-years of experience for licensure as a clinical laboratory technologist under this “grandparenting” provision.

COMMENT: Laboratory assistants should be exempt from licensure.

RESPONSE: The scopes of practice for these new professions are defined in the Education Law. SED does not have the authority to modify the statutory scopes of practice in regulation. Laboratory assistants who perform work within the statutory scopes of practice must be licensed or certified.

COMMENT: Students who are enrolled in clinical laboratory technology and clinical laboratory technician programs, and who have been trained and deemed competent, should be able to perform supervised testing outside of their education program.

RESPONSE: Education Law section 8609(4) provides an exemption from the licensure requirement for students or trainees enrolled in approved clinical laboratory technology education programs for supervised activities that constitute part of a planned course in the program. SED does not have the authority to expand this exemption through regulation to authorize employment of unlicensed students to perform work within the scope of practice of these professions that is outside of their course of study.

COMMENT: The regulation does not consider the economic impact the licensure act will have on laboratories performing specialized cytogenetic testing.

RESPONSE: Cytogenetics is within the scope of practice of clinical laboratory technologists. The requirement for licensure is imposed by statute, not by the regulatory requirements. Any costs that a laboratory will have to bear to employ licensed individuals to perform specialized cytogenetic testing results from the statutory licensure requirement not this implementing regulation.

COMMENT: Requiring cytotechnologists to be licensed will negatively affect the ability of cytotechnologists in rural Chemung County to keep their jobs, negatively affecting employment.

RESPONSE: Article 165 of the Education Law establishes the requirement that cytotechnologists must be licensed in order to practice in New York State. The proposed regulation simply implements the statutory requirements for licensure. Any impact on jobs is attributable to the statute which requires licensure, not the regulation.

## NOTICE OF ADOPTION

### Behavioral Interventions

**I.D. No.** EDU-28-06-00005-A

**Filing No.** 54

**Filing date:** Jan. 16, 2007

**Effective date:** Jan. 31, 2007

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

**Action taken:** Amendment of sections 19.5, 200.1, 200.4, 200.7 and 201.2 and addition of section 200.22 to Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207 (not subdivided), 210 (not subdivided), 305(1), (2) and (20), 4401(2), 4402(1), 4403(3) and 4410(13)

**Subject:** Behavioral interventions, including aversive interventions.

**Purpose:** To establish standards for behavioral interventions, including a prohibition on the use of aversive interventions; provide for a child-specific exception to the prohibition on the use of aversive interventions; and establish standards for programs using aversive interventions.

**Text or summary was published** in the notice of emergency/proposed rule making, I.D. No. EDU-28-06-00005-EP, Issue of July 12, 2006.

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

**Revised rule making(s) were previously published in the State Register** on November 15, 2006.

**Text of rule and any required statements and analyses may be obtained from:** Anne Marie Koschnick, Legal Assistant, Office of Counsel, Education Department, State Education Bldg., Rm. 148, Albany, NY 12234, (518) 473-8296, e-mail: legal@mail.nysed.gov

**Assessment of Public Comment**

Since publication of a Notice of Revised Rule Making in the State Register on November 15, 2006, the State Education Department received the following new comments that were not otherwise addressed in the Assessment of Public Comment resulting from the Notice of Proposed Rule Making published on July 12, 2006.

#### *Section 19.5(b) – Definition of Aversive Interventions*

COMMENT:

Clarify if the phrase “intrusive stimuli or activities” refers to how much the adult must “physically” intervene; delete “intrusive stimuli or activities” as this is impossible to adequately define.

DEPARTMENT RESPONSE:

The word “intrusive” in this context is intended to mean having the effect of causing pain or discomfort to the student.

COMMENT:

The new language regarding contingent food programs makes it more difficult to interpret; the delay of food can be an important practice in successfully treating children with significant feeding problems; delaying food temporarily (within a treatment session) then providing preferred food contingent upon eating nonpreferred food can be effective; revise the regulation to state that contingent food programs that include the denial or delay of the provision of meals “as a punisher” or altering staple food or drink is prohibited.

DEPARTMENT RESPONSE:

No further revision to the regulation is necessary to address these comments since delaying food to address a medical feeding problem would not fall within the definition of an aversive intervention intended to inflict pain or discomfort to eliminate or reduce a maladaptive behavior.

COMMENT:

Clarify if physical restraint is a type of movement limitation; and for prohibition purposes, redefine movement limitation to include mechanical, prone, and other more intrusive restraint methods. Basket holds and brief physical restrictions of movement (e.g., holding a child’s hands at their side) should be excluded from the definition of an aversive intervention.

DEPARTMENT RESPONSE:

Physical restraint is a type of movement limitation. Physical, mechanical or other types of movement limitation used on a planned basis to provide a consequence to a student’s behavior and that are intended to cause pain or discomfort to the student for the purpose of reducing a maladaptive behavior fall within the definition of an aversive intervention. Brief physical prompts to interrupt or prevent a specific behavior and/or that are medically necessary for the treatment or protection of the student are not considered aversive interventions.

COMMENT:

Clarify if the new prohibition includes the use of electric skin shock.

DEPARTMENT RESPONSE:

Electric skin shock would be considered a prohibited aversive intervention except through a child-specific exception pursuant to section 200.22(e) of the proposed regulation.

COMMENT:

The phrase “other stimuli or actions similar to” the interventions identified in section 19.5(b)(2) is overly broad and can cause confusion as to the aversive interventions that are allowed.

DEPARTMENT RESPONSE:

The phrase “other stimuli or actions similar to” is necessary to provide authority to the Department to determine if interventions other than those specifically listed would be considered aversive.

#### *Section 200.7 - Approval of private schools*

COMMENT:

Section 200.7(a)(3)(iv) should start with a provision that recognizes that removal from the approved list should not occur if a school has obtained court authorization for the use of aversives and be revised to read, “If a school has not obtained court authorization for the use of aversive interventions in a student’s treatment plan, schools may be removed from the approved list five business days .”; an exception should be added to section 200.7(b)(8)(i) to allow aversives procedures that are approved by a court.

DEPARTMENT RESPONSE:

No revision to the proposed rulemaking is necessary since the regulations establish standards for the use of aversives and do not alter the due process rights of parties under section 200.5 to seek a hearing, administrative appeal and court review.

COMMENT:

Most supported the prohibition on the use of aversive interventions on preschoolers without exception. A few recommended continuation of exceptions for use of aversives for preschool students: section 200.7(b)(8)(ii)

should be deleted to allow preschools to use aversives to ensure self-abuse can be effectively treated at the earliest possible age; keep original language that provided a child-specific exception for preschool and school-age children or restrict the use of the most extraordinary methods (e.g., shock or mechanical restraint) but allow other evidence-based methods as eligible for child specific exceptions for preschool children as well as school-age children.

**DEPARTMENT RESPONSE:**

The potential risk of harm, both physically and emotionally, to a preschool child when a consequence is imposed that is intended to cause pain or discomfort is greater than for a school age child, given a preschool child's physical and developmental levels. The period of time a preschool child would have had the opportunity to benefit from a full range of evidence-based positive behavioral interventions is insufficient to ensure that the full-range of evidence based positive behaviors interventions have been consistently employed and have failed to result in sufficient improvement of the child's behavior. Therefore, the proposed regulations continue to prohibit the use of aversives by New York State approved preschool program providers and prohibit a child-specific exception for any New York State (NYS) preschool child.

**COMMENT:**

Clarify if a school that did not submit policies and procedures by August 15, 2006 or did not have them approved by June 30, 2007 would be able to make an application after that date and if schools can no longer apply for child-specific exceptions after June 30, 2009.

**DEPARTMENT RESPONSE:**

The proposed regulations would authorize only those schools that are notified by the Department by June 30, 2007 that their policies and procedures on the use of aversive interventions meet the standards of the Regulations of the Commissioner. No additional schools may apply to use aversive interventions. Only students with IEPs that, as of June 30, 2009, include a recommendation for aversives may be considered in subsequent years for a child-specific exception to the prohibition on the use of aversives after June 30, 2009.

*Section 200.22(a) – Functional Behavioral Assessment (FBA)*

**COMMENT:**

Add a requirement that the FBA propose a hypothesis as to the function of a target behavior so that alternative, replacement behaviors can be identified and taught to the student; require the FBA to provide a baseline of the replacement behaviors with regard to frequency, duration, intensity, and/or latency across activities, settings, people and time of day.

**DEPARTMENT RESPONSE:**

No revision to the proposed rulemaking is necessary since the FBA is defined in section 200.1(r) to mean the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment. The FBA must include the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it. The Department will consider the second comment in developing nonregulatory guidance subsequent to the adoption of the proposed regulation.

**COMMENT:**

Require all FBAs to be based on multiple sources of information and include all parental information which is even hypothetically relevant.

**DEPARTMENT RESPONSE:**

No revision is necessary in response to this comment since an FBA would be required to be based on multiple sources of information unless it is clearly not appropriate or practicable to do so; and any information submitted by the parent is required to be considered in the evaluation and individualized education program (IEP) development process.

**COMMENT:**

Require FBAs be conducted (or supervised) and monitored by personnel with appropriate training in applied behavioral analysis and data based decision making.

**DEPARTMENT RESPONSE:**

Section 200.4 of the Regulations of the Commissioner of Education requires individual evaluations to be administered by trained and knowledgeable personnel.

**COMMENT:**

Recommend that SED establish a funding method for conducting detailed behavioral diagnostics (FBA and developing behavior plans) and involve developing centers of excellence to conduct behavioral diagnostics, train school staff and provide ongoing consultation.

**DEPARTMENT RESPONSE:**

The Department is taking steps to establish short-term behavioral assessment and intervention centers that would provide students presenting with severe self-injurious behaviors with extensive behavioral assessments and behavioral implementation plans.

*Section 200.22(b) – Behavioral intervention plans (BIPs)*

**COMMENT:**

While the proposed amendment allows a CSE to consider the development of a BIP when a student's behavior impedes his/her learning or that of others, federal law requires the creation of a BIP under these circumstances.

**DEPARTMENT RESPONSE:**

No changes are necessary since the proposed regulation requires more specific criteria to be considered than is specified in federal regulation. The proposed regulation states that the CSE shall consider the development of a BIP when the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; the student's behavior places the student or others at risk of harm or injury; the CSE or CPSE is considering more restrictive programs or placements as a result of the student's behavior; and/or as required pursuant to section 201.3 of this Title.

**COMMENT:**

No FBA or BIP should be allowed to be implemented as a matter of federal protective law unless and until parents or other lawfully appointed representatives have fully consented to each and every portion thereof.

**DEPARTMENT RESPONSE:**

No revisions are necessary to address this comment since section 200.4 of the Regulations of the Commissioner requires parental consent for an initial evaluation and reevaluation, which would include an FBA. The proposed regulation requires parent consent when the use of aversive interventions is to be part of a student's IEP. A parent who disagrees with a recommendation of the CSE may exercise his or her due process rights under section 200.5 of the Regulations of the Commissioner.

**COMMENT:**

Each special education child should have a specific individualized behavioral plan prepared by an applied behavioral specialist as well as a psychologist; the parents should be involved in the preparation of a BIP; and require reinforcement schedules to strengthen alternative behaviors.

**DEPARTMENT RESPONSE:**

No revisions are necessary to address these comments since (1) not every student with a disability has behaviors that interfere with his or her learning or that of others and therefore not every student with a disability would need a BIP and (2) the need for a BIP should be discussed at a CSE meeting, to which the student's parents are members. Other comments will be considered in developing nonregulatory guidance relating to these regulations.

**COMMENT:**

Add more specific requirements related to the acquisition and maintenance of alternative behaviors that are incompatible with the target behaviors.

**DEPARTMENT RESPONSE:**

The Department will consider this comment as it develops nonregulatory guidance subsequent to the adoption of the proposed amendment.

**COMMENT:**

Actions to be taken to decrease specific behaviors should be specified on a BIP.

**DEPARTMENT RESPONSE:**

The proposed regulations requires the BIP to identify the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s).

**COMMENT:**

NYSED has proposed significant improvements to ensure there is more reporting and oversight when using BIPs, time out rooms and emergency interventions; however, the regulations are still lacking in some reporting requirements and there is still no oversight by NYSED of any of the provisions; regulations should require schools to provide parents with quarterly progress reports, similar to reports on a student's academic progress.

**DEPARTMENT RESPONSE:**

The Department will enforce its regulatory standards on behavioral interventions consistent with State and federal requirements. Parents must

be provided with a report of their child's progress, which should include reports of student progress toward their annual goals relating to behavior.

*Section 200.22(c) - Use Of Time Out Room*

COMMENT:

Additional criteria around the use of the time out room should be added; require specialized training of staff monitoring time out rooms; clarify how a parent would report inappropriate interventions used with his or her child during time out; require time out room policies be given to parents with the procedural safeguards notice when an IEP is implemented; time-out rooms have helped many students and staff and administrators and professionals dealing with time-out rooms are all made aware of the rules and consequences; time out rooms are used to help and not hurt the child.

DEPARTMENT RESPONSE:

No revisions to the proposed regulation have been made since the revised regulation requires the school district to inform the student's parents prior to the initiation of a BIP that includes the use of a time out room and requires parents to be given a copy of the school's policy on the use of time out rooms. Parent reports of alleged inappropriate interventions used in a time out room should be directed to school administrators. If a parent alleges the district violated a federal or State law or regulation relating to the use of a time out room, this could be the subject of a State Complaint directed to the NYSED. Because of the nature of the last comment, no response is necessary.

COMMENT:

Clarify that a parent has the right to consent or to deny consent to the use of time out rooms, provided that no consent is required if there is an actual safety emergency involving the risk of imminent serious physical injury to the student or others.

DEPARTMENT RESPONSE:

No changes to the proposed rule have been made in response to this comment since a parent may disagree with an IEP recommendation using his/her due process rights in section 200.5 of the Regulations of the Commissioner.

COMMENT:

Revise the proposed amendment to add: no room used for time out or seclusion purposes shall have a door with a lock and no device such as a chain and padlock shall be used at any time to keep the door closed; no furniture or objects may be used to block the door from the outside; and no person may hold the door closed from the outside.

DEPARTMENT RESPONSE:

The revised proposed regulation requires that the time out room shall be unlocked and the door must be able to be opened from the inside. Since the blocking of a door with a chain or padlock or furniture would be the same as locking the door, thereby interfering with opening the door from the inside, no further revision to the proposed regulation is necessary.

COMMENT:

Require that documentation procedures minimally include a record for each student showing the date and time of each use, a detailed account of the incident that led to use of time out room, the amount of time that the student was in the time out room, and information to monitor the effectiveness of the use of the time out room to decrease specified behaviors which resulted in the student being placed in the room. Establish a maximum limit on the amount of time a child can spend in a time out room, both consecutively and cumulatively, for any five day period.

DEPARTMENT RESPONSE:

The revised proposed regulation requires the school policy and procedures on the use of time out rooms to establish time limitations on the use of time rooms and to include data collection to monitor the use and effectiveness of the use of the time out rooms. Such data collection should appropriately include the information provided in the above comment.

COMMENT:

Clarify if the use of a time out room is an aversive intervention. If the time out room is not considered an aversive intervention, the requirements on time out rooms should appear in another section of the regulations or in a guidance memorandum. NYSED has not provided any research-validated findings or well-founded psychological, psychiatric or educational rationale for allowing the use of time out rooms for punishment.

DEPARTMENT RESPONSE:

Section 200.22 of the proposed regulation addresses behavioral interventions in general and does not pertain exclusively to aversive interventions. The use of time out rooms is not considered an aversive intervention and may not be used as a punishing consequence to a student's behavior. The revised proposed regulation specifically defines a time out room as an

area for a student to safely deescalate, regain control and prepare to meet the expectations to return to his or her education program.

COMMENT:

Clarify whether sections 200.22(c)(9) and (d)(5) excludes Boards of Cooperative Educational Services (BOCES) facilities from the time out room and emergency intervention requirements and, if so, revise the regulations so that BOCES are not exempt from complying with the minimal standards in this section.

DEPARTMENT RESPONSE:

Part 116 of the Regulations of the Commissioner of Education governs education programs and services for children in full-time residential care in homes or facilities operated or supervised by a State department or political agency, which would not include a board of education or BOCES program. The exception pertaining to Part 116 programs, therefore, does not pertain to BOCES programs.

COMMENT: Parents should be notified verbally on the same day and in writing within 24 hours of each incident of placing a student in seclusion.

DEPARTMENT RESPONSE:

The proposed regulation would prohibit the use of a time out room for seclusion of the student. The schools policies/procedures on the use of time out rooms must address information to be provided to parents, which should include a policy on when parents would be notified if their child was placed in a time out room. Minimally, whenever a time out room is used as an emergency intervention pursuant to section 200.22(d), the parent must be notified of the emergency intervention. It is expected that such notification would be provided the same day whenever possible.

COMMENT:

NYSED should be required to publish monthly information including the number of each use of a time out room, and each use of restraints and seclusion, for each school and BOCES program, and to make such information easily accessible to parents and the public.

DEPARTMENT RESPONSE:

The proposed regulation prohibits seclusion. The parent of the student would have access to information on the use of restraints for his/her own child. The proposed regulation requires a school to maintain documentation on the use of emergency interventions and the use of time out rooms; such data could be subject to Department review. To require public reporting of such data would be overly burdensome.

*Section 200.22(d) - Emergency Interventions*

COMMENT:

Clarify what interventions could be considered "emergency" interventions; require consistent and coordinated standards for physical restraints and therapeutic crisis interventions when a program is licensed or certified by more than one agency.

DEPARTMENT RESPONSE:

The proposed regulations were developed in review of the regulations governing other State agency programs and specifies that, for an education program operated by another State agency, if a provision of the proposed regulations conflicts with the rules of the respective State agency operating such program, the rules of such State agency shall prevail and the conflicting provision of the regulations would not apply. NYS agencies are developing recommendations for coordinated standards for the use of restraints in NYS treatment programs serving children and youth.

COMMENT:

Revised amendments fail to adequately protect the health and safety of students exposed to restraint.

DEPARTMENT RESPONSE:

The revised proposed regulation requires a school to ensure staff are appropriately trained in safe and effective restraint procedures to protect the health and safety of students when a physical restraint is used in an emergency situation; and requires documentation of the emergency intervention be submitted to school administration and medical personnel.

COMMENT:

Clarify how soon after the intervention is employed that parents be notified; at a minimum schools should be required to attempt to verbally notify parents of the use of an emergency intervention by the end of the same day the intervention was used and to send parents written notification within three calendar days of the intervention used including, information on the school's attempt to verbally notify the parent if the school was unsuccessful in doing so.

DEPARTMENT RESPONSE:

The proposed regulation requires that parents be notified when emergency interventions are used with his/her child. It is expected that such notification would be provided the same day whenever possible.

**COMMENT:**

Revise the definition of emergency to mean a situation in which there is an imminent risk of serious physical injury to the students or others and require that emergency interventions only be used where there is such an emergency and alternative procedures and methods not involving the use of physical force, but which do include the use of research-validated protocols to defuse behavioral crises, have been attempted, but failed, or cannot reasonably be employed. Require those who use physical interventions to be trained in research-validated methods of crisis de-escalation and to hold current certification from the authority or organization providing the training.

**DEPARTMENT RESPONSE:**

The Department interprets the circumstances specified in section 19.5(a)(3) of this Title for which the use of reasonable physical force could be used to be limited only to those student behaviors that would pose imminent risk of injury to the student or others. The proposed regulation requires appropriate training in safe and effective restraint procedures.

**COMMENT:**

Require schools to report to NYSED on a regular basis the number of times schools emergency interventions are used with students with disabilities; and require that documentation on the use of emergency interventions include a "detailed" description of the incident and that parents be notified in writing within 24 hours, or within 2 hours if any injury has been sustained to the student or others. The amount of information required is burdensome to direct care staff that must maintain it; delete requirements that documentation include the date of birth, setting and location and information on whether the student has a current behavior plan. Clarify if the parent must be notified incident by incident and if a parent can waive this requirement.

**DEPARTMENT RESPONSE:**

The revised proposed regulation requires that a school maintain specific documentation on the use of emergency interventions for each student, which shall include: the name and age of the student; the setting and location of the incident; the name of the staff or other persons involved; a description of the incident and the emergency interventions used, including the duration of such intervention; a statement as to whether the student has a current BIP; and details of any injuries sustained by the student or others, including staff, as a result of the incident. Such documentation is subject to review by the Department upon request. The Department does not agree that including the student's date of birth, the setting and location where the emergency intervention occurred, and whether the student has a current BIP places an undue documentation burden on staff. A parent should be informed each time an emergency intervention is necessary for his or her child and no program may request the parent waive this requirement.

**COMMENT:**

Require the school district to review data to consider the need for a BIP, or to alter a BIP, within a specific time period (e.g., three days) and/or after a specified number of emergency interventions for a student when emergency interventions are used; and require that a BIP be developed in 10 days.

**DEPARTMENT RESPONSE:**

The revised proposed regulation prohibits the use of emergency interventions as a substitute for systematic behavioral interventions that are designed to change, replace, modify or eliminate a targeted behavior and further require that the CSE consider the development of a BIP for a student when the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; the student's behavior places the student or others at risk of harm or injury; the CSE or CPSE is considering more restrictive programs or placements as a result of the student's behavior; and/or as required pursuant to section 201.3 of this Title (discipline requirements). It is expected that the CSE would meet to address a student's behaviors precipitating emergency interventions within a reasonable period of time and without undue delay.

**COMMENT:**

Define "appropriate training in safe and effective restraint procedures."

**DEPARTMENT RESPONSE:**

The Department will consider this comment as it develops nonregulatory guidance subsequent to the adoption of the regulations.

**COMMENT:**

Clarify if emergency procedures and time out, including environmental time out, can be used with preschool children.

**DEPARTMENT RESPONSE:**

It is unclear what the commenter meant by environmental time out. The regulations pertaining to the use of time out rooms and emergency procedures would apply to preschool students. *Section 200.22(e) - Child-specific exception to use aversive interventions to reduce or modify student behaviors*

**COMMENT:**

Clarify if section 19.5(e)(2) prohibits the types of aversive interventions specified or allows, at the discretion of the Commissioner for such interventions to be used. Clarify whether the interventions listed in section 19.5(e)(2) are immediately barred, and if so, what is to happen to those students currently getting those aversive interventions.

**DEPARTMENT RESPONSE:**

The types of aversive interventions specified in section 200.22(e) are prohibited without exception as of the effective date of the regulations. The phrase "at the discretion of the commissioner" means that the list of prohibited interventions is not exhaustive and the Department has the authority to prohibit any intervention it determines to be similar to those expressly prohibited. Upon adoption of the regulations, the program providing such interventions must cease their application and a revised BIP must be developed for the student based on the results of the FBA.

**COMMENT:** The safety and welfare of children in a particular program is at risk if behavioral skin-shock treatment is not allowed.

**DEPARTMENT:**

The revised proposed rule authorizes the child-specific exception for the use of aversive interventions until June 30, 2009. If a program is in full compliance with section 200.22 of the Commissioner's Regulations, including requirements relating to FBAs and BIPs, most students will be benefiting from nonaversive treatments. For the exceptional case, the child specific exception process would continue to be available in subsequent years only for students whose IEPs include the use of aversive interventions as of June 30, 2009.

**COMMENT:**

Permitting aversive interventions at all for students with disabilities appears to violate 42 USC section 15009, which prohibits exposing developmentally disabled students to any greater risk of harm than that experienced by students in the general population. 42 USC section 15009 does not allow parents to waive their children's protections under this statute. Given that NYSED has acknowledged that aversive interventions do pose a risk of harm, the Board of Regents cannot permit their use at all without violating 42 USC section 15009. Aversive interventions must be barred, without exception, effective immediately. If aversive treatments are needed, they should be handled in the same way that a school or district would handle a student who needed medication and accommodations in school, via collaboration between a physician, the student's parent(s) and the district.

**DEPARTMENT RESPONSE:**

With respect to an alleged violation of 42 USC section 15009, the comment is speculative in that it raises issues of statutory interpretation that have not yet been determined by either the Congress, a Federal agency responsible for oversight, or the Federal judiciary. The comment provides no citation to any authority specifically determining that the use of aversives falls within the prohibition in 42 USC section 15009, but merely presents the opinion of the person providing the comment.

The proposed regulations establish a prohibition on the use of aversives, with a child-specific exception process that must consider the determination of a panel of experts as to the need to provide a specific intervention targeted to a specific behavior(s) to safeguard the health and safety of the student and that of others. This child-specific process would be available for a time-limited period in order to provide a safeguard for students who are presenting serious self-injurious behaviors and, because of their age, have not had the opportunity to benefit from other effective nonaversive interventions. Parents cannot waive the protections established through these regulations. The child-specific exception process provides the parent and school district with objective expert opinions as to whether the student's behaviors are so severe as to warrant an intervention that would intentionally cause pain or discomfort to the student. Such a determination requires the highest level of review, independent of the recommendation of the program provider.

**COMMENT:**

Revise the proposed amendment to require the physician to attend the CSE meeting whenever the CSE is considering the use of aversive interventions; the CSE should never be permitted to grant a child-specific waiver unless a licensed physician who has examined the student and who can certify that the proposed aversive treatment is safe and a licensed psychologist or board certified licensed psychiatrist has assessed the stu-

dent and can state that there are no psychiatric or psychological contraindications to the use of the proposed aversive treatment. The regulations must adopt, at a minimum, the protections in 42 CFR 483.356-Subparts G and H and 42 USC section 290(ii) and (jj).

**DEPARTMENT RESPONSE:**

The school physician is a required member of the CSE if specifically requested in writing by the parent of the student or by a member of the school at least 72 hours prior to the meeting. The proposed regulations provide that the CSE shall request the participation of the school physician member in making a determination to provide a child-specific exception allowing the use of aversive interventions. Therefore, the school physician will attend the meeting whenever the use of aversive interventions is being considered. The proposed regulations require the CSE to review the written application for a child-specific exception, the student's IEP, the student's diagnosis(es), the student's functional behavioral assessment, any proposed, current and/or prior behavioral intervention plans, including documentation of the implementation and progress monitoring of the effectiveness of such plans; and other relevant individual evaluations and medical information that allow for an assessment of the student's cognitive and adaptive abilities and general health status, including any information provided by the student's parent.

With respect to the urged adoption of the protections in 42 CFR 483.356-Subparts G and H and 42 USC section 290(ii) and (jj), such provisions are generally applicable to health care facilities, such as hospitals, nursing facilities, intermediate care facilities and residential treatment centers. The proposed regulations are applicable to schools and school programs and it would be inappropriate to apply Federal standards specifically designed for health facilities to all schools and school programs. To the extent a particular school or program would be a health care facility as defined in the Federal statutes and regulations, such school or program would be subject to such protections.

**COMMENT:**

Require that the CSE ensure that a professional with relevant clinical and behavioral expertise is present at an IEP meeting when considering the use of aversive interventions.

**DEPARTMENT RESPONSE:**

The CSE includes other persons having knowledge or special expertise regarding the student, including related services personnel as appropriate, as the school district or the parent(s) shall designate. It would be appropriate for such other persons to have behavioral expertise to address a student's need for aversive interventions.

**COMMENT:**

Aversives can be life-saving for students for whom positive-only procedures are insufficiently effective, therefore they should not be banned in the programs of students who do not already have them in their IEPs, after June 30, 2009; the exception to this prohibition for students who already have aversives in their IEP improperly discriminates against students, based on their disability who will need aversive therapy but will not receive it because it was not in their IEP previously; and section 200.22 (e) should be omitted. If an absolute ban is proposed after 2009, maintain the child-specific exception and review procedures for empirically supported aversive interventions and support an absolute ban on electric skin shock and mechanical restraints. Others submitted comment that all aversive interventions as defined in section 19.5(b) should be prohibited immediately.

**DEPARTMENT RESPONSE:**

The Department has carefully considered the use of aversive interventions in relation to its treatment value for students with severe self-injurious behaviors, its basis in scientific research and its potential effect on a student's health and safety, moral and ethical issues; and the Department's capacity to ensure the health and safety of students in school programs where aversive interventions are used. The Department does not support the use of aversives since even with these regulatory safeguards, aversive interventions may pose significant health and safety risks for students with disabilities. However, some parents expressed that without this intervention, they believe their children's health and safety are at risk because of their severe self-injurious behaviors. For this reason, a time limited child-specific exception process is proposed.

**COMMENT:**

One commenter submitted its 4th amended Complaint in its lawsuit against the New York State Education Department as part of its comment on the proposed regulations.

**DEPARTMENT RESPONSE:**

It is not possible for the Department to effectively respond to the inclusion of the complaint because the commenter merely "incorporates by

reference" the complaint and fails to articulate how specific provisions of the complaint relate to provisions of the revised rule. In any event, even if a response were possible, it would be inappropriate for the Department to respond to pending litigation in this Assessment of Public Comment.

**COMMENT:**

Many supported the proposed revision that expressly prohibits certain aversive interventions.

**DEPARTMENT RESPONSE:**

Because of the nature of the comment which is supportive of the proposed regulation, no response is necessary.

**COMMENT:**

NYSED should prohibit all public schools from using aversive interventions and allow the use of aversive interventions through the child-specific exception process to be used only in highly specialized and restrictive private schools with highly trained staff.

**DEPARTMENT RESPONSE:**

The proposed regulation limits the use of aversive interventions only to those to those programs that receive notification from the Department by June 30, 2007 that their policies, procedures and practices on the use of aversive interventions have been approved. To date, no public school programs have submitted their policies and procedures for Department review.

**COMMENT:**

Section 200.22(e)(1) should be changed to also allow the use of aversive interventions for seriously harmful behaviors that threaten the emotional or education well-being of the student or that of others and for property destruction.

**DEPARTMENT RESPONSE:**

It would be unethical and unsafe to authorize the use of interventions intended to inflict pain and discomfort on a student for other than self-injurious and/or aggressive behaviors that imminently threaten the health and safety of the student or that of others.

**COMMENT:**

Allow the use of an "automated aversive conditioning device" to treat only self-injurious behavior, aggressive and other behaviors that threaten the physical well-being of the student and only when non-automated aversive conditioning devices have failed to result in sufficient improvement of the student's behavior or have been considered and deemed to be unlikely to result in sufficient improvement of the student's behavior; delaying effective treatment may cause the student to suffer serious physical harm.

**DEPARTMENT RESPONSE:**

No changes have been made to the proposed amendment since an automated aversive conditioning device that continues to apply an aversive intervention such as skin shock to the student until the student ceases a behavior raises health and safety concerns and therefore is not allowable for any behavior.

**COMMENT:**

The use of "the combined simultaneous use of physical or mechanical restraints and the application of an aversive intervention" should not be banned. The wording dealing with this issue in section 200.22(e)(2) should be changed to the following: "No program may use, as a programmed aversive behavioral intervention, a combination of physical or mechanical restraint and another noxious, painful or intrusive stimulus. Nothing in this section shall prohibit the use of restraint while an aversive is administered where that restraint is reasonably necessary to protect the safety of the pupil, other pupils, teacher or any person from physical injury, to protect the property of the school, school district or others." A corresponding change should be made to the wording of section 200.22(f)(2)(ix) so that it conforms to the wording suggested above for this issue.

**DEPARTMENT RESPONSE:**

No revision to the proposed regulation will be made to address this comment since the combined use of an aversive intervention while a student is in a restraint is corporal punishment. The proposed regulation specifies that emergency interventions shall be used only in situations in which alternative procedures and methods not involving the use of physical force cannot reasonably be employed and emergency interventions shall not be used as a punishment or as a substitute for systematic behavioral interventions that are designed to change, replace, modify or eliminate a targeted behavior.

**COMMENT:**

The use of mini-meals to reward student behavior should not be banned by these regulations provided that there are adequate safeguards, approved by a physician, to insure proper nutrition and health.

**DEPARTMENT RESPONSE:**

The proposed regulation prohibits denial or unreasonable delays in providing regular meals to the student that would result in a student not receiving adequate nutrition. Where the use of mini-meals to reward a student would involve unreasonable delays in providing regular meals or intentionally inflicting a deprived state of hunger on the part of the student, such intervention would be prohibited. All programs must ensure a student receives proper nutrition and medical care.

## COMMENT:

Require the CSE to reconvene within 10 business days of receipt of the expert panel's recommendation to consider that recommendation; require the CSE to specify the title and qualifications of the professional(s) at the school permitted to administer the aversive intervention on any IEP allowing the use of aversive interventions.

## DEPARTMENT RESPONSE:

While the regulations do not impose a specific time period for the CSE to meet to consider the child-specific exception determination of the expert panel, it is expected that the CSE should do so without delay. The proposed regulation has not been revised to address the comment that the IEP specify the title of the professional authorized to administer the aversive intervention; however, the proposed regulation establishes supervision and training requirements for individuals applying aversive interventions.

## COMMENT:

The IEP should not be required to identify very specific behaviors because these are always changing and it would be impractical to convene an IEP meeting for each new behavior that needs to be treated and section 200.22 (e) (9) (i) should be changed to read: "(i) categories of self-injurious, aggressive and/or other targeted behavior(s)."

## DEPARTMENT RESPONSE:

The Department does not agree with this recommendation. A student's specific behaviors that pose serious health and safety concerns should be evident and clearly specified on the student's FBA, IEP and BIP. To authorize the use of aversive interventions based on categories of behaviors would be inappropriate and subject to broad interpretation.

## COMMENT:

A school system that has placed a child in a program using aversives should not have to submit an annual application to NYSED for a child-specific waiver.

## DEPARTMENT RESPONSE:

The Department does not agree with this comment. It is expected that a student's behaviors would improve through implementation of the student's BIP and that the continued use of such interventions therefore needs to be reviewed and reconsidered on a regular basis.

## COMMENT:

Establish and secure funding for a process in which all applications for child-specific exceptions can be thoroughly vetted by a panel of true behavioral experts from the fields of psychiatry, behavioral psychology and school psychology.

## DEPARTMENT RESPONSE:

The Department will authorize funds sufficient to consider the total number of child-specific exception applications submitted.

## COMMENT:

Parents and the public have a right to know who is examining all such applications; the credentials of those doing the examining, and whether any such persons are operating under unwritten NYSED policy.

## DEPARTMENT RESPONSE:

The names of the individual panel members for each student's application are provided to the school district that submitted the application. The parent would have access to the names of the individuals through the school district. The panel makes independent determinations.

## COMMENT:

The CSE should be required to provide written justification for its decision if it rejects the decision of the three member panel.

## DEPARTMENT RESPONSE:

A CSE must document in its prior written notice to the parent a description of the factors that the district considered and the reasons why those options were rejected. *Section 200.22(f)(3) Human Rights Committee (HRC)*

## COMMENT:

Require the HRC to review documentation of emergency restraints. Require all quality assurance reviews submitted to the CSE and placement agency to also be submitted to the HRC to provide more effective and coordinated monitoring of programs using aversive interventions.

## DEPARTMENT RESPONSE:

This suggested documentation would be appropriate for review by a HRC. This recommendation will be considered in the development of

nonregulatory guidance subsequent to the adoption of the proposed amendment.

## COMMENT:

Allow a HRC to include either a licensed psychologist with appropriate credentials in applied behavior analysis or a licensed psychologist and a board certified behavior analyst. Require that all HRC members be present for each HRC meeting; authorize the HRC to order immediate cessation of the use of aversive interventions, restraints and seclusion where these have been shown to be harmful, ineffective or where the use of non-aversive positive behavioral interventions appears warranted.

## DEPARTMENT RESPONSE:

No revision has been made to address the first comment since the proposed regulation requires at least one licensed psychologist with appropriate credentials in applied behavior analysis to participate in meetings of the HRC. It would not be appropriate to authorize a Human Rights Committee to order the immediate cessation to a student's behavioral intervention program. However, a recommendation from a Human Rights Committee to disapprove or discontinue an intervention when such interventions fail to provide sufficient protection of legal and human rights of individuals must be addressed by the program. School personnel invited to HRC meetings should also consider such recommendations when reviewing and revising a student's IEP. *Section 200.22(f)(4) – Supervision and training requirements*

## COMMENT:

The requirement that aversive interventions must be administered "by appropriately licensed professionals or certified special education teachers in accordance with Part 80 of this Title and sections 200.6 and 200.7 of this Part or under the direct supervision and direct observation of such staff" makes it impossible to use aversives; behavior modification treatment with supplemental aversives is only effective to treat severe behavior disorders when it is applied on a consistent basis 24 hours per day seven days per week and it would be impossible for any program to insure that there will be a licensed professional or certified special education teacher with the student at all times on a 24 hours per day, seven days per week basis because it would likely be too costly for any school to implement and would do nothing to add to the effectiveness or safety of aversives. The requirement should be revised so that it reads as follows: "Aversive interventions shall be administered under the supervision of appropriately trained clinicians." Require that these individuals be trained in health and psychiatric/psychological indicators of medical crisis or psychiatric/psychological trauma. Only allow a clinician employed by a school to administer an aversive intervention. Do not allow paraprofessionals or non-treatment personnel to administer aversive interventions.

## DEPARTMENT RESPONSE:

The application of aversive interventions in a student's residence pursuant to an IEP must be subject to the same high standards of oversight and supervision that we would require for the school day. Therefore, if an agency applies the use of aversive interventions in a student's residence pursuant to the IEP, it is appropriate that the agency ensure that a licensed professional or appropriately certified special education teacher provides direct supervision and observation of such staff. To address the comment that such a professional would need to be available for each student, video monitoring of such interventions by appropriately licensed staff may be one means to provide such supervision and observation.

The regulations require training of any individual providing aversive interventions be occur on a regular, and at least annual basis, which shall include, but is not limited to, training on safe and therapeutic emergency physical restraint interventions; data collection of the frequency, duration and latency of behaviors; identification of antecedent behaviors and reinforcing consequences of the behavior; approaches to teach alternative skills or behaviors including functional communication training; assessment of student preferences for reinforcement; assessing and responding to the collateral effects of the use of aversive interventions including, but not limited to, effects on a student's health, increases in aggression, increases in escape behaviors and/or emotional reactions; privacy rights of students; and documentation and reporting of incidents, including emergency restraints and injuries. All staff must be aware of the symptoms that a student may be having collateral effects of aversive interventions so that such information can be immediately reported to and addressed by administrative and medical/psychological and/or psychiatric or other appropriately qualified personnel. *Section 200.22(f)(7) – Progress monitoring*

## COMMENT:

Revise the regulation to add that if the school district or IEP team does not fulfill their obligations under section 200.22(f)(7)(ii), that this would not adversely affect the approval status of the school.

## DEPARTMENT RESPONSE:

It is unclear what the writer intended by this comment. A program that uses aversive interventions when such a recommendation is not on a student's IEP would be a violation of the Commissioner's Regulations and would subject the school to the enforcement actions pursuant to section 200.7 of the Commissioner's Regulations.

## COMMENT:

Require CSEs to conduct monthly face-to-face interviews with all children who are subject to the use of aversives, restraints and seclusion; require CSEs to secure monthly input from these children's parents regarding the use, or potential abuse, of such behavior control modalities.

## DEPARTMENT RESPONSE:

It would be expected that the school district representative will interview every student, except where the student cannot participate in an interview because of his or her communication abilities. The regulations establish a minimum requirement for a site visit and interview/observation of the student, but the school district may conduct such observations/interviews as frequently as necessary to ensure that the student's IEP and BIP are being appropriately implemented. The school district must also review the quarterly reports submitted to the district by the program providing the aversive intervention, which must include incident reports and reports on the assessment of and strategies used to address any indirect or collateral effects the use of aversive interventions may be having on the student, including, but not limited to, increases in aggressive or escape behaviors, health-related effects and/or emotional reactions.

*Other comments*

## COMMENT:

Require that copies of all regulations which authorize the use of aversives, restraints, time out/seclusion rooms and emergency measures on students with disabilities be given to parents and to students upon whom such aversive interventions may be carried out at least once a school year, and at least 30 calendar days prior to any meeting to develop or revise a student's IEP; where students cannot read or be assumed to be able to comprehend the full import of the regulations, such information should be provided to the child and at the same time explained to them in terms and language which they can understand.

## DEPARTMENT RESPONSE:

The parent must be fully informed about the recommendation to use aversive interventions. Prior written notice must be given to the parent prior to or at the time parent consent is requested. The proposed regulation requires a parent to be given a copy of the school's policies and procedures on the use of aversive interventions.

## COMMENT:

The Department should conduct further research and consultations with experts prior to adoption of these regulations and focus its efforts to ensure that students with disabilities who have behavioral problems receive the programs, services and supports they need and if such supports are provided there will be no need for behavioral techniques that endanger the safety of children.

## DEPARTMENT RESPONSE:

The Department conducted a review of the research and consulted with experts prior to proposing the adoption of these regulations. The Department will develop a proposal for regional centers to provide short-term intensive evaluation and behavioral intervention placements for students exhibiting severe behavior disorders to receive a comprehensive FBA, and development and implementation of a BIP to significantly reduce problem behaviors, and transition support to return students to prior school placements or other less restrictive placements.

## COMMENT:

The best way to discipline children with autism is to give them an environmentally friendly place to be educated and to help them not need aversive interventions by keeping an open mind to associated issues such as environmental causes, dietary needs and allowing non FDA approved homeopathic treatments to be given by school personnel with a doctor's prescription.

## DEPARTMENT RESPONSE:

Environmental and medical factors contributing to a student's behaviors should be considered in the FBA and BIP developed consistent with these regulations. The use of homeopathic treatments is beyond the scope of this rulemaking.

## COMMENT:

Additional funds should be provided to NYSED to "police" the use of aversive interventions and increased authority should be provided to NYSED to impose consequences on institutions in violation of the regulations.

## DEPARTMENT:

The proposed regulations establish standards for behavioral interventions against which the Department will monitor all schools. Proposed amendments to section 200.7 would establish increased authority to monitor and enforce these standards with approved private schools.

## NOTICE OF ADOPTION

**Practice of Physical Therapy without a Referral**

**I.D. No.** EDU-43-06-00009-A

**Filing No.** 55

**Filing date:** Jan. 16, 2007

**Effective date:** Feb. 1, 2007

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

**Action taken:** Addition of sections 29.17 and 77.9 to Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207 (not subdivided); 6504 (not subdivided); 6506(1); 6507(2)(a); 6509(9), and 6731(d)

**Subject:** Practice of physical therapy without a referral.

**Purpose:** To implement the requirements of section 6731(d) of the Education Law by defining the experience requirement that a licensed physical therapist must meet to provide treatment without a referral, clarifying the content of the notice of advice provided to a patient prior to treatment by a physical therapist without a referral, and establishing a definition of unprofessional conduct relating to such practice.

**Text or summary was published** in the notice of proposed rule making, I.D. No. EDU-43-06-00009-P, Issue of October 25, 2006.

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

**Text of rule and any required statements and analyses may be obtained from:** Anne Marie Koschnick, Legal Assistant, Office of Counsel, Education Department, State Education Bldg., Rm. 148, 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

**Vocational Rehabilitation Program**

**I.D. No.** EDU-43-06-00010-A

**Filing No.** 57

**Filing date:** Jan. 16, 2007

**Effective date:** Feb. 1, 2007

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

**Action taken:** Amendment of section 247.14 and addition of section 247.18 to Title 8 NYCRR.

**Statutory authority:** Education Law, sections 101 (not subdivided), 207 (not subdivided) and 1004(1)

**Subject:** Vocational Rehabilitation Program.

**Purpose:** To provide the Office of Vocational and Educational Services for Individuals with Disabilities more flexibility to establish educational and vocational training, room and board and book payment rates as the budgetary restraints of the program require.

**Text or summary was published** in the notice of proposed rule making, I.D. No. EDU-43-06-00010-P, Issue of October 25, 2006.

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

**Text of rule and any required statements and analyses may be obtained from:** Anne Marie Koschnick, Legal Assistant, Office of Counsel, Education Department, State Education Bldg., Rm. 148, Albany, NY 12234, (518) 473-8296, e-mail: legal@mail.nysed.gov

**Assessment of Public Comment**

The agency received no public comment.

## Department of Health

### EMERGENCY RULE MAKING

#### Recreational Aquatic Spray Grounds

**I.D. No.** HLT-52-06-00004-E

**Filing No.** 48

**Filing date:** Jan. 10, 2007

**Effective date:** Jan. 10, 2007

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

**Action taken:** Addition of Subpart 6-3 to Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 225

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

**Specific reasons underlying the finding of necessity:** During the summer of 2005, approximately 4,000 patrons of the Seneca Lake State Park spray ground became ill with cryptosporidiosis as a result of exposure to the spray ground water.

This type of aquatic facility poses a significant risk of illness to the patrons due to the design which involves the collection and recirculation of the sprayed water. To prevent a similar illness outbreak involving this type of recreational aquatic activity, spray ground design and operation regulations are necessary.

Emergency adoption of the new regulation is necessary to provide the operators of existing facilities with adequate time to evaluate facilities, complete an engineering report and make modifications, as needed, prior to use. Proposed facilities will be able to utilize the design standards to ensure new facilities are in compliance.

**Subject:** Recreational aquatic spray grounds.

**Purpose:** To establish standards for the safe and sanitary operation of recreational aquatic spray grounds that re-circulate water.

**Substance of emergency rule:** The proposed Subpart contains the following provisions:

Recreational aquatic spray grounds (spray ground) are defined and spray ground owners are required to obtain an annual permit to operate from the local health department (LHD) having jurisdiction in the county that the spray ground is located.

Design standards for new and existing spray grounds are established. The standards including requirements for disinfection (chemical and ultraviolet) and filtration equipment, as well as, requirements for spray pad, spray pad treatment tank, decking and spray pad enclosure construction and design.

Existing spray ground operators must provide a report to the LHD which evaluates compliance with the design criteria contained in the regulation and needed improvements. The report must be prepared by a New York State licensed professional engineer and submitted to the LHD at least 90 days prior to operation.

LHDs must follow the recommendations of the State Health Department prior to accepting or denying alternative designs for new and existing spray grounds.

Operation and maintenance standards are established including daily start-up procedures, minimum disinfection levels, filtration rates, water quality standards and general safety provisions. The spray ground operator must maintain daily operation records.

On-site water supplies, toilet facilities, and sanitary wastewater treatment systems must comply with sanitary and operation standards.

Spray grounds must be supervised when open for use and must be maintained by a qualified swimming pool water treatment operator.

Spray ground operators must develop, update and implement a written safety plan consisting of procedures for patron supervision, injury prevention, reacting to emergencies, injuries and other incidents providing first aid and assistance.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of proposed rule making, I.D. No. HLT-52-06-00004-P, Issue of December 27, 2006. The emergency rule will expire March 10, 2007.

**Text of emergency rule and any required statements and analyses may be obtained from:** William Johnson, Department of Health, Division of

Legal Affairs, Office of Regulatory Reform, Corning Tower, Rm. 2415, Empire State Plaza, Albany, NY 12237, (518) 473-7488, fax: (518) 486-4834, e-mail: regsna@health.state.ny.us

#### Summary of Regulatory Impact Statement

Statutory Authority:

The Public Health Council is authorized by Section 225(4) of the Public Health Law (PHL) to establish, amend and repeal sanitary regulations to be known as the State Sanitary Code (SSC), subject to the approval of the Commissioner of Health. PHL Sections 225(5)(a) and 201 (1)(m) authorize SSC regulation of the sanitary aspects of businesses and activities affecting public health.

Needs and Benefits:

During the summer of 2005, approximately 3,000 patrons of the Seneca Lake State Park spray ground became ill with cryptosporidiosis as a result of exposure to the spray ground water. This type of aquatic facility poses a significant risk of illness to the patrons due to the design, which involves the collection and recirculation of sprayed water. To prevent future illness outbreaks involving this type of aquatic activity, spray ground design and operation regulations are necessary including design criteria for new and existing spray grounds for water recirculation, filtration and disinfection (chemical and ultraviolet), electrical safety and spray pad enclosure.

Additionally, the regulation contains requirements for obtaining an annual permit to operate from the state or local health department (LHD) having jurisdiction, as well as, other bathhouse, personnel, potable water supply, wastewater disposal and general safety requirements.

Regulated Parties:

Statewide in 2005, there were thirty-two seasonally operated spray grounds that use re-circulated water. Four additional spray grounds are under construction. Until the emergency regulations became effective on January 18, 2006, spray ground operations were not regulated by the SSC. Of the 36 existing and proposed spray grounds, 14 have submitted the required engineering report and plans for installation of ultraviolet disinfection systems and other necessary modifications, and 5 indicated they will not meet the spray ground definition because they plan to discharge feature water to waste, therefore regulatory compliance is not necessary. The proposed regulation clarifies of certain requirements but is consistent with the emergency regulation effective April 18, 2006.

Costs to Regulated Parties:

There may be significant cost to spray grounds operators for water recirculation, filtration and disinfection (chemical and ultraviolet) improvements and additions. Additionally there will be expenses associated with an engineering report, which addresses the design criteria, and other miscellaneous improvements.

Government:

The printing and distribution the new Code and the corresponding revised inspection report will be a minimal State Health Department expense. There may be additional costs to some city and county health departments that enforce the proposed rule, because the proposed rule will increase the number of facilities regulated by some of these agencies. LHD's are expected to use existing staff to for the workload because of the low number of spray grounds in a jurisdiction.

The costs to municipally operated spray grounds are described above in Costs to Regulated Parties.

This regulation does not duplicate any existing federal, state or local regulations.

Alternatives Considered:

Several treatment options were considered for control of cryptosporidium including the use of ozone, membrane filtration, dilution and patron control. UV disinfection was selected as the code standard because of its effectiveness and appropriateness for the high flow rates of spray grounds. Other treatment options that can be documented to effectively remove cryptosporidium are acceptable in the proposed regulation.

Compliance Schedule:

The proposed regulation will be effective upon publication of a notice of adoption in the *State Register*.

#### Regulatory Flexibility Analysis

Effect on small business and local government:

There are thirty-two (32) recreational aquatic spray grounds (spray grounds) in New York State and four that are under construction. Eighteen (18) of the thirty-six (36) are or will be operated by local governments.

Compliance requirements:

Reporting and Recordkeeping:

A spray ground operator must maintain daily operation records of the recreational aquatic spray ground including disinfection levels, bather

usage and other maintenance. A copy of the records must be maintained at the facility for 12 months.

Facilities that are required to disinfect their potable water supply must maintain daily records of the potable water system disinfection. Forms will be provided by the permit-issuing official and require monthly submittal to the permit-issuing official.

Injury and illness that occur at a spray ground must be reported by the owner/operator to the permit-issuing official within 24 hours of its occurrence and recorded in a logbook.

A written safety plan must be developed and implemented. The safety plan must contain procedures for daily patron supervision, injury prevention, reacting to emergencies, injuries and other incidents, providing first aid and summoning help. The safety plan must be approved by the permit-issuing official and maintained at the spray ground.

Other affirmative acts:

Spray ground owners are required to obtain an annual permit to operate from the local health department (LHD) having jurisdiction in the county that the facility is located.

Design criteria for new and existing spray grounds are established to assure safe and sanitary spray ground operation.

1. Water recirculation, filtration and disinfection (chemical and ultraviolet) standards are established to assure all water that is sprayed onto patrons is free of pathogens. Filtration is essential for effective disinfection. Both ultraviolet (UV) and chemical disinfection are required because UV is necessary to destroy cryptosporidium and chemical disinfection is effective for many other pathogens normally associated with swimming pools.

2. Spray pad and spray pad treatment tank construction standards ensure that there is no standing water on the spray pad, the spray pad is slip resistant, and the spray pad and spray pad treatment tank do not promote bacterial growth or harbor pathogens.

3. Electrical standards protect patrons from electrocution.

4. Spray pad enclosure requirements prevent access to the pad by people and animals during non-supervised time periods. Preventing access will reduce contaminants that can enter the recirculation system.

To ensure compliance with the regulation, spray grounds existing prior to January 18, 2006 (effective date of initial emergency regulation) are required to submit an engineering report addressing the design criteria specified in the regulation. Reports must be prepared by a professional engineer and identify areas of non-compliance with the regulation and include recommendations for correcting the identified deficiencies.

Personnel:

Spray grounds must provide at least one supervisory staff to provide periodic supervision of the spray pad. Supervisory staff is necessary to control patron activities and respond to events that can affect patron health and safety.

Spray feature water treatment systems must be maintained by a qualified swimming pool water treatment operator to assure continuous and proper operation of water treatment equipment.

Safety:

Signs, which contain seven rules and warning statements, must be posted at the spray pad or enclosure/entrance and bathhouse/toilet facilities. The statements inform the patrons that the water is recirculated (not potable) and highlights the practices to reduce the potential for the contamination of the spray ground water.

First aid equipment must be provided at the spray ground unless otherwise specified in the safety plan.

A written safety plan must be developed and implemented. The safety plan must contain procedures for daily patron supervision, injury prevention, reacting to emergencies, injuries and other incidents, providing first aid and summoning help. The safety plan must be approved by the permit-issuing official and maintained at the spray ground.

Potable water supply and waste water disposal:

Potable water supplies serving the spray ground must comply with Subpart 5-1 of the State Sanitary Code. On-site water supplies that do not meet the definition of a Public Water supply must comply with the requirements in Subpart 5-1 for non-community water supplies.

Sewage and other wastewater must be disposed of in acceptable sanitary facilities.

Bathhouse and foot shower:

Adequate sanitary facilities are required including toilets, lavatories, refuse disposal, diaper changing areas and foot showers. The presence and maintenance of conveniently located toilet facilities, diaper changing areas and foot shower will help eliminate diaper changing on or near the spray pad and reduce the potential for spray pad contamination.

Professional services:

Operators of existing spray grounds must submit an engineering report that addresses the design criteria contained in the proposed Subpart. Reports must be prepared by a professional engineer and identify areas of non-compliance with the regulation and include recommendations for correcting the identified deficiencies. Spray grounds that require modifications to the existing equipment and plumbing will require additional engineering services related to design modification(s).

A qualified swimming pool water treatment operator must maintain the spray pad water treatment system. Facilities that do not currently employ such personnel may hire a company to provide the service or send a current employee to become certified.

Compliance cost:

The proposed rule has cost impacts that affect thirty-two (32) existing seasonally operated spray grounds and four spray grounds that are under construction.

Existing spray grounds must submit an engineering report that addresses the design criteria contained in the proposed Subpart. Some facilities may have existing reports that can be submitted; however, those that do not have an adequate existing report will need to hire a licensed professional engineer to prepare one. Cost estimates for the report range between \$2,000 and \$20,000. The cost is expected to be at the lower end of the range because spray ground operators will most likely utilize engineering firms that are already familiar with the facility and therefore require less time to prepare the report.

Spray grounds that require modifications to the existing equipment and plumbing incur additional cost. The estimated cost for engineering services related to design modification(s) range from 6% to 15% of the project cost.

The estimated cost for other modifications are as follows:

Spray Ground Feature Water Treatment:

Ultraviolet (UV) disinfection equipment cost will vary based on the spray ground feature flow rate. Costs are based on estimates provided by two leading UV reactor manufacturers.

Flow rate (gpm)	UV reactor cost	Installation <sup>1</sup>	Lamp replacement <sup>2</sup>
50	\$6,585 - \$12,000	\$1,930 - \$4,000	\$240 - \$500
100	\$9,000 - \$17,500	\$2,050 - \$4,000	\$480 - \$500
140 - 150	\$13,800 - \$19,000	\$2,290 - \$4,500	\$600 - \$720
250	\$20,965 - \$23,000	\$2,650 - \$5,000	\$600 - \$840
500	\$29,355 - \$31,000	\$3,068 - \$5,500	\$700 - \$1,680
1,000 - 1,300	\$34,000 - \$42,225	\$3,712 - \$6,000	\$700 - \$2,320
2,000 - 2,300	\$40,000 - \$50,000	\$4,100 - \$7,000	\$800 - \$3,480

<sup>1</sup>UV reactor installation includes necessary labor and supplies for plumbing and electrical connection.

<sup>2</sup>Lamp replacement is anticipated to be once every 4-5 years for seasonally operated facilities.

The cost to operate UV reactors ranges from \$30 to \$875 per season for electric and \$350 to \$450 for cleaning and other maintenance.

Spray grounds that do not have adequate treatment tank filtration will require an additional pump and filtration. The pump and filter costs are based on the volume of water to be filtered. Costs range between \$350 and \$620 for pumps and \$350 and \$850 for filters. The number of required filters varies for each facility and cannot be estimated.

The proposed regulation requires spray grounds to have an automatic chemical controller for monitoring and adjusting the disinfectant and pH levels in the treatment tank. The cost for a chemical controller is between \$1800 and \$4,200 plus installation.

Each spray ground is required to have valves and piping in the spray pad drain system to allow for discharging water to waste prior entering the spray pad treatment tank. The cost of installing a water diversion valve will vary based on the accessibility of piping at the point where the valve must be installed. Cost estimates range between \$750 and \$6,400.

Bathhouse/foot shower:

Some spray grounds may need to replace or add bathhouse facilities and/or foot showers when insufficient facilities are provided. The need and cost for additional fixtures will vary greatly by facility and cannot be estimated.

Personnel:

Spray grounds must be provided with periodic supervision. Most spray grounds will have acceptable staff already on-site fulfilling this role and will incur no additional expense. Spray grounds that do not have staff to periodically supervise the facility will have a cost increase associated with hiring someone or reassigning staff to perform supervisory duties. Staff may perform other duties such as facility maintenance in addition to

performing the supervisory responsibilities. The minimum wage is currently \$6.75 an hour.

A qualified swimming pool water treatment operator must maintain the spray pad water treatment system. Facilities that do not currently employ such personnel may hire a company to provide the service or send a current employee to a course to become certified. Courses to become certified as a qualified swimming pool water treatment operator cost approximately \$280. The cost of hiring a company to provide the service is \$6,000 a season.

#### Miscellaneous expenses:

Spray grounds must be enclosed to prevent access by people and animals during non-supervised time periods. The cost of enclosures varies depending on the style. Fencing cost range from \$9.00 a lineal foot to \$23.00 per foot which includes installation. Some fence installation types include the cost of a gate while others have an additional gate charge.

Facilities must post signs stating seven rules/warning statements. The cost of a 2 feet by 3 feet commercially prepared sign ranges from \$85 to \$400. Two signs are required at each facility.

Spray grounds are required to have a 24-unit first aid kit or adequate first aid supplies. The cost of a 24-unit first aid kit is between \$25 and \$75. Purchasing first aid supplies to satisfy the requirement will cost less.

#### Economic and technological feasibility:

The proposal is technologically feasible because it requires the use of existing technology. The overall economic feasibility cannot be predicted at this time because the economic feasibility for each regulated spray ground is dependent upon the financial condition of that spray ground and the extent to which that spray ground must undertake additional actions to comply with the requirements of this regulation.

#### Minimizing adverse economic impact:

The proposed rule establishes standards for recreational aquatic spray grounds to minimize risk to the public health. Should this rule have a substantial adverse impact on a particular facility, a waiver of one or more requirements other than spray ground feature water disinfection (chemical and ultraviolet or accepted equivalent) and filtration, will be considered, so long as alternative arrangements protect public health and safety. Alternatively, a variance, allowing additional time to comply with one or more requirements, can be granted if the health and safety of the public is not prejudiced by the variance.

#### Small business participation:

During the development of the emergency regulation, the Department met with design professionals and industry representatives on one occasion and had numerous telephone conversations to develop a better understanding of spray ground operation, particularly concerning spray ground feature water recirculation and treatment, and incorporated the information into the proposed regulation.

#### **Rural Area Flexibility Analysis**

##### Types and estimated number of rural Areas:

There are thirty-six (36) recreational aquatic spray grounds (spray grounds) in New York State grounds including four that are under construction. Approximately half are located in rural areas.

Reporting and recordkeeping and other compliance requirements: A spray ground operator must maintain daily operation records of the recreational aquatic spray ground including disinfection levels, bather usage and other maintenance. A copy of the records must be maintained at the facility for 12 months.

Facilities that are required to disinfect their potable water supply must maintain daily records of the potable water system disinfection. Forms will be provided by the permit-issuing official and require monthly submittal to the permit-issuing official.

Injury and illness that occur at a spray ground must be reported by the owner/operator to the permit-issuing official within 24 hours of its occurrence and recorded in a logbook.

Spray ground owners are required to obtain an annual permit to operate from the local health department (LHD) having jurisdiction in the county that the facility is located.

Design criteria for new and existing spray grounds is established to assure safe and sanitary spray ground operation.

(1) Water recirculation, filtration and disinfection (chemical and ultraviolet) standards are established to assure all water that is sprayed onto patrons is free of pathogens. Filtration is essential for effective disinfection. Both ultraviolet (UV) or other acceptable equivalent, and chemical disinfection are required because UV is necessary to destroy cryptosporidium and chemical disinfection is effective for many other pathogens normally associated with swimming pools.

(2) Spray pad and spray pad treatment tank construction standards ensure that there is no standing water on the spray pad, the spray pad is slip resistant, and the spray pad and spray pad treatment tank do not promote bacterial growth or harbor pathogens.

(3) Electrical standards protect patrons from electrocution.

(4) Spray pad enclosure requirements prevent access to the pad by people and animals during non-supervised time periods. Preventing access will reduce contaminants that can enter the recirculation system.

To ensure compliance with the regulation, existing spray grounds are required to submit an engineering report addressing the design criteria specified in the regulation. Reports must be prepared by a professional engineer and identify areas of non-compliance with the regulation and include recommendations for correcting the identified deficiencies.

#### Personnel:

Spray grounds must provide at least one supervisory staff to provide periodic supervision of the spray pad. Supervisory staff is necessary to control patron activities and respond to events that can affect patron health and safety.

Spray feature water treatment systems must be maintained by a qualified swimming pool water treatment operator to assure continuous and proper operation of water treatment equipment.

#### Safety:

Signs, which contain seven rules and warning statements, must be posted at the spray pad or enclosure/entrance and bathhouse/toilet facilities. The statements inform the patrons that the water is recirculated (not potable) and highlights the practices to reduce the potential for the contamination of the spray ground water.

First aid equipment must be provided at the spray ground unless otherwise specified in the safety plan.

A written safety plan must be developed and implemented. The safety plan must contain procedures for daily patron supervision, injury prevention, reacting to emergencies, injuries and other incidents, providing first aid and summoning help. The safety plan must be approved by the permit-issuing official and maintained at the spray ground.

#### Potable water supply and waste water disposal:

Potable water supplies serving the spray ground must comply with Subpart 5-1 of the State Sanitary Code. On-site water supplies that do not meet the definition of a Public Water supply must comply with the requirements in Subpart 5-1 for non-community water supplies.

Sewage and other wastewater must be disposed of in acceptable sanitary facilities.

#### Bathhouse and foot shower:

Adequate sanitary facilities are required including toilets, lavatories, refuse disposal, diaper changing areas and foot showers. The presence and maintenance of conveniently located toilet facilities, diaper changing areas and foot showers will help eliminate diaper changing on or near the spray pad and reduce the potential for spray pad contamination.

#### Professional services:

Operators of spray grounds existing prior to January 18, 2006 (effective date of the initial emergency regulation) must submit an engineering report that addresses the design criteria contained in the proposed Subpart. Reports must be prepared by a professional engineer and identify areas of non-compliance with the regulation and include recommendations for correcting the identified deficiencies. Spray grounds that require modifications to the existing equipment and plumbing will require additional engineering services related to design modification(s).

A qualified swimming pool water treatment operator must maintain the spray pad water treatment system. Facilities that do not currently employ such personnel may hire a company to provide the service or send a current employee to become certified.

#### Cost:

The proposed rule has cost impacts that affect thirty-two (32) existing seasonally operated spray grounds and four spray grounds that are under construction.

Existing spray grounds must submit an engineering report that addresses the design criteria contained in the proposed Subpart. Some facilities may have existing reports that can be submitted; however, those that do not have an adequate existing report will need to hire a licensed professional engineer to prepare one. Cost estimates for the report range between \$2,000 and \$20,000. The cost is expected to be at the lower end of the range because spray ground operators will most likely utilize engineering firms that are already familiar with the facility and therefore require less time to prepare the report.

Spray grounds that require modifications to the existing equipment and plumbing incur additional cost. The estimated cost for engineering ser-

vices related to design modification(s) range from 6% to 15% of the project cost.

The estimated cost for other modifications are as follows:

#### Spray Ground Feature Water Treatment:

Ultraviolet (UV) disinfection equipment cost will vary based on the spray ground feature flow rate. Costs are based on estimates provided by two leading UV reactor manufacturers.

Flow rate (gpm)	UV reactor cost	Installation <sup>1</sup>	Lamp replacement <sup>2</sup>
50	\$6,585 - \$12,000	\$1,930 - \$4,000	\$240 - \$500
100	\$9,000 - \$17,500	\$2,050 - \$4,000	\$480 - \$500
140 - 150	\$13,800 - \$19,000	\$2,290 - \$4,500	\$600 - \$720
250	\$20,965 - \$23,000	\$2,650 - \$5,000	\$600 - \$840
500	\$29,355 - \$31,000	\$3,068 - \$5,500	\$700 - \$1,680
1,000 - 1,300	\$34,000 - \$42,225	\$3,712 - \$6,000	\$700 - \$2,320
2,000 - 2,300	\$40,000 - \$50,000	\$4,100 - \$7,000	\$800 - \$3,480

<sup>1</sup>UV reactor installation includes necessary labor and supplies for plumbing and electrical connection.

<sup>2</sup>Lamp replacement is anticipated to be once every 4-5 years for seasonally operated facilities.

The cost to operate UV reactors ranges from \$30 to \$875 per season for electric and \$350 to \$450 for cleaning and other maintenance.

Spray grounds that do not have adequate treatment tank filtration will require an additional pump and filtration. The pump and filter costs are based on the volume of water to be filtered. Costs range between \$350 and \$620 for pumps and \$350 and \$850 for filters. The number of required filters varies for each facility and cannot be estimated.

The proposed regulation requires spray grounds to have an automatic chemical controller for monitoring and adjusting the disinfectant and pH levels in the treatment tank. The cost for a chemical controller is between \$1800 and \$4,200 plus installation.

Each spray ground is required to have valves and piping in the spray pad drain system to allow for discharging water to waste prior entering the spray pad treatment tank. The cost of installing a water diversion valve will vary based on the accessibility of piping at the point where the valve must be installed. Cost estimates range between \$750 and \$6,400.

#### Bathroom/Foot Shower:

Some spray grounds may need to replace or add bathroom facilities and/or foot showers when insufficient facilities are provided. The need and cost for additional fixtures will vary greatly by facility and cannot be estimated.

#### Personnel:

Spray grounds must be provided with periodic supervision. Most spray grounds will have acceptable staff already on-site fulfilling this role and will incur no additional expense. Spray grounds that do not have staff to periodically supervise the facility will have a cost increase associated with hiring someone or reassigning staff to perform supervisory duties. Staff may perform other duties such as facility maintenance in addition to performing the supervisory responsibilities. The minimum wage is currently \$6.75 an hour.

A qualified swimming pool water treatment operator must maintain the spray pad water treatment system. Facilities that do not currently employ such personnel may hire a company to provide the service or send a current employee to a course to become certified. Courses to become certified as a qualified swimming pool water treatment operator cost approximately \$280. The cost of hiring a company to provide the service is \$6,000 a season.

#### Miscellaneous expenses:

Spray grounds must be enclosed to prevent access by people and animals during non-supervised time periods. The cost of enclosures varies depending on the style. Fencing cost range from \$9.00 a lineal foot to \$23.00 per foot which includes installation. Some fence installation types include the cost of a gate while others have an additional gate charge.

Facilities must post signs stating seven rules/warning statements. The cost of a 2 feet by 3 feet commercially prepared sign ranges from \$85 to \$400. Two signs are required at each facility.

Spray grounds are required to have a 24-unit first aid kit or adequate first aid supplies. The cost of a 24-unit first aid kit is between \$25 and \$75. Purchasing first aid supplies to satisfy the requirement will cost less.

#### Minimizing adverse economic impact on rural areas:

The proposed rule establishes standards for recreational aquatic spray grounds to minimize risk to the public health. Should this rule have a substantial adverse impact on a particular facility, a waiver of one or more requirements other than spray ground feature water disinfection (chemical and ultraviolet or accepted equivalent) and filtration, will be considered, so long as alternative arrangements protect public health and safety. Alternatively, a variance, allowing additional time to comply with one or more requirements, can be granted if the health and safety of the public is not prejudiced by the variance.

#### Rural area participation:

During the development of the emergency regulation, the Department met with design professionals and industry representatives on one occasion and had numerous telephone conversations to develop a better understanding of spray ground operation, particularly concerning spray ground feature water recirculation and treatment, and incorporated the information into the proposed regulation.

#### Job Impact Statement

No Job Impact Statement is required pursuant to Section 201-a(2)(a) of the State Administrative Procedure Act. It is apparent, from the nature of the proposed amendment, that it will not have a substantial adverse impact on jobs and employment opportunities.

---



---

## Higher Education Services Corporation

---



---

### EMERGENCY RULE MAKING

#### New York State District Attorney Loan Forgiveness Program

**I.D. No.** ESC-05-07-00009-E

**Filing No.** 50

**Filing date:** Jan. 12, 2007

**Effective date:** Jan. 12, 2007

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

**Action taken:** Addition of section 2201.9 to Title 8 NYCRR.

**Statutory authority:** Education Law, sections 653 and 655

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

**Specific reasons underlying the finding of necessity:** The emergency rule is necessary because compliance with the normal proposal process will delay loan forgiveness to eligible recipients.

**Subject:** New York State District Attorney Loan Forgiveness Program.

**Purpose:** To implement the program.

**Text of emergency rule:** New section 2201.9 is added to Title 8 of the New York Code, Rules and Regulations to read as follows:

*Section 2201.9 New York State District Attorney Loan Forgiveness Program*

(a) *Purpose.* New York State District Attorney Loan Forgiveness Program awards are being offered to retain experienced attorneys employed in District Attorney Offices throughout New York State.

(b) *Eligibility.* An applicant shall be a legal resident of New York State for at least one year and maintain such residency; a U.S. citizen or eligible non-citizen; an eligible attorney; and have eligible student loan expenses.

(c) *Definitions.*

(1) "Corporation" shall mean the New York State Higher Education Services Corporation.

(2) "Eligible attorney" shall mean a District Attorney or Assistant District Attorney, admitted to practice law in New York State, who is employed on a full-time basis throughout the year of qualified service

immediately preceding application in a District Attorney's office in New York State and has been a New York State resident for at least one year.

(3) "Eligible period" shall mean the six-year period after completion of the third year, measured from the date the eligible attorney began such employment, and before the commencement of the tenth year of employment as an eligible attorney and adjusted for any temporary leave.

(4) "Eligible student loan expenses" shall mean the total cumulative loan balance, at the time of the attorney's first successful application for reimbursement under this Program, required to be paid by the eligible attorney for student loans, including any accrued interest, covering the cost of attendance at his or her undergraduate institution(s) and/or law school(s). Student loan expenses shall include New York State student loans, federal government loans, and loans made by commercial entities subject to governmental examination. Student loan expenses shall not include: Parent PLUS loans; loans cancelled under any program; private loans given by family or personal acquaintances; or student loan debt paid by credit card. Student loan expenses shall be reduced by any grants, loan forgiveness, public service scholarships or other reductions to student loan expenses that a student has received or shall receive, including, but not limited to law school loan forgiveness and public service scholarships.

(5) "Full-time" shall mean thirty-five hours per week.

(6) "Program" shall mean the New York State District Attorney Loan Forgiveness Program.

(7) "Temporary leave" shall, for purposes of the Program, be considered any extended period of leave from full-time service allowed by law, regulation or pursuant to the policies of the office of the district attorney employing the eligible attorney. Periods of temporary leave shall not be considered in calculating the year of qualified service. The calculation of the year of qualified service shall recommence when the eligible attorney returns to full-time service as a district attorney or assistant district attorney. The taking of temporary leave, by itself, shall not adversely impact the duration and award amounts set forth herein.

(8) "Year of qualified service" shall mean each of the fourth through ninth years (365 calendar days per year) of full-time employment in a District Attorney's Office in New York State as an eligible attorney. In calculating a year of qualified service, periods of temporary leave shall be considered an interruption in employment and shall not be considered in the calculation of qualified service. The calculation of the time period of qualified service shall recommence when the eligible attorney returns to full-time service. For purposes of this section, all periods of time during which an admitted attorney was employed as an eligible attorney and all periods of time during which the attorney was a law school graduate who, while awaiting admission to the New York State bar, was employed by a prosecuting or criminal defense agency may be combined.

(d) Administration. In addition to the requirements of § 661 of the Education Law, applicants for this Program shall:

(1) File applications annually on forms prescribed by the Corporation;

(2) Postmark or electronically transmit applications to the Corporation on or before October 1st of each year, provided that this deadline may be extended at the discretion of the Corporation;

(3) Apply upon the conclusion of each year of qualified service, beginning no earlier than the conclusion of the fourth year of qualified service and ending no later than the due date immediately following the conclusion of the ninth year of qualified service; and;

(4) Provide an attestation on the Program application as to full-time qualified service for the year of qualified service immediately preceding their application.

(e) Duration and award amounts.

(1) Award disbursements under this Program are available for up to a maximum of six years of qualified service, provided Program funding is available.

(2) Upon the conclusion of each year of qualified service during the eligible period, eligible attorneys may receive awards for student loan expenses in an amount up to three thousand four hundred dollars (\$3,400).

(3) The maximum lifetime amount of awards for student loan expenses shall not exceed an eligible attorney's student loan expense documented on their first successful application for reimbursement under this Program or twenty thousand four hundred dollars (\$20,400), whichever is less.

(4) The maximum lifetime awards for student loan expenses shall be limited by the number of remaining years of qualified service available to an eligible attorney.

(5) The Corporation may offset any award given if the recipient is in default on a student loan guaranteed by the Corporation. As used herein,

offset is a collection method whereby the payment for the Program from the Corporation is withheld in whole or in part to satisfy a debt owed to the Corporation.

(f) Priority of award. In any year for which there are more eligible attorneys than funds available, the Corporation shall notify the President Pro Tem and Majority Leader of the New York State Senate and indicate that the Corporation shall be using the following method of award distribution:

(1) Eligible attorneys who received an award for forgiveness of student loan expenses for the preceding year of qualified service shall receive first priority. If funding is insufficient to make awards to this group, recipients will be chosen by random selection.

(2) Distribution of any remaining funds to remaining eligible attorneys shall be done by random selection.

(g) Disqualification. An eligible attorney shall be disqualified from receiving an award for forgiveness of student loan expenses if:

(1) The applicant owes a service obligation for any State or Federal program;

(2) The applicant is in default on a federally guaranteed student loan, unless the loan is guaranteed by the Corporation.

(3) The applicant has loans for which documentation is not available;

(4) The applicant has loans without a promissory note; or

(5) The applicant's loans are paid in full.

**This notice is intended** to serve only as a notice of emergency adoption. This agency does not intend to adopt the provisions of this emergency rule as a permanent rule. The rule will expire April 11, 2007.

**Text of emergency rule and any required statements and analyses may be obtained from:** Cheryl B. Fisher, Associate Attorney, Higher Education Services Corporation, 99 Washington Ave., Rm. 1350, Albany, NY 12255, (518) 473-1581, e-mail:CFisher@HESC.com

#### Regulatory Impact Statement

Statutory authority:

The New York State Higher Education Services Corporation's (HESC) statutory authority to promulgate regulations and administer the New York State District Attorney Loan Forgiveness Program is codified within Article 14 of the Education Law. In addition, Chapter 50 of the Laws of 2005 and a Memorandum of Agreement entered into between HESC and the New York State Division of Criminal Justice Services ("DCJS"), dated March 2, 2006, provides HESC with the authority to promulgate this regulation.

Pursuant to Education Law § 652(2), HESC was established for the purpose of improving the post-secondary educational opportunities of eligible students through the centralized administration of New York State financial aid programs and coordinating the State's administrative effort in student financial aid programs with those of other levels of government.

In addition, Education Law § 653(9) empowers HESC's Board of Trustees to perform such other acts as may be necessary or appropriate to carry out the objects and purposes of the corporation including the promulgation of rules and regulations.

HESC's President is authorized, under Education Law § 655(4), to propose rules and regulations, subject to approval by the Board of Trustees, governing, among other things, the application for and the granting and administration of student aid and loan programs, the repayment of loans or the guarantee of loans made by the corporation; and administrative functions in support of state student aid programs. Also, consistent with Education Law § 655(9), HESC's President is authorized to receive assistance from any Division, Department or Agency of the State in order to properly carry out his powers, duties and functions. Finally, Education Law § 655(12) provides HESC's President with the authority to perform such other acts as may be necessary or appropriate to carry out effectively the general objects and purposes of HESC.

Legislative objectives:

The District Attorney Loan Forgiveness Program (the "Program") has been established pursuant to two Memoranda of Understanding between the Governor and the Legislature of the State of New York, as well as, Chapter 50 of the Laws of 2005, in order to provide loan forgiveness for qualified attorneys who have dedicated themselves to public service in district attorneys offices throughout New York State. The New York State Legislature established the Program to encourage experienced district attorneys to remain in service.

The Governor of the State of New York and the President Pro Tem and Majority Leader of the Senate entered into a Memorandum of Understanding dated June, 2005 and amended on January 25, 2006 providing for the creation of the Program with funding through the Legal Services Assis-

tance Fund. Additionally, the Governor, the President Pro Tem and Majority Leader of the Senate and the Speaker of the Assembly entered into an agreement dated September 2005 and amended on January 25, 2006. On October 18, 2006, the Senate amended these agreements.

Both agreements require DCJS to enter into an agreement with HESC for the administration of the program. In a Memorandum of Agreement, dated March 2, 2006, HESC and DCJS agreed that HESC would administer the Program and will promulgate rules and regulations.

**Needs and benefits:**

A statewide survey done of District Attorneys offices in 2002, by the New York State District Attorneys Association, revealed that experienced and skilled district attorneys were leaving their careers in public service for more lucrative employment due to high student loan debt. As a result, the Legislature established the Program to address this need and entice experienced district attorneys to remain in employment. This Program offers qualified applicants \$3,400.00 for each year of qualified service up to a cumulative amount of \$20,400.00, or documented student loan expense, whichever is less.

**Costs:**

i. There are no application fees, processing fees, or other costs to the applicants of this Program.

ii. It is anticipated that there will be no costs to HESC or other state agencies for the implementation of, or continuing compliance with, this rule except for programmatic administration costs. There will be no cost to local governments for the implementation of, or continuing compliance with, this rule.

iii. The cost of this Program to the State in the first year, FY 2005-06, shall not exceed \$4.8 million. Costs to the State shall not exceed available New York State budget appropriations for the Program.

**Paperwork:**

This proposal will require Program applicants to submit an annual application and supporting documentation to establish their eligibility for this Program. No additional paperwork will be required.

**Local government mandates:**

No program, service, duty, or responsibility will be imposed by this rule upon any county, city, town, village, school district, fire district or other special district.

**Duplication:**

No relevant rules or other legal requirements duplicating, overlapping, or conflicting with this rule were identified.

**Alternatives:**

This Program was developed and advocated for by the New York State District Attorneys Association, based upon the results of their survey of District Attorney offices. In consideration of data supplied by this group, this rule has been constructed to most effectively target the issue at hand. No other alternatives were considered.

**Federal standards:**

This proposal does not exceed any minimum standards of the Federal Government.

**Compliance schedule:**

The agency will comply with this rule immediately upon its adoption.

**Regulatory Flexibility Analysis**

This statement is being submitted pursuant to subdivision (3) of section 202-b of the State Administrative Procedure Act and in support of New York State Higher Education Services Corporation's Notice of Emergency Adoption seeking to add a new section 2201.9 to Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

It is apparent from the nature and purpose of this rule that it will not impose an adverse economic impact on small businesses or local governments. This agency finds that this rule will not impose reporting, record-keeping or compliance requirements on small businesses or local governments. This proposal implements a student loan forgiveness program for post-secondary education, funded by New York State and administered by a State agency.

**Rural Area Flexibility Analysis**

This statement is being submitted pursuant to subdivision (4) of section 202-bb of the State Administrative Procedure Act and in support of New York State Higher Education Services Corporation's Notice of Emergency Adoption seeking to add a new section 2201.9 to Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

It is apparent from the nature and purpose of this rule that it will not impose an adverse impact on rural areas. This agency finds that this rule will not impose any reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. The proposal implements

a student loan forgiveness program for post-secondary education, funded by New York State and administered by a state agency.

**Job Impact Statement**

This statement is being submitted pursuant to subdivision (2) of section 201-a of the State Administrative Procedure Act and in support of New York State Higher Education Services Corporation's Notice of Emergency Adoption seeking to add a new section 2201.9 to Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

It is apparent from the nature and purpose of this rule that it could only have a positive impact or no impact on jobs and employment opportunities. The proposal implements a student loan forgiveness program for post-secondary education, funded by New York State and administered by a State agency.

---



---

## Insurance Department

---



---

### NOTICE OF ADOPTION

**Healthy New York Program**

**I.D. No.** INS-44-06-00004-A

**Filing No.** 52

**Filing date:** Jan. 16, 2007

**Effective date:** Jan. 31, 2007

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

**Action taken:** Addition of section 362-2.7 and amendment of sections 362-2.5, 362-3.2, 362-4.1, 362-4.2, 362-4.3, 362-5.1, 362-5.2, 362-5.3 and 362-5.5 of Title 11 NYCRR.

**Statutory authority:** Insurance Law, sections 201, 301, 1109, 3201, 3216, 3217, 3221, 4235, 4303, 4304, 4305, 4318, 4326, and 4327

**Subject:** Healthy New York Program.

**Purpose:** To reduce Healthy New York premium rates to enable more uninsured businesses and individuals to afford health insurance; and generally improve the Healthy New York Program.

**Text or summary was published** in the notice of proposed rule making, I.D. No. INS-44-06-00004-P, Issue of November 1, 2006.

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

**Text of rule and any required statements and analyses may be obtained from:** Andrew Mais, Insurance Department, Health Bureau, 25 Beaver St., New York, NY 10004, (212) 480-2285, e-mail: amais@ins.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

---



---

## Office of Mental Health

---



---

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

**Operation of Acute Psychiatric Crisis Residence**

**I.D. No.** OMH-05-07-00003-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 Subpart 589-2 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 7.09(b) and 31.04(a)

**Subject:** Operation of acute psychiatric crisis residence.

**Purpose:** To correct an error in the title of the Subpart.

**Text of proposed rule:** The title of subpart 589-2 is amended to read as follows:

Subpart 589-2

Operation of [Situational] *Acute Psychiatric Crisis Residence*

**Text of proposed rule and any required statements and analyses may be obtained from:** Dan Odell, Bureau of Policy, Legislation and Regulation, Office of Mental Health, 44 Holland Ave., Albany, NY 12229, (518) 473-6945, e-mail: dodell@omh.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.

#### **Consensus Rule Making Determination**

No person is likely to object to this proposed rule making since it merely corrects an error in the title of Subpart 589-2.

Subpart 589-1, which precedes Subpart 589.2 in 14 NYCRR is correctly titled: Subpart 589-1 Operation of Situational Crisis Residence and the text of Subpart 589-1 deals with and references situational crisis residence. However, Subpart 589-2, is also titled: Operation of Situational Crisis Residence, even though the text of Subpart 589-2 deals with and references acute psychiatric crisis residence. This consensus rule making will correct the title of Subpart 589-2.

#### **Job Impact Statement**

It is evident from the nature of the proposed rule making, which merely corrects the title of a subpart, that the proposed rule making will have no impact on jobs or employment activities.

invoice was prepared, a promised date of delivery, if any such date was given, the name of the customer, year, [and] make, *and plate number and/or vehicle identification number of the vehicle*, the terms and time limit of any guarantee for the repair work performed, a description of the problem reported by the customer, and the repair shop registration number. If the inflatable restraint system is replaced, the invoice shall indicate the name and tax identification number from whom the inflatable restraint was purchased. If such system is a salvage unit, the invoice must also state the dismantler's registration number, the vehicle identification number of the vehicle from which the unit came and the part number from the salvage inflatable restraint system. The invoice must indicate "salvage inflatable restraint system" if a salvage unit was used. The insurer and consumer shall receive a copy of the purchase invoice for the replacement inflatable restraint system. A repair performed under warranty requires an invoice which complies with this subdivision. In addition, if body parts were used in the repair, the invoice must indicate if each such part is a new original equipment manufacturer part, a new after market equipment manufacturer part or a used part. A statement on an invoice that all body parts are in one of the three classes except as otherwise indicated complies with this last requirement. All information on an invoice must be legible;

Paragraph 3 of subdivision (b) of Section 82.7 is amended to read as follows:

(3) A mobile unit shall have the official outdoor repair shop sign displayed in such manner that it is visible to pedestrians. A mobile unit owner may post on his, her or its vehicle a sign proportionally smaller than the sign described above but no smaller than [1" x 2"] *one (1) foot high by two (2) feet wide.*

Subdivision (b) of Section 82.18 is amended to read as follows:

(b) As required by section [167-d(9)] 3411(i) of the New York State Insurance Law, a repair shop shall complete its portion of a "Certificate of Automobile Repair[s]", *Insurance Department form NYS APD form 1-a*, when requested to do so by an insurance company.

**Text of proposed rule and any required statements and analyses may be obtained from:** Michele L. Welch, Counsel's Office, Department of Motor Vehicles, Empire State Plaza, Swan St. Bldg., Rm. 526, Albany, NY 12228, (518) 474-0871, e-mail: mwelc@dmv.state.ny.us

**Data, views or arguments may be submitted to:** Christine M. Legorius, Assistant Counsel, Department of Motor Vehicles, Empire State Plaza, Swan St. Bldg., Rm. 526, Albany, NY 12228, (518) 474-0871, e-mail: mwelc@dmv.state.ny.us

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

#### **Consensus Rule Making Determination**

The proposed regulation would amend 15 NYCRR Parts 82.5(a), 82.5(c), 82.7(b)(3) and 82.18(b).

Part 82.5 relates to the obligations of repair shops. The proposed amendment to Part 82.5(a) requires that the facility number be added to a customer estimate for each specific repair or service offered. Although most repair shops already provide their facility number on estimates, requiring this information on all estimates will readily assist the customer in easily tracing the shop by using the official facility number for purposes of searching for a legitimately registered business. In turn, DMV can easily search the vehicle safety database to locate the official business and records and provide the customer with such information.

The proposed amendment to Part 82.5(c) requires that the registration plate number and/or vehicle identification number be on invoices given to the customer. Although most repair shops already provide this information on invoices, this information will clearly describe a vehicle, leaving little chance to mistakenly identify a vehicle. Such identification will benefit the customer and the DMV in the event of an investigation by clearly identifying the vehicle. Adding the vehicle identification number on an invoice will also assist in matching necessary parts diagnostics procedures and customers.

Part 82.7(b)(3) relates to repair shop signs. The proposed amendment is necessary to correct an error in the numeric dimensions of a mobile unit outdoor repair sign from inches to feet by eliminating reference to the numeric dimensions and adding in its place the correct written dimensions.

Part 82.18(b) relates to the duty of a repair shop to complete its portion of a "Certificate of Automobile Repairs" referenced as Insurance Department form NYS APD form 1, as is required under the New York State Insurance Law, section 167-d(9). However, this section of the Insurance Law was changed from section 167-d(9) to Insurance Law, Section 3410(i). Additionally, the "Certificate of Automobile Repairs" was changed from form NYS APD form 1 to NYS APD form 1-a. The proposed amendments to Part 82.18(b) are necessary to reflect the correct

---



---

## Department of Motor Vehicles

---



---

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

#### **Repair Shops**

**I.D. No.** MTV-05-07-00002-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 82 of Title 15 NYCRR.

**Statutory authority:** Vehicle and Traffic Law, sections 215(a) and 398-g(2)

**Subject:** Repair shops.

**Purpose:** To make minor revisions to the repair shop regulations.

**Text of proposed rule:** Subdivisions (a) and (c) of Section 82.5 are amended to read as follows:

(a) upon the request of any customer make an estimate in writing of the parts and labor necessary for each specific repair or service offered and shall not charge for work done or parts supplied in excess of the estimate without the consent of such customer. The repair shop may charge a reasonable fee for making an estimate. The estimate shall contain the following: the customer's name, the name *and facility number* of the repair shop, the date of the estimate, a list of parts necessary for each specific repair together with the costs of for each part, indicating any parts which are not new parts of at least original equipment quality, the labor charge for each repair together with the cost of each labor charge, year and make of vehicle, registration plate number or vehicle identification number, a description of the problem reported by the customer, and a statement informing the customer of his right to receive replaced parts if the customer makes a written request for such return. In addition, for body parts, the repair shop must indicate if the part is a new original equipment manufacturer part, a new after market equipment manufacturer part or a used part. A statement on an estimate that all body parts are in one of the three classes except as otherwise indicated complies with this last requirement. All information on an estimate must be legible;

(c) provide the customer with an invoice. An invoice shall contain the following information: the name, [and] address *and facility number* of the repair shop, the date of the invoice, the date the vehicle was presented to the repair shop for repair or services, a list of all parts supplied and labor performed, including the cost for each such part and labor, a notation indicating the status of any part used which is not new and of at least original quality (i.e. used, rebuilt, etc.) the odometer reading at the time the

section of the Insurance Law. The amendment also eliminates any reference to the form number so as to provide for continued accuracy in the regulation should the form number change again in the future.

These are consensus rules as no person is likely to object to the rules as proposed and written.

#### **Job Impact Statement**

A job impact statement is not submitted with this regulation because adding the facility number on an estimate, adding the registration plate number and/or vehicle identification number on an invoice and making corrections to errors in existing regulations shall have no impact on job opportunities in New York State.

## Public Service Commission

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

#### **Interconnection Agreement between Verizon New York Inc. and Neutral Tandem-New York, LLC**

**I.D. No.** PSC-05-07-00004-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 Neutral Tandem-New York, LLC for approval of an interconnection agreement executed on Oct. 16, 2006.

**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 Neutral Tandem-New York, LLC have reached a negotiated agreement whereby Verizon New York Inc. and Neutral Tandem-New York, LLC 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 for the term of an underlying agreement, or as extended.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, 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.

(07-C-0022SA1)

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

#### **Approval of Gas Meters and Accessories by Consolidated Edison Company of New York, Inc.**

**I.D. No.** PSC-05-07-00005-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, reject, or modify, in whole or in part, an application by

Consolidated Edison Company of New York, Inc. for the approval of the Romet RM23000 series of rotary meters. The Romet RM 23000 TCID is equipped with an instrument drive module, and the RM23000TC without instrument drive module for use in commercial and industrial applications.

**Statutory authority:** Public Service Law, section 67(1)

**Subject:** Approval of types of gas meters and accessories.

**Purpose:** To approve the family of Romet RM23000 temperature-compensated meters to be utilized in New York State.

**Substance of proposed rule:** The Commission will consider a request from Consolidated Edison Company of New York, Inc. (Con Edison) for the approval to use two distinct models of the Romet RM23000 temperature-compensated rotary meter in New York State. The models include the RM23000TCID that is equipped with an instrument drive module, and the RM23000TC that is without instrument drive module. According to Con Edison, the Romet RM23000TC meters will be used in commercial and industrial applications, and maintain measurement accuracy compliant to the American National Standards Institute, ANSI B109.3. The approximate cost of the RM23000TC is between \$2,135 and \$2,573, depending on the options ordered.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, 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.

(06-G-1568SA1)

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

#### **Leasing of Distribution Lines by Niagara Mohawk Power Corporation**

**I.D. No.** PSC-05-07-00006-P

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

**Proposed action:** The commission is considering whether to approve or reject, in whole or in part, or to modify a petition filed by Niagara Mohawk Power Corporation and New Visions Powerline Communications, Inc. on Dec. 28, 2006 regarding Niagara Mohawk Power Corporation leasing space on their distribution lines for Broadband Over Powerline to New Visions Powerline Communications, Inc.

**Statutory authority:** Public Service Law, sections 66(1), 70 and 107

**Subject:** Broadband over powerlines.

**Purpose:** To consider Niagara Mohawk Power Corporation's request for leasing distribution lines to New Visions Powerline Communications, Inc. for Broadband Over Powerline services.

**Substance of proposed rule:** The Commission is considering whether to approve or reject, in whole or in part, or to modify a petition filed by Niagara Mohawk Power Corporation and New Visions Powerline Communications, Inc. on December 28, 2006 regarding Niagara Mohawk Power Corporation leasing space on their distribution lines for Broadband Over Powerline to New Visions Powerline Communications, Inc.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, 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.  
(06-M-1582SA1)

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

**Tariff Revisions by Pabst Water Company, Inc.**

**I.D. No.** PSC-05-07-00007-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, tariff revisions filed by Pabst Water Company, Inc. to make various changes in the rates, charges, rules and regulations in its tariff schedule, P.S.C. No. 3—Water, to become effective April 1, 2007.

**Statutory authority:** Public Service Law, sections 4(1), 5(1)(f), 89-c(1) and (10)

**Subject:** Water rates and charges.

**Purpose:** To increase Pabst Water Company, Inc.’s annual revenues by about \$6,828 or 28.5 percent.

**Substance of proposed rule:** On January 8, 2007, Pabst Water Company, Inc. (Pabst or the company) filed to become effective April 1, 2007, Leaf No. 12, Revision 1, to its tariff schedule, P.S.C. No. 3 – Water. Pabst requests to increase its annual revenues by about \$6,828 or 28.5%. The company provides flat rate water service to 65 customers and two seasonal residential customers in an area known as Peach Lake in the Town of North Salem, Westchester County. The typical residential customer’s annual flat rate bills would increase from \$374 to \$481. Fire protection service is not provided. Pabst’s tariff, along with its proposed changes (Leaf No. 12, Revision 1) is available on the Commission’s Home Page on the World Wide Web ([www.dps.state.ny.us](http://www.dps.state.ny.us)) – located under the file room – Tariffs. The Commission may approve or reject, in whole or in part, or modify, the company’s proposed tariff revisions.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

**Data, views or arguments may be submitted to:** Jaclyn A. Brillig, 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.  
(07-W-0017SA1)

---



---

**State University of New York**

---



---

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

**Traffic and Parking Regulations at SUNY Brockport**

**I.D. No.** SUN-05-07-00001-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 563.7 of Title 8 NYCRR.

**Statutory authority:** Education Law, section 360(1)

**Subject:** Traffic and parking regulations of the State University of New York College at Brockport.

**Purpose:** To bring the traffic and parking regulations into conformity with chapter 699, Laws of 2005, by authorizing the exemption of veterans attending the State University of New York College at Brockport from parking fees.

**Text of proposed rule:** Section 563.7 is amended by adding a new subdivision (n) to read as follows:

(n) *Veterans.* Any veteran, as defined in section 360 of the New York State Education Law, in attendance as a student at the college shall be exempt from parking fees upon submission by the veteran of a written request for exemption together with written certification by the veteran that such veteran was honorably discharged or released under honorable circumstances from such service.

**Text of proposed rule and any required statements and analyses may be obtained from:** Angela Winn, Associate Counsel, State University of New York, State University Plaza, Albany, NY 12246, (518) 443-5400, e-mail: [Angela.Winn@suny.edu](mailto:Angela.Winn@suny.edu)

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

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

**Regulatory Impact Statement**

1. Statutory authority: Education Law §360(1) authorizes the State University Trustees to make rules and regulations relating to parking, vehicular and pedestrian traffic and safety on the State-operated campuses of the State University of New York.

2. Legislative objectives: The present measure will bring the parking and traffic regulations applicable to the State University of New York College at Brockport into compliance with Chapter 699 of the Laws of 2005 by authorizing SUNY/Brockport to exempt veterans attending the College from applicable parking fees.

3. Needs and benefits: New York State Education Law was amended to authorize exemption of veterans from State University parking fees. This amendment is needed to conform the SUNY/Brockport parking and traffic regulations to the change in law.

4. Costs: Veterans enrolled at State-operated campuses of the State University will have exemptions from parking fees and thus incur savings.

5. Local government mandates: None.

6. Paperwork: Veterans are required to submit a written request for exemption and certify that they were honorably discharged.

7. Duplication: None.

8. Alternatives: There are no viable alternatives.

9. Federal standards: There are no related Federal standards.

10. Compliance schedule: SUNY/Brockport will notify those affected as soon as the rule is effective. Compliance should be immediate.

**Regulatory Flexibility Analysis**

No regulatory flexibility analysis is submitted with this notice because this proposal does not impose any requirements on small businesses and local governments. This proposed rule making will not impose any adverse economic impact on small businesses and local governments or impose any reporting, recordkeeping or other compliance requirements on small businesses and local governments. The proposal addresses internal parking and traffic regulations on the campus of the State University of New York College at Brockport.

**Rural Area Flexibility Analysis**

No rural area flexibility analysis is submitted with this notice because this proposal will not impose any adverse economic impact on rural areas or impose any reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. The proposal addresses internal parking and traffic regulations on the campus of the State University of New York College at Brockport.

**Job Impact Statement**

No job impact statement is submitted with this notice because this proposal does not impose any adverse economic impact on existing jobs or employment opportunities. The proposal addresses internal parking and traffic regulations on the campus of the State University of New York College at Brockport.