

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 Correctional Services

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Inmate Legal Visits

I.D. No. COR-26-07-00005-P

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

Proposed action: Addition of Part 210 to Title 7 NYCRR.

Statutory authority: Correction Law, sections 112 and 146

Subject: Inmate legal visits.

Purpose: To provide procedures for visits between inmates and their legal representatives.

Text of proposed rule:

PART 210

INMATE LEGAL VISITS

(Statutory Authority: Correction Law §§ 112, 146)

Sec.

§ 210.1 Purpose. To provide a uniform manner in which inmate legal visits are to be conducted throughout the department in conformance with statutory and case law regarding inmate access to the courts. This regulation contains the guidelines which govern legal visits within a facility under the control of the New York State Department of Correctional Services.

§ 210.2 Definitions.

(a) *Legal Visit:* A visit between an inmate and an attorney, approved legal representative, or attorney's authorized representative for the purpose of discussing confidential legal matters.

(b) *Attorney:* One who is duly admitted to the practice of law in this State or another jurisdiction; he or she need not be formally retained or be the attorney-of-record for the inmate.

(c) *Approved Legal Representative:* Second or third year law school students and law school graduates approved by order of the appropriate Appellate Division (See Judiciary Law § 484).

(d) *Attorney's Authorized Representative:* Paralegals, law students, and investigators or any other individuals identifiably employed by or under the supervision of and responsible to an attorney.

§ 210.3 Policy.

(a) The right of meaningful access to the courts and the right to counsel are rights an inmate clearly retains upon incarceration. Accordingly, an inmate retains the right to legal visits.

(b) A legal visit may be used solely for the purpose of discussing confidential legal matters.

(c) A legal visit by an attorney's representative (e.g. an investigator) unaccompanied by an attorney will only be authorized if the attorney for whom the representative is employed certifies to the department:

(1) that such visit is necessary in connection with his or her legal services to the inmate being visited; and

(2) that the legal services relate to a specific and unresolved matter.

(d) A facility or institution may not impose any further restrictions without the prior approval of the counsel to the department.

§ 210.4 Procedure.

(a) Attorneys and their representatives are expected to give at least one full business day (24 hours minimum) notice to a facility indicating the inmate(s) requested to be seen. This notice may be in writing or by telephone. The superintendent may authorize a legal visit upon less than one full business day notice if he or she deems there is good cause to do so. Attorneys and/or their representatives may, in the alternative, visit an inmate in the regular visiting room in accordance with the procedures set forth in Part 200 of this Title, "Visitation."

(b) The superintendent may deny legal visits of any attorney or representative for good cause if such action is necessary to maintain the safety, security or good order of the facility. However, the superintendent must consult with counsel's office prior to any such denial.

(c) Legal visits are to be conducted Monday through Friday except holidays, during the normal facility visiting hours. Attorneys and their representatives should be advised of the times when inmates are eating meals and/or count times, and should be discouraged from arriving at these times. Advanced requests for after-hour, holiday, or weekend legal visits, based on special circumstances, shall be considered on a case-by-case basis.

(d) In general, all legal visits shall be contact visits. The superintendent must consult with counsel's office prior to enforcing the suspension of an inmate's contact visitation privileges during a legal visit with an attorney or approved legal representative. Regular procedures apply to the suspension of an inmate's contact visitation privileges with attorney's authorized representatives.

(e) If an attorney or representative requests to see a large number of inmates together, reasonable efforts shall be made to accommodate the request. Subject to considerations of safety, security and good order of the facility and the legal necessity for such a visit, a limited number of inmates

may be allowed to meet simultaneously with an attorney, approved legal representative or authorized representative.

(f) Legal materials may be exchanged during a legal visit and may be left with an inmate by an attorney or representative subject to inspection for contraband. The intention to leave legal materials with the inmate shall be communicated by the attorney or representative to the visiting room correction officer. These procedures shall also be followed if an inmate wishes to leave legal materials with an attorney or representative. The inspection shall be done in the presence of the attorney and the inmate. The content of such materials may not be read during the inspection. If contraband is found, all parts of the materials shall be forwarded directly to the superintendent without further inspection, and a report from the person inspecting the materials shall detail the circumstances. In the event that the legal materials to be exchanged are voluminous, the facility may either

(1) conduct an inspection of the legal materials in the package room at the conclusion of the visit provided that the removal of the legal materials from the visiting room and inspection in the package room can be done in the presence of the inmate unless both the inmate and the attorney or representative consent to such inspection out of the presence of the inmate, or

(2) have a supply of blank envelopes available in the visiting room into which the legal materials can be placed and sealed for subsequent reopening and inspection in the presence of the inmate consistent with the procedures for handling legal mail set forth in Part 721 of this Title, "Privileged Correspondence."

(g) In emergency situations, or when a substantial threat exists to the safety, security, or operations of the facility, or to the visiting attorney or representative, legal visits may be suspended. This is to be done for the duration necessary to ensure the safety and security of the facility and of the visitor.

(h) Nothing in this Part is to be construed to countermand procedures as found in Part 200 of this Title and departmental directives related to entrance rules and procedures, searches, control of contraband, visiting room protocol and visitor penalties (termination, suspension or permanent revocation) for misconduct.

(i) An inmate has the right to attend and the right to refuse any legal visit. Any refusal must be in writing and signed by the inmate in duplicate; one copy to be given to the attorney requesting the legal visit and the other copy to be placed in the inmate's file. When an inmate refuses a legal visit and refuses to sign such a statement, the refusal shall be documented and witnessed by two department employees.

(j) The superintendent shall designate an area for legal visits. Such area should ensure the confidentiality of all communications during the visit.

See Appendix in the back of this issue.

Text of proposed rule and any required statements and analyses may be obtained from: Anthony J. Annucci, Deputy Commissioner and Counsel, Department of Correctional Services, Bldg. 2, State Campus, Albany, NY 12226-2050, (518) 485-9613, e-mail: AJAnnucci@docs.state.ny.us

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

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

Regulatory Impact Statement

Statutory Authority:

Section 112 of the Correction Law assigns to the commissioner of correction the powers and duties of management and control of correctional facilities and inmates, and the responsibility to make rules and regulations for the government of correctional facilities.

Section 146 of the Correction Law requires the commissioner to promulgate regulations governing visits by persons not otherwise authorized by law.

Legislative Objective:

The legislature intended that the commissioner promulgate regulations, consistent with Correction Law, to ensure that inmates have access to their legal counsel and to provide uniform procedures for visits between inmates and legal representatives.

Needs and Benefits:

This proposed rule mirrors a long-existing departmental directive which provides a uniform procedure for inmates and their legal representatives to have confidential visits and exchange legal materials. Inasmuch as visiting legal representatives are members of the public, it is appropriate to file these procedures as public documents.

Costs:

a. To State government: None anticipated.

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

c. Costs to private regulated parties: None.

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

(i) Initial expenses: None.

(ii) Annual cost: None.

Paperwork:

a. New reporting or application forms: None.

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

c. New or addition record keeping that will be required of the regulated party to comply with the rule or prove compliance with the rule: None.

Local Government Mandates:

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

Duplication:

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

Alternatives:

The Department has successfully integrated procedures for confidential visits between inmates and their legal representatives, beginning with an internal directive in 1980. No alternative procedures have evolved in the recent past several years and none have been suggested.

Federal Standards:

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

Compliance Schedule:

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

Regulatory Flexibility Analysis

A regulatory flexibility analysis is not required for this proposal since it will not impose any adverse economic impact or reporting, record keeping or other compliance requirements on small businesses or local governments. This proposal merely provides a uniform procedure for inmates and their legal representatives to have confidential visits and exchange legal materials.

Rural Area Flexibility Analysis

A rural area flexibility analysis is not required for this proposal since it will not impose any adverse economic impact or reporting, record keeping or other compliance requirements on rural areas. This proposal merely provides a uniform procedure for inmates and their legal representatives to have confidential visits and exchange legal materials.

Job Impact Statement

A job impact statement is not submitted because this proposed rule will have no adverse impact on jobs or employment opportunities. This proposal merely provides a uniform procedure for inmates and their legal representatives to have confidential visits and exchange legal materials.

Education Department

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Students with Limited English Proficiency

I.D. No. EDU-26-07-00008-P

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

Proposed action: Amendment of Part 154 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207, 215, 2117(1), 3204(2), (2-a), (3) and (6) and L. 2007, ch. 57, section 10

Subject: Students with limited English proficiency.

Purpose: To prescribe requirements for the development of comprehensive plans for students with limited English proficiency by school districts pursuant to Education Law section 3204, as amended by chapter 57 of the Laws of 2007, and to otherwise conform Part 154 of the commissioner's regulations to the statute.

Text of proposed rule: 1. The title of Part 154 of the Regulations of the Commissioner of Education is amended, effective October 4, 2007, as follows:

Part 154

[APPORTIONMENT AND] SERVICES FOR PUPILS WITH LIMITED ENGLISH PROFICIENCY

2. Paragraph (1) of subdivision (d) of section 154.2 of the Regulations of the Commissioner of Education is amended, effective October 4, 2007, as follows:

(1) The language arts instructional component shall include English language arts instruction and English as a second language instruction. The learning standards for English language arts (ELA) and English as a second language (ESL), and key ideas and performance indicators for such standards, shall serve as the basis for the [(ELA)] ELA and ESL curriculums, respectively.

- (i) . . .
- (ii) . . .

3. Section 154.3 of the Regulations of the Commissioner of Education is repealed, effective October 4, 2007.

4. A new section 154.3 of the Regulations of the Commissioner of Education is added, effective October 4, 2007, as follows:

154.3 School District Responsibility.

The provisions of this section shall apply to programs operated in the 2007-08 school year and thereafter. All limited English proficient students shall be entitled to receive services in accordance with subdivision 2 and 2(a) of section 3204 of the Education Law.

(a) Each school district receiving total foundation aid, including each community school district of the city of New York, shall develop a comprehensive plan to meet the educational needs of pupils with limited English proficiency. Such plan shall be kept on file in the district and made available for department review upon request of the department. The plan shall include:

- (1) the district's philosophy for the education of such pupils;*
- (2) administrative practices and procedures to:*
 - (i) diagnostically screen pupils for limited English proficiency pursuant to Part 117 of this Title;*
 - (ii) identify such pupils with limited English proficiency;*
 - (iii) annually evaluate each such pupil including each such pupil's performance in content areas to measure the pupil's academic progress.*
- (3) a description of the nature and scope of the bilingual and/or English as a second language instructional program and services available to limited English proficient pupils;*
- (4) a description of the criteria used by the district to place limited English proficient pupils in appropriate bilingual or free-standing English as a second language programs;*
- (5) a description by building of the curricular and extracurricular services provided to pupils with limited English proficiency;*
- (6) a description of the district and school level procedures for the management of the program, including staffing, site selection, parental notification, coordination of funds, training and program planning;*
- (b) School related information shall be distributed to parents or other persons in parental relationship to pupils with limited English proficiency in English or when necessary the language they understand;*
- (c) The school district shall submit to the commissioner the results of the annual evaluation of limited English proficient pupils, including test data and any additional data required by the commissioner, in the format and timeframe specified by the commissioner;*
- (d) The school district shall ensure that the provisions of section 3204 of the Education Law with respect to the instruction of limited English proficient pupils are adhered to.*

(e) The school district shall refer limited English proficient pupils who are suspected of having a disability to the committee on special education in accordance with Part 200 of this Title and assure that a bilingual multidisciplinary assessment is conducted in accordance with section 200.4(b) of this Title before the committee identifies pupils with limited English proficiency as having a disability.

(f) The school district shall submit to the commissioner the following documents in a form and by a date specified by the commissioner:

- (1) an assurance:*
 - (i) of access to appropriate instructional and support services for such pupils, including guidance programs pursuant to section 100.2(j) of this Title;*

(ii) that each such pupil has equal opportunities to participate in all school programs and extracurricular activities as non-limited English proficient pupils;

(iii) that the minimum ESL and ELA requirements prescribed in section 154.2(d) of this Part for the freestanding ESL programs are adhered to;

(iv) that the minimum ESL, ELA and NLA requirements prescribed in section 154.2(e) of this Part for bilingual education programs are adhered to;

(v) that teachers in the district's free-standing ESL and bilingual education programs are appropriately certified pursuant to Part 80 of this Title;

(vi) the district will comply with the requirements of this Part and the provisions of the Education Law governing programs for pupils with limited English proficiency;

(vii) that programs for limited English proficient pupils will be administered in accordance with applicable federal and state law and regulations and the district's comprehensive plan;

(2) a report by building of the number of pupils identified as being limited English proficient in the preceding year, including their grade level, native language and instructional program;

(3) a report by building of the number of limited English proficient pupils served in the preceding year, including their grade level, native language and instructional program;

(4) a report by building of the number of pupils that took the NYSES-LAT in the preceding school year;

(5) a report by building of the number and qualifications of teachers and support personnel providing services to pupils with limited English proficiency;

(6) a fiscal report containing such data concerning the preceding school year as may be required by the commissioner; and

(7) beginning in July 2008 and annually thereafter, a report on the expenditure of state, local and federal funds in the prior year on programs, activities and services for pupils with limited English proficiency.

(g) Types of programs.

(1) Bilingual Education Program. Each school district which has an enrollment of 20 or more pupils with limited English proficiency of the same grade level assigned to a building, all of whom have the same native language which is other than English, shall provide such pupils with bilingual education programs.

(2) Free-standing English as a Second Language Program. Each school district which has pupils with limited English proficiency of the same grade level assigned to a building, but which does not have 20 of such pupils with the same native language which is other than English, shall provide either a free-standing English as a second language program, or a bilingual education program to such pupils.

(h) Support services. Each school district with limited English proficient pupils participating in bilingual or free-standing English as a second language programs shall provide appropriate support services needed by such pupils to achieve and maintain a satisfactory level of academic performance. Such services may include, but need not be limited to, individual counseling, group counseling, home visits, and parental counseling. Where appropriate, such services shall be provided in the first language of the pupil and the pupil's parents or other persons in parental relation to the pupil.

(i) Transitional services. Each school district shall ensure a transition for former limited English proficient pupils transferring from a bilingual or free-standing English as a second language program into an English mainstream program. Transitional services shall be provided for the first year after the pupil is placed in the English mainstream instructional program.

(j) In-service training. Each school district with limited English proficient pupils shall provide in-service training to all personnel providing instruction or other services to such pupils in order to enhance their appreciation for the pupils' native languages and cultures and their ability to provide appropriate instructional and support services.

(k) Parental notification. (1) The parents or other persons in a parental relation to a pupil designated as limited English proficient shall be notified, in English and the language they understand, of their child's placement in an instructional bilingual or free-standing English as a second language program and their options as set forth in paragraphs (2) and (3) of this subdivision. School districts offering programs to limited English proficient pupils shall make an effort to meet with the parents or other persons in parental relation to such pupils, at least twice a year, to help

them understand the goals of the program and how they might help their children.

(2) The parents or other persons in parental relation to a pupil designated as limited English proficient shall have the option to withdraw their child only from participation in an instructional bilingual education program, provided that:

(i) the parents or other persons in parental relation to a pupil designated as limited English proficient meet with the school principal along with the school or district supervisor of bilingual education to discuss and explain further the nature, purposes, educational values of the program and the skills required of personnel;

(ii) as a minimum such pupil shall participate in a free-standing English as a second language program.

(3) In a school building where the number of eligible pupils does not require the offering of a bilingual education program, parents or other persons in parental relation to a pupil identified as limited English proficient shall have the option of transferring their child to a school within the district provided such program is available at such other school. A parent who chooses not to exercise the transfer option shall be informed that his or her child shall participate in a free-standing English as a second language program.

(4) Parents or other persons in parental relation to a pupil designated as limited English proficient who is a new entrant, as defined in section 117.2(d) of this Title, shall be provided an orientation session on the state standards, assessments, school expectations and general program requirements for the bilingual education program and the free-standing English as a second language program. Such orientation shall take place within the first semester of their child's enrollment in the school and, when needed, shall be provided in the first language of the pupil's parents or other persons in parental relation to the pupil.

(l) A pupil whose score on the LAB-R or the NYSESLAT, as specified in section 154.2(a), (b) and (c) of this Part, is a result of a disability shall be provided special education programs and services in accordance with the individualized education program (IEP) developed for such pupil pursuant to Part 200 of this Title, and shall also be eligible for services pursuant to this Part when such services are recommended in the IEP. A pupil with a disability receiving services in accordance with the provisions of this section shall be counted as a pupil with limited English proficiency, as well as a student with a disability, for purposes of calculating State aid pursuant to section 3602 of the Education Law.

5. Section 154.4 of the Regulations of the Commissioner of Education is repealed, effective October 4, 2007.

Text of proposed 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

Data, views or arguments may be submitted to: Johanna Duncan-Poitier, Senior Deputy Commissioner of Education - P16, Education Department, 2M West Wing, Education Bldg., 89 Washington Ave., Albany, NY 12234, (518) 474-3862, e-mail: p16education@mail.nysed.gov

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

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

Regulatory Impact Statement

STATUTORY AUTHORITY:

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

Education Law section 215 authorizes the Board of Regents and the Commissioner of Education to require school districts to prepare and submit reports containing such information as they may prescribe.

Education Law section 2117(1) empowers the Board of Regents and the Commissioner of Education to require school districts to submit any information they deem appropriate.

Education Law section 3204(2) and (2-a) provide for instructional programs for pupils with limited English proficiency to be conducted in accordance with regulations of the Commissioner. Education Law section 3204(3) authorizes the Commissioner to establish standards for the instruction of children with limited English proficiency, and section 3204(6) requires the Commissioner to establish such standards by regulation.

Education Law section 3204(2-a)(1), as amended by section 10 of Chapter 57 of the Laws of 2007, requires each school district which is receiving total foundation aid to develop a comprehensive plan consistent

with requirements as the Commissioner may establish in regulations to meet the educational needs of pupils of limited English proficiency. Such plan shall include a description of the programs, activities and services used to meet the educational needs of such pupils that comply with the regulations of the Commissioner governing such programs.

LEGISLATIVE OBJECTIVES:

The proposed amendment is consistent with the authority conferred by the above statutes and is necessary to implement Education Law section 3204(2-a)(1), as amended by section 10 of Chapter 57 of the Laws of 2007.

NEEDS AND BENEFITS:

The proposed amendment is necessary to comply with the requirements of section 10 of Chapter 57 of the Laws of 2007. Changes to the Education Law related to the education of pupils with limited English proficiency, as enacted under Chapter 57 of the Laws of 2007, are no longer in line with the current Part 154 regulations. Current Part 154 regulations prescribe requirements for districts claiming state limited English proficiency aid as well as for districts not claiming state limited English proficiency aid for the education of pupils with limited English proficiency. Pursuant to Chapter 57 of the Laws of 2007, school districts will no longer claim State limited English proficiency aid. Beginning in 2007-08, all districts will receive total foundation aid. Each school district that receives total foundation aid must develop a comprehensive plan consistent with Education Law section 3204(2-a)(1) and Part 154 of the Commissioner's Regulations.

COSTS:

(a) Costs to State government: None.

(b) Cost to local government: It is anticipated that any costs to school districts would be minimal and will be absorbed using existing staff and resources, and/or State funded technical assistance resources.

(c) Cost to private regulated parties: None.

(d) Cost to Regulating agency: It is anticipated that the Statewide cost associated with the training and submission of required documents will be minimal and will be covered through State and federal funds.

For the 2008-2009 school year and thereafter, it is expected that costs associated with the development of the comprehensive plans will decrease since some of the activities were only carried out initially during the training phases and development of the initial plan.

LOCAL GOVERNMENT MANDATES:

The proposed amendment is necessary to conform Part 154 of the Regulations of the Commissioner of Education to Education Law section 3204(2-a), as amended by Chapter 57 of the Laws of 2007.

Section 154.3 prescribes the specific requirements for school districts receiving total foundation aid. The amendment requires that each school district receiving foundation aid:

(1) develop a comprehensive plan. The plan must include the district's philosophy for the education of pupils with limited English proficiency (LEP) and the administrative practices and procedures to screen, identify and annually evaluate LEP pupils. The plan must also include a description of the bilingual or English as a Second Language (ESL) program to be implemented, the criteria for placement in such programs, the types of curricular and extracurricular activities and the program management procedures;

(2) distribute school related information to parents in the language that they understand;

(3) submit assessment data to the Department as prescribed by the Commissioner;

(4) refer students suspected of having a disability to the Committee on Special Education;

(5) submit a signed statement of assurances certifying that pupils with limited English proficiency will have access and equal opportunities to participate in appropriate instructional programs, extracurricular activities and support services; that such pupils will be provided the minimum language arts requirements prescribed under Part 154 of the Commissioner's Regulations; that teachers in free-standing and bilingual education programs are appropriately certified; and that programs for pupils with limited English proficiency will be administered in accordance with applicable statutes, regulations and the district's plan;

(6) submit a report by building of the number of students identified, served and who took the New York State English as a Second Language Achievement Test;

(7) submit a report of the number of teachers and their qualifications;

(8) beginning in July 2008 and annually thereafter, submit a report of the expenditures of State, local and federal funds in the prior year for programs and activities for pupils with limited English proficiency.

PAPERWORK:

Each school district receiving total foundation aid shall develop a comprehensive plan for the education of pupils with limited English proficiency. Such plan shall be kept on file in the district and made available for Department review upon request of the Department. The plan shall include:

- (1) the district's philosophy for the education of such pupils;
- (2) administrative practices and procedures to:
 - (i) diagnostically screen pupils for limited English proficiency pursuant to Part 117 of this Title;
 - (ii) identify such pupils with limited English proficiency;
 - (iii) annually evaluate each such pupil including each such pupil's performance in content areas to measure the pupil's academic progress.
- (3) a description of the nature and scope of the bilingual and/or English as a second language instructional program and services available to limited English proficient pupils;
- (4) a description of the criteria used by the district to place limited English proficient pupils in appropriate bilingual or free-standing English as a second language programs;
- (5) a description by building of the curricular and extracurricular services provided to pupils with limited English proficiency; and
- (6) a description of the district and school level procedures for the management of the program, including staffing, site selection, parental notification, coordination of funds, training and program planning.

The school district shall submit to the Commissioner the results of the annual evaluation of limited English proficient pupils, including test data and any additional data required by the Commissioner, in the format and timeframe specified by the Commissioner.

The school district shall submit to the Commissioner the following documents in a form and by a date specified by the Commissioner:

- (1) an assurance:
 - (i) of access to appropriate instructional and support services for such pupils, including guidance programs pursuant to section 100.2(j) of the Commissioner's Regulations;
 - (ii) that each pupil has equal opportunities to participate in all school programs and extracurricular activities as non-limited English proficient pupils;
 - (iii) that the minimum ESL and ELA requirements prescribed in section 154.2(d) of the Commissioner's Regulations for the freestanding ESL programs are adhered to;
 - (iv) that the minimum ESL, ELA and NLA requirements prescribed in section 154.2(e) of this Part for bilingual education programs are adhered to;
 - (v) that teachers in the district's free-standing ESL and bilingual education programs are appropriately certified pursuant to Part 80 of the Commissioner's Regulations;
 - (vi) that the district will comply with the requirements of Part 154 and the provisions of the Education Law governing programs for pupils with limited English proficiency;
 - (vii) that programs for limited English proficient pupils will be administered in accordance with applicable federal and state law and regulations and the district's comprehensive plan;
- (2) a report by building of the number of pupils identified as being limited English proficient in the preceding year, including their grade level, native language and instructional program;
- (3) a report by building of the number of limited English proficient pupils served in the preceding year, including their grade level, native language and instructional program;
- (4) a report by building of the number of pupils that took the NYSESLAT in the preceding school year;
- (5) a report by building of the number and qualifications of teachers and support personnel providing services to pupils with limited English proficiency;
- (6) a fiscal report containing such data concerning the preceding school year as may be required by the Commissioner; and
- (7) beginning in July 2008 and annually thereafter, a report on the expenditure of state, local and federal funds in the prior year on programs, activities and services for pupils with limited English proficiency.

DUPLICATION:

The proposed amendment will not duplicate or exceed any other existing federal or State statute or regulation.

ALTERNATIVES:

The proposed amendment is necessary to comply with the requirements of Education Law section 3204(2-a), as amended by section 10 of Chapter 57 of the Laws of 2007. There are no significant alternatives and none were considered.

FEDERAL STANDARDS:

The proposed amendment does not exceed any federal rule in a similar area.

COMPLIANCE STANDARD:

The proposed amendment provides that the new requirements for the development of the comprehensive plan be fully implemented by the 2007-2008 school year.

Regulatory Flexibility Analysis

Small Businesses:

The proposed amendment relates to the establishment of revised requirements for the development of comprehensive plans for pupils with limited English proficiency by school districts receiving total foundation aid. The proposed amendment does not impose any adverse economic impact, reporting, record keeping or other compliance requirements on small businesses. No further steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

Local governments:

EFFECT OF RULE:

The proposed amendment applies to all school districts in the State that receive total foundation aid.

COMPLIANCE REQUIREMENTS:

The proposed amendment is necessary to conform Part 154 of the Regulations of the Commissioner of Education to Education Law section 3204(2-a), as amended by Chapter 57 of the Laws of 2007.

Section 154.3 prescribes the specific requirements for school districts receiving total foundation aid. The amendment requires that each school district receiving foundation aid:

- (1) develop a comprehensive plan. The plan must include the district's philosophy for the education of pupils with limited English proficiency (LEP) and the administrative practices and procedures to screen, identify and annually evaluate LEP pupils. The plan must also include a description of the bilingual or English as a Second Language (ESL) program to be implemented, the criteria for placement in such programs, the types of curricular and extracurricular activities and the program management procedures;
- (2) distribute school related information to parents in the language that they understand;
- (3) submit assessment data to the Department as prescribed by the Commissioner;
- (4) refer students suspected of having a disability to the Committee on Special Education;
- (5) submit a signed statement of assurances certifying that pupils with limited English proficiency will have access and equal opportunities to participate in appropriate instructional programs, extracurricular activities and support services; that such students will be provided the minimum language arts requirements prescribed under Part 154 of the Commissioner's Regulations; that teachers in free-standing and bilingual education programs are appropriately certified; and that programs for pupils with limited English proficiency will be administered in accordance with applicable statutes, regulations and the district's plan;
- (6) submit a report by building of the number of students identified, served and who took the New York State English as a Second Language Achievement Test;
- (7) submit a report of the number of teachers and their qualifications;
- (8) beginning in July 2008 and annually thereafter, submit a report of the expenditures of State, local and federal funds in the prior year for programs and activities for pupils with limited English proficiency.

PROFESSIONAL SERVICES:

The proposed amendment does not impose any additional professional services requirements on school districts.

COMPLIANCE COSTS:

It is anticipated that any costs to school districts would be minimal and will be absorbed using existing staff and resources, and/or State funded technical assistance resources.

It is further anticipated that the Statewide cost associated with the training of required documents will be minimal and will be covered through State and federal funds. For the 2008-2009 school year and thereafter, it is expected that costs associated with the development of the comprehensive plans will decrease since some of the activities were only carried out initially during the training phases and development of the initial plan.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment does not impose any additional technological requirements on school districts. Economic feasibility is addressed above under compliance costs.

MINIMIZE ADVERSE IMPACT: The proposed rule is necessary to implement Education Law section 3204(2-a), as amended by Chapter 57 of the Laws of 2007. Consequently, the major provisions of the proposed rule are statutorily imposed and it is not feasible to establish differing requirements or to exempt school districts and eligible agencies from coverage by the rule. Nevertheless, in establishing the uniform provisions necessary to conform Part 154 of the Commissioner's Regulations to the statute, the Department has considered a variety of options and selected those approaches that will achieve the goal of increased program quality while minimizing additional costs and compliance requirements upon school districts. Since school districts are directly responsible for the instruction of LEP pupils, it is not feasible to apply any of the approaches for minimizing adverse economic impacts pursuant to State Administrative Procedure Act section 202-b(1).

LOCAL GOVERNMENT PARTICIPATION:

Comments on the proposed rule will be solicited from school districts through the offices of the district superintendents of each supervisory district in the State. The proposed amendment will also be posted on the Department's New York State Bilingual Education (NYSBEN) web site to facilitate a wide distribution. Additionally, the proposed amendment will be shared with the Department's Committee of Practitioners on the Education of English Language Learners, the regional Bilingual Education Technical Assistance Centers and selected professional organizations.

Rural Area Flexibility Analysis

TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

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

REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS; AND PROFESSIONAL SERVICES

The proposed amendment is necessary to conform Part 154 of the Regulations of the Commissioner of Education to Education Law section 3204(2-a), as amended by Chapter 57 of the Laws of 2007.

Section 154.3 prescribes the specific requirements for school districts receiving total foundation aid. The amendment requires that each school district receiving foundation aid:

(1) develop a comprehensive plan. The plan must include the district's philosophy for the education of pupils with limited English proficiency (LEP) and the administrative practices and procedures to screen, identify and annually evaluate LEP pupils. The plan must also include a description of the bilingual or English as a Second Language (ESL) program to be implemented, the criteria for placement in such programs, the types of curricular and extracurricular activities and the program management procedures;

(2) distribute school related information to parents in the language that they understand;

(3) submit assessment data to the Department as prescribed by the Commissioner;

(4) refer students suspected of having a disability to the Committee on Special Education;

(5) submit a signed statement of assurances certifying that pupils with limited English proficiency will have access and equal opportunities to participate in appropriate instructional programs, extracurricular activities and support services; that such students will be provided the minimum language arts requirements prescribed under Part 154 of the Commissioner's Regulations; that teachers in free-standing and bilingual education programs are appropriately certified; and that programs for pupils with limited English proficiency will be administered in accordance with applicable statutes, regulations and the district's plan;

(6) submit a report by building of the number of students identified, served and who took the New York State English as a Second Language Achievement Test;

(7) submit a report of the number of teachers and their qualifications;

(8) submit a report of the expenditures of State, local and federal funds in the prior year for programs and activities for pupils with limited English proficiency.

The proposed amendment does not impose any additional professional services requirements on school districts.

COMPLIANCE COSTS:

It is anticipated that any costs to school districts would be minimal and will be absorbed using existing staff and resources, and/or State funded technical assistance resources.

It is further anticipated that the Statewide cost associated with the training of required documents will be minimal and will be covered through State and federal funds. For the 2008-2009 school year and thereafter, it is expected that costs associated with the development of the comprehensive plans will decrease since some of the activities were only carried out initially during the training phases and development of the initial plan.

MINIMIZING ADVERSE IMPACT:

The proposed rule is necessary to implement Education Law section 3204(2-a), as amended by Chapter 57 of the Laws of 2007. Consequently, the major provisions of the proposed rule are statutorily imposed and it is not feasible to establish differing requirements or to exempt school districts and eligible agencies from coverage by the rule. Nevertheless, in establishing the uniform provisions necessary to conform Part 154 of the Commissioner's Regulations to the statute, the Department has considered a variety of options and selected those approaches that will achieve the goal of increased program quality while minimizing additional costs and compliance requirements upon school districts. Because this amendment implements statutory provisions that are applicable to school districts across the State, it was not possible to provide for a lesser standard or an exemption for school districts in rural areas.

RURAL AREA PARTICIPATION:

The proposed amendment will be sent for review and comment to members of the Department's Rural Advisory Committee, which includes representatives from rural areas. The proposed amendment will also be posted on the Department's New York State Bilingual Education (NYSBEN) web site to facilitate a wide distribution. Additionally, the proposed amendment will be shared with the Department's Committee of Practitioners on the Education of English Language Learners, the regional Bilingual Education and Technical Assistance Centers and selected professional organizations.

Job Impact Statement

The proposed amendment relates to the establishment of revised requirements for the development of comprehensive plans for pupils with limited English proficiency by school districts receiving total foundation aid, and will not have an adverse impact on jobs or employment activities. Because it is evident from the nature of the proposed amendment that it will have no impact on jobs or employment opportunities, no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

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

State Aid Awards

I.D. No. EDU-26-07-00009-P

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

Proposed action: Amendment of section 150.2 and addition of section 150.4 to Title 8 NYCRR.

Statutory authority: Education Law, sections 207 and 6401-a and L. 2007, ch. 57

Subject: State aid awards for high need nursing programs at certain independent colleges and universities.

Purpose: To establish the eligibility criteria and the requirements and procedures for certain eligible independent colleges and universities and the Commissioner of Education to follow when applying for, or awarding, State aid awards for high needs nursing programs, in order to implement the requirements of chapter 57 of the Laws of 2007.

Text of proposed rule: 1. Section 150.2 of the Regulations of the Commissioner of Education is amended, effective October 4, 2007, as follows:

No portion of any State aid paid to an institution of higher education pursuant to the provisions of [section] sections 6401 and 6401-a of the Education Law shall be used for the religious instruction or religious worship or for the advancement or inhibition of religion.

2. Section 150.4 of the Regulations of the Commissioner of Education is added, effective October 4, 2007, as follows:

§ 150.4 State aid for high needs nursing program.

(a) Purpose. The purpose of this section is to establish the eligibility criteria and requirements for certain independent colleges and universi-

ties applying for State aid awards for high needs nursing programs pursuant to section 6401-a of the Education Law.

(b) Definitions. For purposes of this section:

(1) Enrolled shall mean that a student is registered full-time in the fall semester at an eligible institution in an associate or baccalaureate degree program in nursing that is registered by the department pursuant to section 52.12 of this Title;

(2) Eligible institution shall mean a higher education institution that meets the following requirements:

(i) the institution shall be a non-profit or independent college or university incorporated by the Regents or the Legislature that is geographically located in New York State;

(ii) the institution shall maintain an earned nursing degree program registered by the department, culminating in an associate degree or higher, excluding any online nursing degree program offered via the internet;

(iii) the institution shall meet such standards of educational quality applicable to comparable public institutions of higher education, as may be from time to time established by the Regents; and

(iv) the institution shall meet the requirements for State aid under the constitutions of the United States and the State of New York.

(3) Fall semester means that part of the academic year that begins between late August and November 1.

(4) Department shall mean the New York State Education Department.

(5) Full-time student shall mean a student that is enrolled at an eligible institution in full-time study, as defined in section 145-2.1 of this Title.

(6) High needs nursing program shall mean any nursing program registered by the department pursuant to section 52.12 of this Title at an eligible institution as defined in this section, and shall not include online or internet nursing degree programs.

(c) Application. Eligible institutions that wish to apply for State aid pursuant to section 6401-a of the Education Law shall submit an application to the commissioner by September 15 of the academic year in which they are seeking State aid, on a form prescribed by the commissioner.

(d) Awards.

(1) The commissioner shall grant State aid awards to each eligible institution within the amounts appropriated for such purpose, not to exceed one million dollars and based on the availability of funds. Such awards shall be computed by multiplying an amount not to exceed two hundred fifty dollars for each student enrolled in a high needs nursing program at an eligible two year degree institution and an amount not to exceed five hundred dollars for each student enrolled in a high needs nursing program at an eligible four year degree institution in the fall semester preceding the annual period for which such an apportionment is made.

(2) For purposes of this section, an eligible two year degree institution which has received authority to confer baccalaureate degrees shall continue to be considered an eligible two year degree institution until such time as it has actually begun to confer baccalaureate degrees.

(3) In the case of a jointly registered nursing degree program at more than one eligible institution, the eligible institution granting the degree shall receive the State aid award under this section.

(4) In the event that the appropriation cannot fully fund such awards, the commissioner will appropriate the monies to each eligible institution proportionately based on the amount of available funds and pursuant to a schedule determined by the commissioner.

(e) Institutional reports. Beginning July 1, 2007, each eligible institution applying for State aid pursuant to section 6401-a of the Education Law shall submit an annual certification by their chief executive officer to the commissioner by November 15 of each year, certifying the number of students enrolled in a high needs nursing program at such institution for the fall semester and any other information the commissioner may require, in a form prescribed by the commissioner.

Text of proposed 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

Data, views or arguments may be submitted to: Johanna Duncan-Poitier, Senior Deputy Commissioner of Education - P16, Education Department, 2M West Wing, Education Bldg., 89 Washington Ave., Albany, NY 12234, (518) 474-3862, e-mail: p16education@mail.nysed.gov

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

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

Section 6401-a of the Education Law, as added by Chapter 57 of the Laws of 2007, authorizes the Commissioner of Education to award state aid for high needs nursing programs at certain independent colleges and universities and to promulgate any regulations necessary to implement the requirements of this section.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment carries out the legislative objectives set forth in the aforementioned statutes in that it establishes the eligibility criteria and the requirements and procedures certain independent colleges and universities and the Commissioner of Education must follow when applying for, or awarding state aid for high needs nursing programs, in order to implement the requirements of Chapter 57 of the Laws of 2007.

3. NEEDS AND BENEFITS:

Section 6401-a of the Education Law, as added by Chapter 57 of the Laws of 2007, authorizes the Commissioner of Education to award state aid for high needs nursing programs at certain independent institutions of higher education within the State. In order to conform with the new requirements set forth in section 6401-a of the Education Law, the proposed amendment establishes eligibility criteria and the requirements and procedures for certain eligible institutions and the Commissioner of Education to follow when applying for, and awarding, state aid under this section. Specifically, the amendment makes the following changes:

The amendment authorizes the Commissioner of Education to grant State aid awards to each eligible institution within the amounts appropriated for such purpose, not to exceed one million dollars and based on the availability of funds. In the event that the appropriation cannot fully fund such awards, the proposed amendment allows the Commissioner to appropriate the monies to each eligible institution proportionately based on available funds and pursuant to a schedule determined by the Commissioner.

The awards are computed by multiplying an amount not to exceed two hundred fifty dollars for each full-time student enrolled in a high needs nursing program at an eligible two year degree institution and an amount not to exceed five hundred dollars for each full-time student enrolled in a high needs nursing program at an eligible four year degree institution in the fall semester preceding the annual period for which such an appropriation is made.

This amendment defines an eligible institution as a higher education institution that meets the following requirements: (1) the institution must be a non-profit or independent college or university incorporated by the Regents or the Legislature that is geographically located in New York State; (2) the institution must maintain an earned nursing degree program registered by the department, culminating in an associate degree or higher, excluding any online nursing degree program offered via the internet; (3) the institution must meet such standards of educational quality applicable to comparable public institutions of higher education, as may be from time to time established by the Regents; and (4) the institution must meet the requirements for State aid under the constitutions of the United States and the State of New York. The amendment also defines high needs nursing program as any nursing program registered by the department at an eligible institution and shall not include online or internet nursing degree programs.

The proposed amendment requires each eligible institution that wishes to apply for State aid pursuant to this section to apply to the Commissioner by September 15 of the academic year in which they are seeking State aid. It also requires each eligible institution applying for State aid under this section to submit a certification by their chief executive officer to the Commissioner, by November 15 of each year, certifying the number of full-time students enrolled in a high needs nursing program at such institution in the fall semester.

The proposed amendment clarifies that an eligible two year degree institution which has received authority to confer bachelor degrees shall continue to be considered an eligible two year degree institution until such time as it has actually begun to confer bachelors' degrees. Also, in the case of a jointly registered nursing degree program at more than one eligible institution, the proposed amendment clarifies that the eligible institution granting the degree shall receive the State aid award under this section.

Other than the annual application and certified enrollment report mentioned above, the amendment does not add or alter any other reporting or recordkeeping requirements for independent colleges and universities, in-

cluding those located in rural areas. The amendment will not require regulated parties to acquire professional services.

4. COSTS:

a. Costs to the State government. The proposed amendment will not impose additional costs on State government.

b. Costs to local government. None.

c. Costs to private regulatory parties. The proposed amendment may impose negligible costs on regulated entities when applying for state aid awards under Section 6401-a of the Education Law. Specifically, an annual negligible cost may be imposed on regulated parties to complete the required application form and the certified enrollment report.

d. Costs to the regulatory agency. The proposed amendment, which provides for State aid for high needs nursing programs for certain independent institutions of higher learning will add one time negligible additional responsibilities for the State Education Department to develop a basic application and an enrollment report form. The Department will administer the program using existing staff and resources.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment will not impose any new mandates on local governments.

6. PAPERWORK:

Other than the annual application and certified enrollment report mentioned above, the amendment does not add or alter any other reporting or recordkeeping requirements for independent colleges and universities, including those located in rural areas. The amendment will not require regulated parties to acquire professional services.

7. DUPLICATION:

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

8. ALTERNATIVES:

There are no viable alternatives to the proposed amendment at this time.

9. FEDERAL STANDARDS:

The proposed amendment provides for State aid for high needs nursing programs for certain independent institutions of higher learning, and requires institutions to be eligible for state aid under the provisions of the constitution of the United States and the constitution of the State of New York.

10. COMPLIANCE SCHEDULE:

Consistent with the effective date of the statute, the proposed amendment applies to certain eligible independent colleges and universities applying for state aid for high needs nursing programs beginning on July 1, 2007.

Regulatory Flexibility Analysis

Section 6401-a of the Education Law, as added by Chapter 57 of the Laws of 2007, authorizes the Commissioner of Education to award state aid for high needs nursing programs at certain independent institutions of higher education within the State. In order to conform with the new requirements set forth in Section 6401-a of the Education Law, the proposed amendment establishes the eligibility criteria and requirements and procedures for eligible institutions and the Commissioner of Education to follow when applying for, and awarding state aid under this section.

Based on 2005-2006 academic year data, the Department estimates that approximately 43 colleges and universities will be eligible for state aid for high needs nursing programs under Section 6401-a of the Education Law. However, in order to be eligible for state aid under this section, the institution must be a non-profit or independent college or university. Accordingly, the institutions applying for state aid under this section are not small businesses.

Because it is evident from the nature of the proposed amendment that it will not affect small businesses or local governments, no further steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis is not required and one has not been prepared.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment applies to certain independent colleges and universities in New York State with high needs nursing programs registered by the State Education Department. Based on 2005-2006 academic year data, the Department estimates that approximately 43 colleges and universities will be eligible for state aid under the proposed regulation. Of these, approximately 12 are located in rural areas, defined as the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less.

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

Section 6401-a of the Education Law, as added by Chapter 57 of the Laws of 2007, authorizes the Commissioner of Education to award state aid for high needs nursing programs at certain independent institutions of higher education within the State. In order to conform with the new requirements set forth in Section 6401-a of the Education Law, the proposed amendment establishes eligibility criteria and the requirements and procedures for certain eligible institutions and the Commissioner of Education to follow when applying for, and awarding, state aid under this section. Specifically, the amendment makes the following changes:

The amendment authorizes the Commissioner of Education to grant State aid awards to each eligible institution within the amounts appropriated for such purpose, not to exceed one million dollars and based on the availability of funds. In the event that the appropriation cannot fully fund such awards, the proposed amendment allows the Commissioner to appropriate the monies to each eligible institution proportionately based on available funds and pursuant to a schedule determined by the Commissioner.

The awards are computed by multiplying an amount not to exceed two hundred fifty dollars for each full-time student enrolled in a high needs nursing program at an eligible two year degree institution and an amount not to exceed five hundred dollars for each full-time student enrolled in a high needs nursing program at an eligible four year degree institution in the fall semester preceding the annual period for which such an appropriation is made.

This amendment defines an eligible institution as a higher education institution that meets the following requirements: (1) the institution must be a non-profit or independent college or university incorporated by the Regents or the Legislature that is geographically located in New York State; (2) the institution must maintain an earned nursing degree program registered by the department, culminating in an associate degree or higher, excluding any online nursing degree program offered via the internet; (3) the institution must meet such standards of educational quality applicable to comparable public institutions of higher education, as may be from time to time established by the Regents; and (4) the institution must meet the requirements for State aid under the constitutions of the United States and the State of New York. The amendment also defines high needs nursing program as any nursing program registered by the department at an eligible institution and shall not include online or internet nursing degree programs.

The proposed amendment requires each eligible institution that wishes to apply for State aid pursuant to this section to apply to the Commissioner by September 15 of the academic year in which they are seeking State aid. It also requires each eligible institution applying for State aid under this section to submit a certification by their chief executive officer to the Commissioner, by November 15 of each year, certifying the number of full-time students enrolled in a high needs nursing program at such institution in the fall semester.

The proposed amendment clarifies that an eligible two year degree institution which has received authority to confer bachelor degrees shall continue to be considered an eligible two year degree institution until such time as it has actually begun to confer bachelors' degrees. Also, in the case of a jointly registered nursing degree program at more than one eligible institution, the proposed amendment clarifies that the eligible institution granting the degree shall receive the State aid award under this section.

Other than the annual application and certified enrollment report mentioned above, the amendment does not add or alter any other reporting or recordkeeping requirements for independent colleges and universities, including those located in rural areas. The amendment will not require regulated parties to acquire professional services.

3. COSTS:

The proposed amendment implements specific statutory requirements for certain eligible independent colleges and universities. However, the proposed regulation may result in minimal costs to these regulated entities in order to complete the application form and the certified enrollment report.

4. MINIMIZING ADVERSE IMPACT:

The proposed amendment implements the requirements of Chapter 57 of the Laws of 2007. The statute makes no exception and does not impose different requirements for eligible independent colleges and universities located in rural areas. The proposed amendment has been carefully drafted to implement the statutory mandates. The intent of the statute is to establish the eligibility criteria and the requirements and procedures for eligible institutions and the Commissioner of Education to meet, when applying for and/or awarding state aid under this section. Because of the nature of the

proposed amendment, imposing different standards for rural entities would be inappropriate.

5. RURAL AREA PARTICIPATION:

A copy of the proposed amendment was shared with each of the independent colleges and universities in New York State with high needs nursing programs, including those located in rural areas.

In addition, comments on the proposed amendment were solicited from the Rural Education Advisory Committee, whose membership includes, among others, representatives of school districts, BOCES, business interests, and government entities located in rural areas.

Job Impact Statement

Section 6401-a of the Education Law, as added by Chapter 57 of the Laws of 2007, authorizes the Commissioner of Education to award state aid to certain eligible independent colleges and universities for high needs nursing programs. In order to implement the requirements of section 6401-a, the proposed amendment is need to establish the eligibility criteria for such awards, the application process and the reporting requirements for independent colleges and universities that wish to apply for State aid for high needs nursing programs under this section.

The amendment implements statutory requirements and will have no impact on jobs or employment opportunities. Because it is evident from the nature of this proposed amendment that it will have no impact on jobs or employment opportunities, no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one was not prepared.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Administration of Ability-to-Benefit Tests for Eligibility for Awards and Loans

I.D. No. EDU-26-07-00010-P

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

Proposed action: Addition of section 145-2.15 to Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided) and 661(4) and L. 2007, ch. 57

Subject: Administration of ability-to-benefit tests for eligibility for awards and loans.

Purpose: To identify certain ability-to-benefit tests and the passing scores for such tests that the Board of Regents approves for purposes of eligibility for awards and loans under section 661 of the Education Law. The proposed amendment also establishes criteria that the department will utilize to determine if an approved ability-to-benefit test is independently administered; in order to implement the requirements of chapter 57 of the Laws of 2007.

Text of proposed rule: Section 145-2.15 of the Regulations of the Commissioner of Education is added, effective October 4, 2007, as follows:

§ 145-2.15. Administration of ability-to-benefit tests for purposes of eligibility for awards and loans.

(a) *Applicability.* To the extent authorized by Chapter 57 of the Laws of 2007 and section 661 of the Education Law, this section identifies certain ability-to-benefit tests approved by the Board of Regents and the passing scores for such tests, for purposes of eligibility for general awards, academic performance awards or student loans prescribed under section 661 of the Education Law. This section also establishes the criteria the commissioner will utilize to determine whether an approved ability-to-benefit test is independently administered. Such requirements shall be applicable to students who first receive aid pursuant to section 661 of the Education Law in academic year 2007-2008.

(b) *Definitions.* For purposes of this section:

(1) *Assessment center* means a center that:

(i) is not located and/or affiliated with an eligible institution as defined in this subdivision; or

(ii) is located at an eligible institution if the following requirements are met:

(a) the center is responsible for gathering and evaluating the information about individual students for multiple purposes, including appropriate course placement;

(b) the center is independent of the admissions and financial aid processes at the institution in which it is located;

(c) the center is staffed by professional employees who have been trained in test administration and federal guidelines regarding the administration of ability-to-benefit tests and who are not employed

through the admissions, student financial aid, or registrar's offices of the institution; and

(d) the center does not have as its primary purpose the administration of ability-to-benefit tests.

(2) *Federally approved ability-to-benefit test* means an ability-to-benefit test approved by the Secretary for federal financial aid purposes.

(3) *School providing secondary education from a state within the United States* means a school authorized, recognized or approved by a State of the Union, American Samoa, the Commonwealth of Puerto Rico, the District of Columbia, Guam, the United States Virgin Islands, the Commonwealth of the Northern Mariana Islands, the Republic of the Marshall Islands, the Federated States of Micronesia, or the Republic of Palau.

(4) *Secretary* means the Secretary of the United States Department of Education or any official or employee of the Department acting for the Secretary under a delegation of authority.

(c) *Ability-to-benefit tests approved by the Board of Regents for eligibility for awards and loans* under section 661 of the Education Law.

(1) For students first receiving aid pursuant to Section 661 of the Education Law in the 2007-2008 academic year and each academic year thereafter, students shall have a certificate of graduation from a recognized school providing secondary education from a state within the United States, or the recognized equivalent of such certificate, or receive a passing score on a federally approved ability-to-benefit test identified by the Board of Regents as satisfying the eligibility requirements of this section that has been independently administered and evaluated, as defined by the commissioner in subdivision (e) of this section.

(2) For purposes of eligibility for awards and loans under section 661 of the Education Law, the department shall publish a list of ability-to-benefit tests that the Board of Regents has identified as satisfactory in determining eligibility to receive a first award in the academic year 2007-2008 and each year thereafter for students without a certificate of graduation from a school providing secondary education from a state within the United States or the recognized equivalent of such a certificate. The identification of such tests shall be without term unless the department determines that a test is no longer satisfactory in determining eligibility for awards and loans under section 661 of the Education Law or the Secretary discontinues federal recognition of such test.

(d) *Satisfactory passing score.* For purposes of eligibility for awards and loans under section 661 of the Education Law, an eligible institution shall submit for approval by the Board of Regents, the passing score it proposes to utilize on any ability-to-benefit test approved by the Board of Regents under subdivision (c) of this section, in a form prescribed by the commissioner. Such score shall not be lower than the score set by the Secretary and the eligible institution shall submit an explanation of its reasons for selecting such passing score and any other information the commissioner may require. Approval of such passing score shall be without term unless the department determines that the passing score is no longer satisfactory in determining eligibility for awards and loans under section 661 of the Education Law or the institution seeks to change such passing score or no longer offers the approved ability-to-benefit test.

In determining whether to approve the proposed score or scores, the commissioner shall take into consideration the following factors:

(1) the level of curricula the institution offers, as provided in section 52.2(c) of this title;

(2) the admission criteria and procedures the institution utilizes to evaluate the capacity of a student to undertake a course of study and the capacity of the institution to provide instructional and other support services to ensure that the student can complete the course of study, as is required by section 52.2(d)(2) of this Title;

(3) evidence that the admission criteria and procedures that the institution utilizes are effective in admitting only persons who have the capacity to undertake a course of study and that the institution provides proper instructional and support services;

(4) the adequacy of the academic support services the institution provides under section 52.2(f)(2) of this Title, which shall be evidenced by the institution's record in promoting successful student outcomes; the percentage of first-time students enrolling in noncredit remedial courses; the percentage of first-time students returning at the beginning of the next academic year; the percentage of first-time students earning an associate degree within three years or a baccalaureate degree within six years from the date they entered the institution and such other information as the commissioner shall specify; and

(5) evidence that the institution evaluates the success of its academic and other support services in providing instructional and other support

services that the student needs to complete the program and that the institution uses the evaluation to improve those services and to modify its admission criteria and procedures.

(e) *Independent administration and evaluation of ability-to-benefit test.* For purposes of meeting the eligibility requirements for awards or loans under section 661 of the Education Law, the institution shall independently administer ability-to-benefit tests approved by the Board of Regents in accordance with the requirements of this section. The department will consider an ability-to-benefit test to be independently administered and evaluated if the following requirements are met:

(1) *the test is administered at an assessment center that is not located and/or affiliated with the institution for which the student is seeking enrollment and the test administrator is an employee of such center; or*

(2) *the test is administered at a degree-granting institution that confers two-year or four-year degrees or an institution that qualifies as an eligible public vocational institution and the chief executive officer of such institution certifies annually, in a form prescribed by the commissioner, that:*

(i) *the test is administered by a unit of the institution that is responsible for other forms of testing or for a provision of academic support services, or both, and such unit does not report to officers responsible for admissions or the administration of student financial aid for such institution;*

(ii) *the test is administered in an environment that is separate, secure, closed and continuously monitored during testing;*

(iii) *students are required to provide written verification of identity, such as a photo identification, and to sign in prior to taking the test and students are prohibited from bringing into the test area any materials prohibited by the test publisher and are required to leave the test area immediately upon completion of the test;*

(iv) *the test is proctored by professional employees who have been trained in test administration and federal guidelines regarding the administration of ability-to-benefit tests and who are not employed through the admissions, student financial aid, or registrar's offices of the institution;*

(v) *each test used for ability to benefit purposes is administered to all students together and the test administrator is unaware which students are taking the test for ability to benefit purposes until after the test is completed and scored;*

(vi) *the scoring of ability-to-benefit tests is overseen by institutional employees who are not employed through the admissions, student financial aid, or registrar's offices and such scores are verified by more than one employee;*

(vii) *all tests, test results, and test databases, if any, are kept in locked and secure containers;*

(viii) *the test administrator has no prior financial or ownership interest in the institution, its affiliates, or its parent corporation, other than the interest obtained through its agreement to administer the test;*

(ix) *the test administrator is not a current or former employee of, or consultant to, the institution, its affiliates, or its parent corporation;*

(x) *the test administrator is not a current or former member of the board of directors, a current or former employee or a consultant to a member of the board of directors or a chief executive officer;*

(xi) *the test administrator is not a current or former student of the institution;*

(xii) *the test administrator is not scoring the test; and*

(xiii) *the annual certification shall also include the following information relating to the previous academic year: the number of students examined, the number of re-tests administered, the scores on all ability-to-benefit tests for each student examined, the number of students achieving passing scores on such tests, the number of students tested that are enrolling in such institution and the success of tested students in terms of retention and graduation.*

(3) *The commissioner will not consider a test independently administered if an institution:*

(i) *compromises test security or testing procedures;*

(ii) *pays a test administrator a bonus, commission, or any other incentive based upon the test scores or pass rates of its students who take the test; or*

(iii) *otherwise interferes with the test administrator's independence or test administration.*

(4) *Any institution administering an ability-to-benefit test shall maintain a record for each student who sat for an ability-to-benefit test under this section, including the name of test taken by such student, the date of the test and the student's scores on such tests.*

(5) *Upon request, the eligible institution shall provide the commissioner with access to test records or other documents related to an audit, investigation or program review of the institution.*

(6) *If the commissioner finds that an institution has violated the certification procedures or the ability-to-benefit test procedures under this section, the commissioner shall have the authority to require an eligible institution to employ an assessment center independent of such institution.*

Text of proposed 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

Data, views or arguments may be submitted to: Johanna Duncan-Poitier, Senior Deputy Commissioner of Education - P16, Education Department, 2M West Wing, Education Bldg., 89 Washington Ave., Albany, NY 12234, (518) 474-3862, e-mail: p16education@mail.nysed.gov

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

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

Paragraph (d) of subdivision (4) of Section 661 of the Education Law, as added by Chapter 57 of the Laws of 2007, requires students who are first receiving State aid in academic year 2006-2007, to have a certificate of graduation from a recognized school providing secondary education within the United States, or the recognized equivalent of such certificate, or have been admitted to such institution after receiving a passing score on a federally approved ability-to-benefit test that has been independently administered and evaluated, as provided by the commissioner.

Paragraph (e) of subdivision (4) of section 661 of the Education Law, as added by Chapter 57 of the Laws of 2007, requires students seeking State financial aid for the first time in the 2007-2008 academic year or thereafter, to have a certificate of graduation from a school providing secondary education from a state within the United States or the recognized equivalent of such certificate, or receive a passing score on a federally approved ability-to-benefit test that has been identified by the Board of Regents as satisfying the eligibility requirements of this section and has been independently administered and evaluated as defined by the Commissioner.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment carries out the legislative objectives of the above-referenced statutes by establishing procedures for the identification of acceptable federally approved ability-to-benefit tests and the passing scores for such tests, and the requirements for the independent administration of such tests so that students applying for State student financial aid for the first time in academic year 2007-2008, who do not hold a diploma from a high school located in the United States, or its recognized equivalent, may be found eligible for such aid.

3. NEEDS AND BENEFITS:

Education Law Section 661 sets forth the eligibility requirements and procedures governing awards and loans under the State student financial aid programs established in Articles 13 and 14 of the Education Law. Chapter 57 of the Laws of 2007, adds paragraphs (d) and (e) to subdivision (4) of Section 661 of the Education Law, setting forth new requirements to be met by students who do not hold diplomas from high schools located within the United States, or its recognized equivalent, seeking State financial aid for the first time in the 2007-2008 academic year.

Currently, under the federal Higher Education Act, students seeking to qualify for Pell grants or other federal Title IV aid who do not have a high school diploma or its recognized equivalent must demonstrate the ability to benefit from the education or training provided by achieving a score set by the Secretary of the United States Department of Education ("Secretary") on an ability-to-benefit test approved by the Secretary. At this time, there are seven ability-to-benefit tests approved by the Secretary: Accuplacer, ASSET Program/Compass, Career Programs Assessment (CPAT), Combined English Language Skills Assessment (CELSA), Descriptive Tests of Language Skills (DTLS) and Descriptive Tests of Mathematical Skills (DTMS), Wonderlic Basic Skills Test, and WorkKeys Program.

Prior to the 2007-2008 academic year, a student applying for State student financial aid who did not have a diploma from a U.S. high school, or its recognized equivalent, was required to achieve a passing score set by the Secretary, on an ability-to-benefit test approved by the Secretary. Section 661(4)(e) of the Education Law, as added by Chapter 57 of the Laws of 2007, modifies this requirement. Now, students seeking State

financial aid for the first time in the 2007-2008 academic year, without a high school diploma or the recognized equivalent of such, must achieve a passing score on an ability-to-benefit test approved by the Board of Regents and the test must be independently administered as defined by the Commissioner.

The proposed regulation requires the Board of Regents to publish a list of the federally approved ability-to-benefit tests that the Board of Regents has identified as satisfactory in determining eligibility for State aid for students without a high school diploma from the United States, or its recognized equivalent. For the fall semester of the 2007-2008 academic year, all seven federally approved ability-to-benefit tests may be used. For terms subsequent to the fall semester of the 2007-2008 academic year, the Department intends to identify and publish a list of federally approved ability-to-benefit tests that the Board of Regents identifies as satisfactory in determining eligibility to receive a State aid award. Once identified, such tests shall be without term unless the department determines that a test is no longer satisfactory in determining eligibility for awards and loans or the Secretary discontinues federal recognition of such test.

The proposed amendment requires each eligible institution to submit for approval by the Board of Regents, the passing score it proposes to utilize on any approved ability-to-benefit test, however, the passing score may not be lower than the federally approved score for such test. For the fall semester of the 2007-2008 academic term, eligible institutions may utilize any passing score that is not lower than the federally approved score. For academic terms subsequent to the fall semester of the 2007-2008 academic term, in determining whether to approve an institution's proposed passing score, the proposed amendment requires that the Board of Regents take into consideration the following factors; (1) the curricula the institution offers; (2) the admission criteria and procedures the institution uses to evaluate the capacity of a student to undertake a course of study and the capacity of the institution to provide instructional and other support services that the student needs to complete the program; (3) evidence that the admission criteria and procedures that the institution utilizes are effective in admitting only persons who have the capacity to undertake a course of study; (4) the adequacy of the academic support services the institution provides; and (5) evidence that the institution evaluates the success of its academic and other support services in providing instructional and other support that the student needs to complete the program. Once approved, an institution's passing score(s) will remain approved unless the institution proposes to change such score(s) or the Board of Regents determines that such passing score is no longer satisfactory in determining eligibility for awards and loans under Section 661 of the Education Law.

The proposed regulation also sets forth the factors the Department will consider to determine if an ability-to-benefit is independently administered and evaluated. For the fall semester of the 2007-2008 academic year, the test will be deemed independently administered if its administration meets the criteria set forth in federal regulations. For academic terms subsequent to the fall semester of the 2007-2008 academic year, the regulation provides that an ability-to-benefit test is independently administered if the test is administered by an assessment center not located at, or affiliated with, the institution for which the student is seeking enrollment and the test administrator is an employee of such center. If the ability-to-benefit test is administered at an eligible institution, the chief executive officer of such institution shall provide an annual certification to the Department that it independently administers such tests according to the factors delineated in the regulation. If the Department finds that an institution has violated the certification procedure or the federal ability-to-benefit procedures, it may require the institution to use an assessment center external to the institution.

4. COSTS:

(a) Costs to State government. This amendment will not impose any additional costs on State government over and above those resulting from the enactment of Chapter 57 of the Laws of 2007.

(b) Costs to local government. The State Education Department believes that the proposed amendment will result in minimal costs over and above those resulting from enactment of Chapter 57 of the Laws of 2007.

The proposed amendment may impose negligible costs on institutions eligible to participate in State student financial aid programs that admit students without a diploma from a U.S. high school and seek to qualify such students for State student financial aid. Each such eligible institution would be required to submit an application for approval of the passing score it proposes to utilize. However, once the institution's passing score(s) is approved by the Board of Regents, an institution's passing score(s) will remain approved unless the institution proposes to change them or the Department revokes the approval for cause.

To administer an ability-to-benefit test on campus, each such eligible institution would be required to submit to the Department an annual certification by their chief executive officer that its administration of these tests meets the requirements set forth in the text of the regulation. The majority of the requirements set forth in the regulation for the independent administration of such tests duplicate the requirements set forth in the federal Higher Education Act and its corresponding federal regulations. Therefore, eligible institutions should already be administering ability-to-benefit tests in a similar manner and any additional costs imposed by this regulation should be minimal.

Since the amendment proposes minimal reporting and recordkeeping requirements, the Department expects that existing staff at eligible institutions will have the necessary expertise to satisfy the requirements of the proposed amendment as part of their ongoing responsibilities.

Minimal costs may arise in the sponsor contributions to the budgets of community colleges that are subject to approval by the sponsoring local government(s).

(c) Costs to private regulated parties. As stated above under "Costs to local government", private regulated parties may incur minimal costs to submit an application for approval of the passing score it proposes to utilize and to complete the annual certification required of institutions that wish to administer ability-to-benefit tests on campus.

(d) Costs to the regulatory agency. The proposed amendment may add one time negligible additional responsibilities for the State Education Department to develop a basic application and an annual certification form. The Department will administer the program using existing staff and resources.

5. LOCAL GOVERNMENT MANDATES:

As noted above, the proposed amendment establishes procedures for identifying acceptable federally approved ability-to-benefit tests, the passing scores for such tests and the requirements for the independent administration of such tests, for students applying for State student financial aid for the first time in academic year 2007-2008, who do not hold a diploma from a high school located in the United States, or its recognized equivalent. It will affect all institutions eligible to participate in State student financial aid programs, including locally-sponsored community colleges that admit such students and seek to qualify them for State student financial aid. The State Education Department estimates that at least 21 community colleges may be affected by the proposed regulation.

6. PAPERWORK:

The proposed amendment requires additional paperwork only for institutions eligible to participate in State student aid programs that admit students without a diploma from a U.S. high school and seek to qualify such students for State student financial aid. Each such eligible institution would be required to submit an application for approval of the passing score it proposes to use, including information to assist the State Education Department, in determining whether to approve a score, about the curricula the institution offers, admission criteria and procedures the institution uses in its evaluation of the capacity of a student to undertake a course of study and the capacity of the institution to provide instructional and other support that the student needs to complete the program, and adequacy of the academic support services the institution provides. Once approved, an institution's passing score(s) will remain approved unless the institution proposes to change them or the Department revokes the approval for cause.

To administer an ability-to-benefit test on campus, each such eligible institution would also be required to have its chief executive officer annually certify to the Department that its administration of the tests meets the requirements set forth in the text of the regulation.

Since the amendment proposes minimal reporting and recordkeeping requirements, the Department expects that existing staff at eligible institutions will have the necessary expertise to satisfy the requirements of the proposed amendment as part of their ongoing responsibilities.

7. DUPLICATION:

The provisions of the proposed amendment are required to carry into effect the requirements of paragraph (e) of subdivision (4) of section 661 of the Education Law, as added by Chapter 57 of the Laws of 2007. The criteria the State Education Department will utilize in reviewing applications by eligible institutions to set passing scores on acceptable ability-to-benefit tests are already required of those institutions in the standards for the registration of undergraduate and graduate curricula set forth in Part 52 of the Regulations of the Commissioner of Education. The definition for assessment center is similar to the federal definition set forth in Section 668.142 of the Code of Federal Regulations and the criteria set forth in the proposed amendment for independent administration builds upon the fed-

eral requirements set forth in Section 668-151 of the Code of Federal Regulations.

8. ALTERNATIVES:

In developing the proposed regulation, the State Education Department consulted with a working group that represented The City University of New York Central Administration, the State University of New York System Administration, Clarkson University, The College of New Rochelle, Touro College, the Commission on Independent Colleges and Universities, Monroe College, Plaza College, the Association of Proprietary Colleges, and the New York State Higher Education Services Corporation. The proposed regulation represents the result of that consultation. There are no viable alternatives to the proposed amendment.

9. FEDERAL STANDARDS:

The proposed amendment builds on federal standards for the administration of federal student financial aid programs established under Title IV of the Higher Education Act and its corresponding regulations. Specifically, the definition for assessment center is similar to the federal definition set forth in Section 668.142 of the Code of Federal Regulations and the criteria set forth in the proposed amendment for independent administration builds upon the federal requirements set forth in Section 668-151 of the Code of Federal Regulations.

10. COMPLIANCE SCHEDULE:

The amendment would be effective on its stated effective date.

Regulatory Flexibility Analysis

(a) Small Businesses:

1. EFFECT OF RULE:

In order to implement the requirements of paragraphs (d) and (e) of subdivision (4) of Section 661 of the Education Law, as added by Chapter 57 of the Laws of 2007, the proposed amendment sets forth the procedures for the identification of federally approved ability-to-benefit tests and the passing scores for such tests that the Board of Regents will deem approved as an alternative for students applying for State financial aid, and the requirements for the independent administration of such tests. The State Education Department estimates that 21 of the eligible 42 proprietary colleges in the State are small businesses with 100 or fewer employees.

2. COMPLIANCE REQUIREMENTS:

Prior to the 2007-2008 academic year, a student applying for State student financial aid who did not have a diploma from a U.S. high school, or its recognized equivalent, was required to achieve a passing score set by the Secretary of the United States Department of Education ("Secretary"), on an ability-to-benefit test approved by the Secretary. Section 661(4)(e) of the Education Law, as added by Chapter 57 of the Laws of 2007, modifies this requirement. Now, students seeking State financial aid for the first time in the 2007-2008 academic year, without a high school diploma or the recognized equivalent of such, must achieve a passing score on a federally approved ability-to-benefit test identified by the Board of Regents as satisfactory in determining eligibility for awards and loans and the test must be independently administered as defined by the Commissioner.

The proposed regulation requires the Board of Regents to publish a list of the federally approved ability-to-benefit tests that the Board of Regents has identified as satisfactory in determining eligibility for State aid for students without a high school diploma from the United States, or its recognized equivalent. For the fall semester of the 2007-2008 academic year, all seven federally approved ability-to-benefit tests may be used. For terms subsequent to the fall semester of the 2007-2008 academic year, the Department intends to identify and publish a list of federally approved ability-to-benefit tests that the Board of Regents identifies as satisfactory in determining eligibility to receive a State aid award. Once identified, such tests shall be without term unless the department determines that a test is no longer satisfactory in determining eligibility for awards and loans or the Secretary discontinues federal recognition of such test.

The proposed amendment requires each eligible institution to submit for approval by the Board of Regents, the passing score it proposes to utilize on any approved ability-to-benefit test, however, the passing score may not be lower than the federally approved score for such test. For the fall semester of the 2007-2008 academic term, eligible institutions may utilize any passing score that is not lower than the federally approved score. For academic terms subsequent to the fall semester of the 2007-2008 academic term, in determining whether to approve an institution's proposed passing score, the proposed amendment requires that the Board of Regents take into consideration the following factors: (1) the curricula the institution offers; (2) the admission criteria and procedures the institution uses to evaluate the capacity of a student to undertake a course of study and the capacity of the institution to provide instructional and other support

services that the student needs to complete the program; (3) evidence that the admission criteria and procedures that the institution utilizes are effective in admitting only persons who have the capacity to undertake a course of study; (4) the adequacy of the academic support services the institution provides; and (5) evidence that the institution evaluates the success of its academic and other support services in providing instructional and other support that the student needs to complete the program. Once approved, an institution's passing score(s) will remain approved unless the institution proposes to change such score(s) or the Board of Regents determines that such passing score is no longer satisfactory in determining eligibility for awards and loans under Section 661 of the Education Law.

The proposed regulation also sets forth the factors a department will consider to determine if an ability-to-benefit is independently administered and evaluated. For the fall semester of the 2007-2008 academic year, the test will be deemed independently administered if its administration meets the criteria set forth in federal regulations. For academic terms subsequent to the fall semester of the 2007-2008 academic year, the regulation provides that an ability-to-benefit test is independently administered if the test is administered by an assessment center not located at, or affiliated with, the institution at which the student is seeking enrollment and the test administrator is an employee of such center. If the ability-to-benefit test is administered at an eligible institution, the chief executive officer of such institution shall provide an annual certification to the Department that it independently administers such tests according to the factors delineated in the regulation. If the Department finds that an institution has violated the certification procedure or the federal ability-to-benefit procedures, it may require the institution to use an assessment center external to the institution.

3. PROFESSIONAL SERVICES:

The proposed amendment will not require eligible institutions that are classified as small businesses to hire professional services to comply. The State Education Department expects that existing staff at eligible institutions will have the necessary expertise to satisfy the requirements of the proposed amendment as part of their ongoing responsibilities.

4. COMPLIANCE COSTS:

The proposed amendment may impose negligible costs on institutions eligible to participate in State student aid programs that admit students without a diploma from a U.S. high school and seek to qualify such students for State student financial aid. Each such eligible institution would be required to submit an application for approval of the passing score it proposes to use, including information to assist the State Education Department, in determining whether to approve a score, about the curricula the institution offers, admission criteria and procedures the institution uses in its evaluation of the capacity of a student to undertake a course of study and the capacity of the institution to provide instructional and other support that the student needs to complete the program, and adequacy of the academic support services the institution provides. However, once approved, an institution's passing score(s) will remain approved unless the institution proposes to change them or the Department revokes the approval for cause.

To administer an ability-to-benefit test on campus, each such eligible institution would be required to submit to the Department an annual certification by their chief executive officer that its administration of these tests meets the requirements set forth in the text of the regulation. The majority of the requirements set forth in the regulation for the independent administration of such tests duplicate requirements set forth in the federal Higher Education Act and its corresponding federal regulations. Therefore, eligible institutions should already be administering ability-to-benefit tests in a similar manner and any additional costs imposed by this regulation should be minimal.

Since the amendment proposes minimal reporting and recordkeeping requirements, the Department expects that existing staff at eligible institutions will have the necessary expertise to satisfy the requirements of the proposed amendment as part of their ongoing responsibilities.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment will not impose any technological requirements on eligible institutions that are classified as small businesses, and is economically feasible. See above "Compliance Costs" for the economic impact of the amendment.

6. MINIMIZING ADVERSE IMPACT:

Paragraphs (d) and (e) of subdivision (4) of section 661 of the Education Law, as added by Chapter 57 of the Laws of 2007, applies equally to all institutions eligible to participate in State student financial aid programs that admit students without a diploma from a U.S. high school and seek to qualify such students for State student financial aid, including those classi-

fied as small businesses. Consequently, the State Education Department believes that the proposed amendment, which sets forth the procedures for identification of federally approved ability-to-benefit tests and the passing scores for such tests, and the requirements for the independent administration of such tests must be uniformly applied to all such institutions.

7. SMALL BUSINESS PARTICIPATION:

Before drafting the proposed amendment, the State Education Department convened a working group comprised of persons knowledgeable about student financial aid and academic affairs, from all four sectors of higher education, including proprietary colleges that are classified as small businesses, as well as the president of the association of proprietary colleges, many of which are classified as small businesses. The comments they provided were taken into consideration when drafting the proposed amendment.

(b) Local Governments:

1. EFFECT OF RULE:

In order to implement the requirements of paragraphs (d) and (e) of subdivision (4) of Section 661 of the Education Law, as added by Chapter 57 of the Laws of 2007, the proposed amendment sets forth the procedures for the identification of federally approved ability-to-benefit tests and the passing scores for such tests that the Board of Regents will deem approved as an alternative for students applying for State financial aid, and the requirements for the independent administration of such tests. The State Education Department estimates that at least 21 community colleges may be effected by the proposed amendment.

2. COMPLIANCE REQUIREMENTS:

Prior to the 2007-2008 academic year, a student applying for State student financial aid who did not have a diploma from a U.S. high school, or its recognized equivalent, was required to achieve a passing score set by the Secretary of the United States Department of Education ("Secretary"), on an ability-to-benefit test approved by the Secretary. Section 661(4)(e) of the Education Law, as added by Chapter 57 of the Laws of 2007, modifies this requirement. Now, students seeking State financial aid for the first time in the 2007-2008 academic year, without a high school diploma or the recognized equivalent of such, must achieve a passing score on a federally approved ability-to-benefit test identified by the Board of Regents as acceptable for determining eligibility for awards and loans and the test must be independently administered, as defined by the Commissioner.

The proposed regulation requires the Board of Regents to publish a list of the federally approved ability-to-benefit tests that the Board of Regents has identified as satisfactory in determining eligibility for State aid for students without a high school diploma from the United States, or its recognized equivalent. For the fall semester of the 2007-2008 academic year, all seven federally approved ability-to-benefit tests may be used. For terms subsequent to the fall semester of the 2007-2008 academic year, the Department intends to identify and publish a list of federally approved ability-to-benefit tests that the Board of Regents identifies as satisfactory in determining eligibility to receive a State aid award. Once identified, such tests shall be without term unless the department determines that a test is no longer satisfactory in determining eligibility for awards and loans or the Secretary discontinues federal recognition of such test.

The proposed amendment requires each eligible institution to submit for approval by the Board of Regents, the passing score it proposes to utilize on any approved ability-to-benefit test, however, the passing score may not be lower than the federally approved score for such test. For the fall semester of the 2007-2008 academic term, eligible institutions may utilize any passing score that is not lower than the federally approved score. For academic terms subsequent to the fall semester of the 2007-2008 academic term, in determining whether to approve an institution's proposed passing score, the proposed amendment requires that the Board of Regents take into consideration the following factors: (1) the curricula the institution offers; (2) the admission criteria and procedures the institution uses to evaluate the capacity of a student to undertake a course of study and the capacity of the institution to provide instructional and other support services that the student needs to complete the program; (3) evidence that the admission criteria and procedures that the institution utilizes are effective in admitting only persons who have the capacity to undertake a course of study; (4) the adequacy of the academic support services the institution provides; and (5) evidence that the institution evaluates the success of its academic and other support services in providing instructional and other support that the student needs to complete the program. Once approved, an institution's passing score(s) will remain approved unless the institution proposes to change such score(s) or the Board of Regents determines that

such passing score is no longer satisfactory in determining eligibility for awards and loans under Section 661 of the Education Law.

The proposed regulation also sets forth the factors a department will consider to determine if an ability-to-benefit is independently administered and evaluated. For the fall semester of the 2007-2008 academic year, the test will be deemed independently administered if its administration meets the criteria set forth in federal regulations. For academic terms subsequent to the fall semester of the 2007-2008 academic year, the regulation provides that an ability-to-benefit test is independently administered if the test is administered by an assessment center not located at, or affiliated with, the institution for which the student is seeking enrollment and the test administrator is an employee of such center. If the ability-to-benefit test is administered at an eligible institution, the chief executive officer of such institution shall provide an annual certification to the Department that it independently administers such tests according to the factors delineated in the regulation. If the Department finds that an institution has violated the certification procedure or the federal ability-to-benefit procedures, it may require the institution to use an assessment center external to the institution.

3. PROFESSIONAL SERVICES:

The proposed amendment will not require eligible community colleges to hire professional services to comply. The State Education Department expects that existing staff at eligible institutions will have the necessary expertise to satisfy the requirements of the proposed amendment as part of their ongoing responsibilities.

4. COMPLIANCE COSTS:

The State Education Department believes that the proposed amendment will result in minimal costs over and above those resulting from enactment of Chapter 57 of the Laws of 2007.

The proposed amendment may impose negligible costs on institutions eligible to participate in State student financial aid programs that admit students without a diploma from a U.S. high school and seek to qualify such students for State student financial aid. Each such eligible institution would be required to submit an application for approval of the passing score it proposes to use, including information to assist the State Education Department, in determining whether to approve a score, about the curricula the institution offers, admission criteria and procedures the institution uses in its evaluation of the capacity of a student to undertake a course of study and the capacity of the institution to provide instructional and other support that the student needs to complete the program, and adequacy of the academic support services the institution provides. However, once approved, an institution's passing score(s) will remain approved unless the institution proposes to change them or the Department revokes the approval for cause.

To administer an ability-to-benefit test on campus, each such eligible institution would be required to submit to the Department an annual certification by their chief executive officer that its administration of these tests meets the requirements set forth in the text of the regulation. The majority of the requirements set forth in the regulation for the independent administration of such tests duplicate the requirements set forth in the federal Higher Education Act and its corresponding federal regulations. Therefore, eligible institutions should already be administering ability-to-benefit tests in a similar manner and any additional costs imposed by this regulation should be minimal.

Since the amendment proposes minimal reporting and recordkeeping requirements, the Department expects that existing staff at eligible institutions will have the necessary expertise to satisfy the requirements of the proposed amendment as part of their ongoing responsibilities.

Minimal costs may arise in the sponsor contributions to the budgets of community colleges that are subject to approval by the sponsoring local government(s).

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment will not impose any technological requirements on eligible community colleges, and is economically feasible. See above "Compliance Costs" for the economic impact of the amendment.

6. MINIMIZING ADVERSE IMPACT:

Paragraph (e) of subdivision (4) of section 661 of the Education Law, as added by Chapter 57 of the Laws of 2007, applies equally to all institutions eligible to participate in State student aid programs that admit students without a diploma from a U.S. high school and seek to qualify such students for State student financial aid, including community colleges. Consequently, the State Education Department believes that the proposed amendment, which sets forth the procedures for the identification of acceptable federally approved ability-to-benefit tests and the passing

scores for such tests, and the requirements for the independent administration of such tests, shall apply uniformly to all such institutions.

7. LOCAL GOVERNMENT PARTICIPATION:

Before drafting the proposed amendment, the State Education Department convened a work group comprised of persons knowledgeable about student financial aid and academic affairs, from all four sectors of higher education, including the Vice Chancellor for Community Colleges and other staff of the State University of New York System Administration and comparable staff of The City University of New York central administration. The comments they provided were taken into consideration when drafting the proposed amendment.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment establishes the procedures for the identification of acceptable federally approved ability-to-benefit tests and the passing scores for such tests, and the requirements for the independent administration of such tests, so that students applying for State student financial aid for the first time in the 2007-2008 academic year who do not hold a diploma from a high school located in the United States, or its recognized equivalent, may be found eligible for such aid. The proposed regulation only applies to institutions eligible to participate in State student financial aid programs that admit students without a diploma from a U.S. high school and seek to qualify such students for State student financial aid. The Department estimates that approximately 54 degree-granting institutions would be affected by the proposed regulation. Of these, the Department estimates that approximately 13 to 15 are located in the State's 44 rural counties with fewer than 200,000 inhabitants and 71 towns in urban counties with a population density of 150 per square mile or less.

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

Prior to the 2007-2008 academic year, a student applying for State student financial aid who did not have a diploma from a U.S. high school, or its recognized equivalent, was required to achieve a passing score set by the Secretary of the United States Department of Education ("Secretary"), on an ability-to-benefit test approved by the Secretary. Section 661(4)(e) of the Education Law, as added by Chapter 57 of the Laws of 2007, modifies this requirement. Now, students seeking State financial aid for the first time in the 2007-2008 academic year, without a high school diploma or the recognized equivalent of such, must achieve a passing score on a federally approved ability-to-benefit test identified by the Board of Regents as satisfactory in determining eligibility and the test must be independently administered, as defined by the Commissioner.

The proposed regulation requires the Board of Regents to publish a list of the federally approved ability-to-benefit tests that the Board of Regents has identified as satisfactory in determining eligibility for State aid for students without a high school diploma from the United States, or its recognized equivalent. For the fall semester of the 2007-2008 academic year, all seven federally approved ability-to-benefit tests may be utilized. For academic terms subsequent to the fall semester of the 2007-2008 academic year, the Department intends to identify and publish a list of federally approved ability-to-benefit tests that the Board of Regents identifies as satisfactory in determining eligibility to receive a State aid award. Once identified, such tests shall be without term unless the department determines that a test is no longer satisfactory in determining eligibility for awards and loans or the Secretary discontinues federal recognition of such test.

The proposed amendment requires each eligible institution to submit for approval by the Board of Regents, the passing score it proposes to utilize on any approved ability-to-benefit test, however, the passing score may not be lower than the federally approved score for such test. However, for the fall semester of the 2007-2008 academic term, eligible institutions may utilize any passing score that is not lower than the federally approved score. For academic terms subsequent to the fall semester of the 2007-2008 academic term, in determining whether to approve an institution's proposed passing score, the proposed amendment requires that the Board of Regents take into consideration the following factors: (1) the curricula the institution offers; (2) the admission criteria and procedures the institution uses to evaluate the capacity of a student to undertake a course of study and the capacity of the institution to provide instructional and other support services that the student needs to complete the program; (3) evidence that the admission criteria and procedures that the institution utilizes are effective in admitting only persons who have the capacity to undertake a course of study; (4) the adequacy of the academic support services the institution provides and (5) evidence that the institution evaluates the success of its academic and other support services in providing instructional and other

support that the student needs to complete the program. Once approved, an institution's passing score(s) will remain approved unless the institution proposes to change such score(s) or the Board of Regents determines that such passing score is no longer satisfactory in determining eligibility for awards and loans under Section 661 of the Education Law.

The proposed regulation also sets forth the factors the Department will consider to determine if an ability-to-benefit is independently administered and evaluated. For the fall semester of the 2007-2008 academic year, the test will be deemed independently administered if its administration meets the criteria set forth in federal regulations. For academic terms subsequent to the fall semester of the 2007-2008 academic year, the regulation provides that an ability-to-benefit test is independently administered if the test is administered by an assessment center not located at, or affiliated with, the institution for which the student is seeking enrollment and the test administrator is an employee of such center. If the ability-to-benefit test is administered at an eligible institution, the chief executive officer of such institution shall provide an annual certification to the Department that it independently administers such tests according to the factors delineated in the regulation. If the Department finds that an institution has violated the certification procedure or the federal ability-to-benefit procedures, it may require the institution to use an assessment center external to the institution.

The proposed amendment will not require eligible institutions, including those located in rural areas, to hire professional services to comply.

3. COSTS:

The proposed amendment may impose negligible costs on institutions eligible to participate in State student aid programs that admit students without a diploma from a U.S. high school and seek to qualify such students for State student financial aid, including those located in rural areas. Each such eligible institution would be required to submit an application for approval of the passing score it proposes to use, including information to assist the State Education Department, in determining whether to approve a score, about the curricula the institution offers, admission criteria and procedures the institution uses in its evaluation of the capacity of a student to undertake a course of study and the capacity of the institution to provide instructional and other support that the student needs to complete the program, and adequacy of the academic support services the institution provides. However, once approved, an institution's passing score(s) will remain approved unless the institution proposes to change them or the Department revokes the approval for cause.

To administer an ability-to-benefit test on campus, each such eligible institution would be required to submit to the Department an annual certification by their chief executive officer that its administration of these tests meets the requirements set forth in the text of the regulation. The majority of the requirements set forth in the regulation for the independent administration of such tests duplicate the requirements set forth in the federal Higher Education Act and its corresponding regulations. Therefore, eligible institutions should already be administering ability-to-benefit tests in a similar manner and any additional costs imposed by this regulation should be minimal.

Since the amendment proposes minimal reporting and recordkeeping requirements, the Department expects that existing staff at eligible institutions will have the necessary expertise to satisfy the requirements of the proposed amendment as part of their ongoing responsibilities.

4. MINIMIZING ADVERSE IMPACT:

The proposed amendment makes no exception for eligible institutions that are located in rural areas. Paragraph (e) of subdivision (4) of section 661 of the Education Law, as added by Chapter 57 of the Laws of 2007, applies equally to all institutions eligible to participate in State student aid programs that admit students without a diploma from a U.S. high school and seek to qualify such students for State student financial aid, including those located in rural areas. Consequently, the State Education Department believes that the proposed amendment, which sets forth the procedures for the identification of acceptable federally approved ability-to-benefit tests and scores on such tests, and the requirements for the independent administration of such tests, required by paragraph (e) of subdivision (4) of section 661, also must apply uniformly to all such institutions, including those located in rural areas and that it would be inappropriate to establish different standards for eligible institutions located in rural areas.

5. RURAL AREA PARTICIPATION:

Before drafting the proposed amendment, the State Education Department convened a work group comprised of persons knowledgeable about student financial aid and academic affairs from all four sectors of higher education. The group included representatives of eligible institutions located in rural areas, as well as of the Association of Proprietary Colleges,

the Commission on Independent Colleges and Universities, and the State University of New York system administration, many of whose institutions or campuses are located in rural areas. The comments they provided were taken into consideration when drafting the proposed amendment.

Job Impact Statement

The purpose of the proposed amendment is to identify certain ability-to-benefit tests and the passing scores for such tests that the Board of Regents approves for purposes of eligibility for awards and loans under Section 661 of the Education Law. The proposed amendment also establishes criteria that the Department will utilize to determine if an approved ability-to-benefit test is independently administered; in order to implement the requirements of Chapter 57 of the Laws of 2007.

Because it is evident from the nature of the proposed amendment that it will not affect jobs or 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.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Diagnostic Screening for Students who are New Entrants or who Have Low Test Scores in Reading or Mathematics

I.D. No. EDU-26-07-00011-P

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

Proposed action: Amendment of Part 117 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101 (not subdivided), 207 (not subdivided), 3208(5) and 4403(3)

Subject: Diagnostic screening for students who are new entrants or who have low test scores in reading or mathematics.

Purpose: To provide for the diagnostic screening of students who are new entrants to school or who have low test scores on the statewide reading or mathematics assessment and provide consistency between definitions in Part 117 and other provisions of the commissioner's regulations, specifically, conforming the definition of "handicapping condition" to the definitions of a "preschool student with a disability" and a "student with a disability".

Text of proposed rule: Part 117 of the Regulations of the Commissioner of Education is amended, effective October 4, 2007, as follows:

117.1 Scope of Part.

The purpose of this Part is to establish standards for the screening of every new entrant to the schools to determine which [pupils] *students* are possibly gifted, have or are suspected of having a [possible handicapping condition] *disability* in accordance with subdivision (6) of section 3208 of the Education Law and/or possibly are limited English proficient in accordance with subdivision 2-a of section 3204 of the Education Law.

117.2 Definitions.

As used in this Part:

(a) A [pupil] *student* who [has a possible handicapping condition] *is suspected of having a disability* shall mean a [pupil] *student* who, on the basis of diagnostic screening, shows evidence of being a [pupil with a handicapping condition] *preschool student with a disability or student with a disability* as defined in section 200.1(d) (mm) and 200.1(zz) of this Title *respectively*.

(b) A [pupil] *student* who possibly is limited English proficient shall mean a [pupil] *student* who, on the basis of diagnostic screening, appears to meet the definition of limited English proficiency as contained in section 154.2 of this Title.

(c) A [pupil] *student* who is possibly gifted shall mean a [pupil] *student* who, on the basis of diagnostic screening, appears to meet the definition of gifted and talented as contained in section 142.2 of this Title.

(d) New entrant shall mean a [pupil] *student* entering the New York State public school system, *pre-kindergarten through grade 12*, for the first time, or reentering a New York State public school with no available record of a prior screening.

(e) [For purposes of paragraph (a) of subdivision (5) of section 3208 of the Education Law, pupils who score below level two on either the third grade reading or mathematics test for New York State elementary schools and pupils who obtain a comparable percentile score on the Regents Preliminary Competency Test in reading or writing shall mean pupils obtaining scores that have been designated by the commissioner as the scores indicating the need for diagnostic screening.] *A student with low test scores shall mean a student who scores below level two on either the third grade English language arts or mathematics assessment for New York*

State elementary schools. Those [pupils] *students* exempted from testing as non-English-speaking shall be examined in the [pupil's] *student's* native language through similar procedures, and shall be screened for [possible handicapping conditions] *suspected disabilities* if resultant scores are comparable to those indicated above.

(f) Diagnostic screening shall mean a preliminary method of distinguishing from the general population those [pupils] *students* who may possibly be gifted, those [pupils] *students* who may [possibly have a handicapping condition] *be suspected of having a disability* and/or those [pupils] *students* who possibly are limited English proficient.

(g) *Health care provider* means a duly licensed physician, physician's assistant, or nurse practitioner.

117.3 Diagnostic Screening.

(a) Each school district shall develop a plan for the diagnostic screening of all new entrants [, pupils who score below level two on either the third grade reading or mathematics test for New York State elementary schools and students who obtain a comparable percentile score on the Regents Preliminary Competency Test, and all such new entrants, pupils and students shall receive such screening] *and students with low test scores. All new entrants and students with low test scores shall be screened in accordance with the plan.*

(b) Such diagnostic screening shall be conducted:

(1) by persons appropriately trained or qualified;

(2) *by persons appropriately trained or qualified* in the [pupil's] *student's* native language if the language of the home is other than English;

(3) in the case of new entrants, *such screening shall be conducted* prior to the school year, if possible, but no later than December first of the school year of entry, or within 15 days of transfer of a [pupil] *student* into a New York State public school should the entry take place after December first of the school year;

(4) in the case of [pupils who score below level two on either the third grade reading or mathematics test for New York State elementary schools, and students who obtain a comparable percentile score on the Regents Preliminary Competency Test,] *students with low test scores, such screening shall be conducted* within 30 days of the availability of the test scores.

(c) Diagnostic screening *for new entrants* shall include, but not be limited to:

(1) a health examination by a [duly licensed physician] *health care provider*, or evidence of such in the form of a health certificate, in accordance with sections 903, 904 and 905 of the Education Law;

(2) certificates of immunization or referral for immunization in accordance with section 2164 of the Public Health Law;

(3) [a determination of receptive and expressive language development, motor development, articulation skills and cognitive development;] *vision, hearing and scoliosis screenings as required by section 136.3 of this Title;*

(4) *a determination of development in oral expression, listening comprehension, written expression, basic reading skills and reading fluency and comprehension, mathematical calculation and problem solving, motor development, articulation skills, and cognitive development using recognized and validated screening tools; and*

(5) a determination [that] *whether* the [pupil] *student* is of foreign birth or ancestry and comes from a home where a language other than English is spoken as determined by the results of a home language questionnaire and an informal interview in English *and the native language.*

(d) *Diagnostic screening for students with low test scores shall include, but not be limited to:*

(1) *vision and hearing screenings to determine whether a vision or hearing impairment is impacting the student's ability to learn; and*

(2) *a review of the instructional programs in reading and mathematics to ensure that explicit and research validated instruction is being provided in reading and mathematics.*

(i) *Students with low test scores shall be monitored periodically through screenings and on-going assessments of the student's reading and mathematics abilities and skills. If the student is determined to be making sub-standard progress in such areas of study, instruction shall be provided that is tailored to meet the student's individual needs with increasingly intensive levels of targeted intervention and instruction.*

(ii) *School districts shall provide written notification to parents when a student requires an intervention beyond which is provided to the general education classroom. Such notification shall include: information about the performance data that will be collected and the general education services that will be provided; strategies for increasing the student's rate of learning; and the parents' right to request an evaluation by the*

Committee on Special Education to determine whether the student has a disability.

[(d)] (e) The results of the diagnostic screening shall be reviewed and a written report of each [pupil] *student* screened shall be prepared by appropriately qualified school district staff. Such report shall include a description of diagnostic screening devices used, the [pupil's] *student's* performance on those devices and, if required, the appropriate referral.

[(e)] (f) A [pupil who may have a handicapping condition] *student who is suspected of having a disability* shall be referred to the committee on special education or the committee on preschool special education, as appropriate, no later than 15 calendar days after completion of such diagnostic screening. Such referral shall be accompanied by the report of such screening.

[(f)] (g) A [pupil] *student* identified as possibly gifted shall be reported to the superintendent of schools and to the parent or legal guardian of such child no later than 15 calendar days after completion of such screening. Such referral shall be accompanied by the report of such screening.

[(g)] (h) A [pupil] *student* identified as possibly being limited English proficient shall be assessed in accordance with Part 154 of this Title.

Text of proposed 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

Data, views or arguments may be submitted to: Johanna Duncan-Poitier, Senior Deputy Commissioner of Education - P16, Education Department, 2M West Wing, Education Bldg., 89 Washington Ave., Albany, NY 12234, (518) 474-3862, e-mail: p16education@mail.nysed.gov

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

Regulatory Impact Statement

STATUTORY AUTHORITY:

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

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

Education Law section 3208(5) requires school districts to provide for the screening of all new entrants to school, as well as students with low test scores on certain statewide assessments.

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

LEGISLATIVE OBJECTIVES:

The proposed amendment is consistent with the authority conferred by the above statutes and is necessary to make technical changes to Part 117 of the Commissioner's Regulations that clarify existing requirements pertaining to the screening of new entrants to school and students with low test scores on certain statewide assessments.

NEEDS AND BENEFITS:

The proposed amendment is necessary to achieve consistency between the definitions in Part 117 and those in other provisions of the Regulations of the Commissioner of Education. Specifically, the definition of a pupil with a possible "handicapping condition" [section 117.2(a)] is amended to conform to the definitions of a "preschool student with a disability" and a "student with a disability" as defined in sections 200.1(mm) and 200.1(zz) respectively. The definition of pupils who must receive diagnostic screening based on their performance on statewide tests [section 117.2(e)] is amended to reflect the definition of a student with low test scores established in Education Law section 3208(5).

Further, these amendments clarify the existing screening requirements. Section 117.2(d) is amended to clarify that prekindergarten students are included in the definition of "new entrants." A new section 117.2(g) is added to define "health care provider." This definition is consistent with that found in Part 136 of the Commissioner's Regulations pertaining to school health services and provides districts and parents with greater flexibility regarding the type of health care professional who can provide the required health and immunization certifications. Section 117.3(b) is amended to incorporate the health screening requirements set forth in section 136.3.

COSTS:

(a) Costs to State government: None.

(b) Costs to local government: None.

(c) Costs to private regulated parties: None.

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

The proposed amendment merely conforms Part 117 to other provisions of the Commissioner's Regulations and Education Law section 3208, and will not impose any additional costs on the State, local governments, private parties or the State Education Department.

LOCAL GOVERNMENT MANDATES:

The proposed amendment merely conforms Part 117 to other provisions of the Commissioner's Regulations and Education Law section 3208, and does not impose any additional program, service, duty or responsibility on local governments.

PAPERWORK:

The proposed amendment merely conforms Part 117 to other provisions of the Commissioner's Regulations and Education Law section 3208, and imposes no new paperwork requirements.

DUPLICATION:

The proposed amendment does not duplicate existing State or Federal requirements, and merely conforms Part 117 of the Commissioner's Regulations to other provisions of the Commissioner's Regulations and Education Law section 3208.

ALTERNATIVES:

There are no significant alternatives to be considered. The proposed amendment is necessary to conform Part 117 to other provisions of the Commissioner's Regulations and Education Law section 3208.

FEDERAL STANDARDS:

There are no related federal standards.

COMPLIANCE SCHEDULE:

The proposed amendment merely conforms Part 117 to other provisions of the Commissioner's Regulations and Education Law section 3208. It is anticipated that school districts will be able to comply with the provisions of this amendment immediately.

Regulatory Flexibility Analysis

Small Businesses:

The proposed amendment merely conforms Part 117 to other provisions of the Commissioner's Regulations and Education Law section 3208, and does 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 proposed amendment that small businesses will not be affected, no further measures are needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

Local Governments:

EFFECT OF RULE:

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

COMPLIANCE REQUIREMENTS:

The proposed amendment is necessary to conform the screening requirements for new entrants to school and students with low test scores to other provisions of the Regulations of the Commissioner of Education and Education Law section 3208, and imposes no new compliance requirements on school districts. Specifically, the definition of a pupil with a possible "handicapping condition" [section 117.2(a)] is amended to conform to the definitions of a "preschool student with a disability" and a "student with a disability" as defined in sections 200.1(mm) and 200.1(zz) respectively. The definition of pupils who must receive diagnostic screening based on their performance on the statewide tests [section 117.2(e)] is amended to reflect the definition of students with low test scores established in Education Law section 3208(5).

Further, these amendments clarify the existing screening requirements. Section 117.2(d) is amended to clarify that prekindergarten students are included in the definition of "new entrants." A new section 117.2(g) is added to define "health care provider." This definition is consistent with that found in Part 136 of this Title pertaining to school health services and provides districts and parents with greater flexibility regarding the type of health care professional who can provide the required health and immunization certifications. Section 117.3(b) is amended to incorporate the health screening requirements set forth in Section 136.3 of this Title.

PROFESSIONAL SERVICES:

The proposed amendment does not impose any additional professional services requirements on school districts.

COMPLIANCE COSTS:

The proposed amendment merely conforms Part 117 to other provisions of the Commissioner’s Regulations and Education Law section 3208, and will not impose any additional costs on school districts.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed rule does not impose any additional costs or new technological requirements on school districts.

MINIMIZING ADVERSE IMPACT:

The proposed amendment merely conforms Part 117 to other provisions of the Commissioner’s Regulations and Education Law section 3208, and does not impose any additional costs or compliance requirements upon school districts.

LOCAL GOVERNMENT PARTICIPATION:

Copies of the proposed amendment have been sent for review and comment to District Superintendents for distribution to school districts within their superintendencies. The proposed amendment will also be posted on the Universal Prekindergarten web site to facilitate a wide distribution. In addition, the proposed amendment will be disseminated to the Department’s External Work Group on Universal Prekindergarten, which includes representatives from small businesses and local government.

Rural Area Flexibility Analysis

TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

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

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

The proposed amendment is necessary to achieve consistency between the definitions in this Part and those in other provisions of the Commissioner’s Regulations and Education Law section 3208. Specifically, the definition of a pupil with a possible “handicapping condition” [section 117.2(a)] is amended to conform to the definitions of a “preschool student with a disability” and a “student with a disability” as defined in sections 200.1(mm) and 200.1(zz) respectively. The definition of pupils who must receive diagnostic screening based on their performance on the statewide assessments [section 117.2(e)] is amended to reflect the definition of a student with low test scores established in Education Law section 3208.

The proposed amendment is necessary to conform the diagnostic screening requirements for new entrants to school and students with low test scores to other provisions of the Commissioner’s Regulations and Education Law section 3208, and imposes no new compliance requirements on school districts.

Further, these amendments clarify the existing screening requirements. Section 117.2(d) is amended to clarify that prekindergarten students are included in the definition of “new entrants.” A new section 117.2(g) is added to define “health care provider.” This definition is consistent with that found in Part 136 of this Title pertaining to school health services and provides districts and parents with greater flexibility regarding the type of health care professional who can provide the required health and immunization certifications. Section 117.3(b) is amended to incorporate the health screening requirements set forth in section 136.3 of this Title.

The proposed amendment merely conforms Part 117 to other provisions of the Commissioner’s Regulations and Education Law section 3208, and does not impose any adverse economic impact, reporting, recordkeeping or any other compliance requirements on rural areas.

COMPLIANCE COSTS:

The proposed amendment merely conforms Part 117 to other provisions of the Commissioner’s Regulations and Education Law section 3208, and will not impose any additional costs on school districts in rural areas.

MINIMIZING ADVERSE IMPACT:

The proposed amendment merely conforms Part 117 to other provisions of the Commissioner’s Regulations and Education Law section 3208, and will not impose any additional costs or compliance requirements on school districts. Furthermore, because this amendment is applicable to all school districts across the State, it was not possible to provide for a lesser standard or an exemption for school districts in rural areas.

RURAL AREA PARTICIPATION:

The proposed amendment has been sent for review and comment to members of the Department’s Rural Advisory Committee, which includes representatives from rural areas. The proposed amendment will also be posted on the Universal Prekindergarten web site to facilitate wide distribution. Additionally, the proposed amendments will be disseminated to the Department’s External Work Group on Universal Prekindergarten, which

includes representatives from small businesses and local government located in rural areas.

Job Impact Statement

The proposed amendment relates to diagnostic screening of public school students and merely conforms Part 117 to other provisions of the Commissioner’s Regulations and Education Law section 3208, and will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the proposed amendment that it will have no impact on jobs or employment opportunities, no further steps were needed to ascertain those facts and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

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

Program Requirements for Students in Prekindergarten and Kindergarten

I.D. No. EDU-26-07-00012-P

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

Proposed action: Amendment of section 100.3 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101 (not subdivided), 207 (not subdivided), 208 (not subdivided), 215 (not subdivided), 305(1) and (2), 308 (not subdivided) and 309 (not subdivided)

Subject: Program requirements for students in prekindergarten and kindergarten.

Purpose: To align program requirements for prekindergarten and kindergarten programs operated by school districts and voluntarily registered nonpublic schools with those established for State-funded universal kindergarten programs.

Text of proposed rule: Subdivision (a) of section 100.3 of the Regulations of the Commissioner of Education is amended, effective October 4, 2007, as follows:

(a) Prekindergarten and kindergarten programs [in] operated by public schools and [in] voluntarily registered nonpublic schools.

(1) Each such school operating a prekindergarten [or] and/or kindergarten program shall adopt and implement curricula, aligned with the State learning standards, that ensures continuity with instruction in the early elementary grades and is integrated with the instructional program in grades one through twelve. [shall establish and provide an educational program based on and adapted to the ages, interests and needs of the children. Learning activities in such programs shall include:

- (i) development of communication skills and exposure to literature;
- (ii) dramatic play, creative art and music activities;
- (iii) participation in group projects, discussion and games;
- (iv) science and mathematical experiences;
- (v) large muscle activities in prekindergarten and instruction in physical education in kindergarten pursuant to section 135.4(c)(2)(i) of this Title; and
- (vi) instruction in health education for students in kindergarten pursuant to section 135.3(b) of this Title.]

(2) Each such school operating a prekindergarten and/or kindergarten program shall [establish and] provide an early literacy and emergent reading program based on [and adapted to the needs, ages and interests of the students.] effective, evidence-based instructional practices. [Elements] Essential components of [early literacy] this program[s] shall include[, but not be limited to:

- (i) use of reading to obtain meaning from print;
- (ii) frequent and intensive opportunities to read for learning and for pleasure;
- (iii) activities that teach regular spelling-sound relationships;
- (iv) learning about the nature of the alphabetic writing system; and
- (v) understanding the structure of spoken words.]
- (i) background knowledge;
- (ii) phonological awareness;
- (iii) expressive and receptive language;
- (iv) vocabulary development;
- (v) phonemic awareness;
- (vi) fluency; and
- (vii) comprehension.

(3) Each such school operating a prekindergarten or kindergarten program shall develop procedures to actively involve each child’s parents or guardians in such programs.]

(3) *The instructional program for prekindergarten and kindergarten shall be based on the ages, interests, strengths and needs of the children. Learning experiences in such programs shall include:*

(i) *differentiated instruction to support the acquisition of new concepts and skills;*

(ii) *materials and equipment which allow for active and quiet play in indoor and outdoor environments;*

(iii) *instruction in the content areas of English language arts, mathematics, science, social studies and the arts, including dance, music, theatre and visual arts; that is designed to facilitate student attainment of the State learning standards and is aligned with the instructional program in the early elementary grades;*

(iv) *opportunities for participation in inquiry-based activities and projects;*

(v) *opportunities to use a wide variety of information in print and electronic mediums;*

(vi) *fine and gross motor activities in prekindergarten, and instruction in physical education in kindergarten pursuant to section 135.4 (c)(2)(i) of this Title; and*

(vii) *instruction on health and nutrition topics for students in prekindergarten and health education for students in kindergarten pursuant to section 135.3(b) of this Title.*

(4) *Each school operating a prekindergarten and/or kindergarten program shall develop procedures to ensure the active engagement of parents and/or guardians in the education of their children. Such procedures shall include support to children and their families for a successful transition into prekindergarten or kindergarten and into the early elementary grades.*

Text of proposed 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

Data, views or arguments may be submitted to: Johanna Duncan-Poitier, Senior Deputy Commissioner of Education - P16, Education Department, 2M West Wing, Education Bldg., 89 Washington Ave., Albany, NY 12234, (518) 474-3862, e-mail: p16education@mail.nysed.gov

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

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

Regulatory Impact Statement

STATUTORY AUTHORITY:

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

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

Education Law section 208 authorizes the Regents to establish examinations as to attainments in learning and to award and confer suitable certificates, diplomas and degrees on persons who satisfactorily meet the requirements prescribed.

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

Education Law section 305(1) and (2) provide that the Commissioner, as chief executive officer of the State system of education and of the Board of Regents, shall have general supervision over all schools and institutions subject to the provisions of the Education Law, or of any statute relating to education, and authorizes the Commissioner to enforce laws relating to the educational system and to execute the Regents' educational policies.

Education Law section 308 authorizes the Commissioner to enforce and give effect to any provision in the Education Law or in any other general or special law pertaining to the school system of the State or any rule or direction of the Regents.

Education Law section 309 charges the Commissioner with the general supervision of boards of education and their management and conduct of all departments of education.

LEGISLATIVE OBJECTIVES:

The proposed amendment is consistent with the authority conferred by the above statutes and is necessary to align section 100.3(a) with the

provisions of Subpart 151-1 of the Regulations of the Commissioner, which establishes requirements for the universal prekindergarten program.

NEEDS AND BENEFITS:

The proposed amendment is necessary to achieve consistency between the provisions of this Part and those in other Parts of the Regulations of the Commissioner of Education. Specifically, the proposed amendment will revise section 100.3(a) to align the program requirements for prekindergarten and kindergarten programs operated by school districts and voluntarily registered nonpublic schools with those established in Subpart 151-1 for state-funded universal prekindergarten programs. These amendments: require school districts to adopt and implement curricula that ensure strong instructional content aligned with the State learning standards and integrated with the instructional program in grades one through twelve; redefine the required components of early literacy and emergent reading instruction; identify the types of learning experiences that must be provided; and require procedures to ensure the active engagement of parents in the education of their children.

COSTS:

(a) Costs to State government: None.

(b) Costs to local government: None.

(c) Costs to private regulated parties: None.

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

The proposed amendment merely conforms section 100.3 of the Commissioner's Regulations to other provisions of this Title, and does not impose any additional costs.

LOCAL GOVERNMENT MANDATES:

The proposed amendment merely conforms section 100.3 of the Commissioner's Regulations to other provisions of this Title, and does not impose any additional program, service, duty or responsibility on local governments.

PAPERWORK:

The proposed amendment merely conforms section 100.3 of the Commissioner's Regulations to other provisions of this Title, and imposes no new paperwork requirements.

DUPLICATION:

The proposed amendment does not duplicate existing State or Federal requirements, and merely conforms section 100.3 of the Commissioner's Regulations to other provisions of this Title.

ALTERNATIVES:

There are no significant alternatives and none were considered. The proposed amendment is necessary to conform section 100.3 of the Commissioner's Regulations to other provisions of this Title.

FEDERAL STANDARDS:

There are no related federal standards.

COMPLIANCE SCHEDULE:

The proposed amendment merely conforms section 100.3 of the Commissioner's Regulations to other provisions of this Title. It is anticipated that school districts will be able to comply with the provisions of this amendment immediately.

Regulatory Flexibility Analysis

Small Businesses:

The proposed amendment relates to program requirements for students in prekindergarten and kindergarten, and merely conforms section 100.3 of the Commissioner's Regulations to other provisions of this Title, and does 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 proposed amendment that small businesses will not be affected, no further measures are needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

Local Governments:

EFFECT OF RULE:

The proposed amendment applies to all prekindergarten and kindergarten programs operated by public school districts and voluntarily registered nonpublic schools.

COMPLIANCE REQUIREMENTS:

The proposed amendment merely conforms section 100.3 of the Commissioner's Regulations to other provisions of this Title, and does not impose any adverse economic impact, reporting, recordkeeping or any other compliance requirements, professional services requirements or additional costs on school districts.

The proposed amendment is necessary to achieve consistency between the provisions of this Part and those in other Parts of the Regulations of the Commissioner of Education. Specifically, the proposed amendment will

revise section 100.3(a) to align the program requirements for prekindergarten and kindergarten programs operated by school districts and voluntarily registered nonpublic schools with those established in Subpart 151-1 for State-funded universal prekindergarten programs. These amendments: require school districts to adopt and implement curricula that ensure strong instructional content aligned with the State learning standards and integrated with the instructional program in grades one through twelve; redefine the required components of early literacy and emergent reading instruction; identify the types of learning experiences that must be provided; and require procedures to ensure the active engagement of parents in the education of their children.

PROFESSIONAL SERVICES:

The proposed amendment does not impose any additional professional services requirements on school districts or voluntarily registered nonpublic schools.

COMPLIANCE COSTS:

The proposed amendment merely conforms section 100.3 of the Commissioner's Regulations to other provisions of this Title and will not impose any additional costs on school districts.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed rule does not impose any additional costs or new technological requirements on school districts.

MINIMIZING ADVERSE IMPACT:

The proposed amendment merely conforms section 100.3 of the Commissioner's Regulations to other provisions of this Title, and does not impose any adverse economic impact, reporting, recordkeeping or any other compliance requirements, professional services requirements or additional costs on school districts.

LOCAL GOVERNMENT PARTICIPATION:

Copies of the proposed amendment have been sent for review and comment to District Superintendents for distribution to school districts within their service areas. The proposed amendment will also be posted on the Universal Prekindergarten web site to facilitate a wide distribution. In addition, the proposed amendment will be disseminated to the Department's External Work Group on Universal Prekindergarten, which includes representatives from school districts.

Rural Area Flexibility Analysis

TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

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

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

The proposed amendment merely conforms section 100.3 of the Commissioner's Regulations to other provisions of this Title, and does not impose any adverse economic impact, reporting, recordkeeping or any other compliance requirements, or professional services requirements, on rural areas.

Specifically, the proposed amendment will revise section 100.3(a) to align the program requirements for prekindergarten and kindergarten programs operated by school districts and voluntarily registered nonpublic schools with those established in Subpart 151-1 for State-funded universal prekindergarten programs. These amendments: require school districts to adopt and implement curricula that ensure strong instructional content aligned with the State learning standards and integrated with the instructional program in grades one through twelve; redefine the required components of early literacy and emergent reading instruction; identify the types of learning experiences that must be provided; and require procedures to ensure the active engagement of parents in the education of their children.

COMPLIANCE COSTS:

The proposed amendment merely conforms section 100.3 of the Commissioner's Regulations to other provisions of this Title and will not impose any additional costs on rural areas.

MINIMIZING ADVERSE IMPACT:

The proposed amendment merely conforms section 100.3 of the Commissioner's Regulations to other provisions of this Title and will not impose any additional costs or compliance requirements on school districts. Furthermore, because this amendment is applicable to school districts and voluntarily registered nonpublic schools across the State, it was not possible to provide for a lesser standard or an exemption for such public schools and nonpublic schools located in rural areas.

RURAL AREA PARTICIPATION:

The proposed amendment has been sent for review and comment to members of the Department's Rural Advisory Committee, which includes

representatives from rural areas. The proposed amendment will also be posted on the Universal Prekindergarten web site to facilitate a wide distribution. Additionally, the proposed amendments will be disseminated to the Department's External Work Group on Universal Prekindergarten, which includes representatives from rural areas.

Job Impact Statement

The proposed amendment relates to program requirements for prekindergarten and kindergarten programs operated by school districts and voluntarily registered nonpublic schools, and merely conforms section 100.3 of the Commissioner's Regulations to other provisions of this Title and will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the proposed amendment that it will not impact on jobs or employment opportunities, no further steps were needed to ascertain those facts and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Requirements for Teachers' Certification and Teaching Practice

I.D. No. EDU-26-07-00013-P

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

Proposed action: Amendment of Subparts 80-1, 80-3, 80-4 and 80-5 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided), 208, 305(1), (2) and (7), 308 (not subdivided), 3001(2), 3004(1), 3006(1)(b), 3007 (not subdivided) and 3009

Subject: Requirements for teachers' certification and teaching practice.

Purpose: To clarify existing standards and procedures that must be met by classroom teachers, school leaders and pupil personnel professionals when seeking certification; and provide flexibility to accept candidates who substantially meet certain certification requirements and/or who have a valid certificate from another state or an authorization to practice from another country evidencing knowledge, skills and abilities comparable to those required for certification in New York State.

Substance of proposed rule (Full text is posted at the following State website: www.highered.nysed.gov): The Board of Regents proposes to amend Subparts 80-1, 80-3, 80-4 and 80-5 of the Regulations of the Commissioner of Education relating to the requirements for teachers' certification and teaching practice.

Section 80-1.6 is amended to extend the time validity of an expired provisional, initial or transitional certificate for an additional year, beyond the two-year extension currently provided for, if a candidate is faced with extreme hardship or other circumstances beyond the control of the individual.

The title of subpart 80-3 and subdivision (a) of section 80-3.1 are amended to change the date that applicants for certification may qualify as educational leaders under the "old" certificate titles and after which applicants will be subject to the requirements for the "new" certificate titles. This amendment changes the date from September 2, 2006 to September 2, 2007.

Subparagraph (iii) of paragraph (3) of subdivision (a) of section 80-3.3 and section 80-3.7 are amended to clarify what candidates the February 1, 2007 and February 1, 2009 deadlines apply to, for certification through individual evaluation.

Subparagraph (i) of paragraph (1) of subdivision (b) of section 80-3.3 and subparagraph (i) of paragraph (2) of subdivision (a) of section 80-3.7 are amended to allow for the acceptance of baccalaureate degrees from institutions of higher education judged by the Commissioner to be substantially equivalent to a regionally accredited institution for purposes of qualifying for a teaching certificate.

Paragraphs (2) and (3) of subdivision (a) of section 80-3.7 are amended to permit the Commissioner to accept substantially equivalent education requirements for candidates seeking to obtain an initial certificate through individual evaluation.

Subclause (2) of clause (b) of subparagraph (iv) of paragraph (3) of subdivision (a) of section 80-3.7, subclause (2) of clause (b) of subparagraph (xi) of paragraph (3) of subdivision (a) of section 80-3.7, and subclause (2) of clause (b) of subparagraph (xii) of paragraph (3) of subdivision (a) of section 80-3.7 are amended to allow for the acceptance of one year of paid full-time experience in lieu of the college-supervised practicum in the classroom teaching titles that require a practicum: literacy, library media specialist, and speech and language disabilities.

Section 80-3.8, subparagraph (iii) of paragraph (3) of subdivision (d) of section 80-4.3 and paragraph (2) of subdivision (h) of Section 80-4.3 are amended to establish a sunset date of September 1, 2008 for applications for statements of continuing eligibility in certain classroom teaching certificate and extension titles: gifted and talented, American Sign language, and theater and to clarify the types of certificates eligible for statements of continued eligibility.

Subclause (1) of clause (a) of subparagraph (ii) of paragraph (1) of subdivision (a) of Section 80-3.10, item (ii) of subclause (2) of clause (a) of subparagraph (i) of paragraph (3) of subdivision (b) of section 80-3.10 and clause (b) of subparagraph (ii) of paragraph (3) of subdivision (c) of section 80-3.10 are amended to permit the acceptance of an educational leadership program accredited by a United States Department of Education recognized accrediting body at a regionally accredited institution outside of New York State as equivalent preparation for certification as a school building leader, school district leader or school district business leader, respectively.

Paragraph (2) of subdivision (e) of section 80-4.3 is amended to clarify the appropriate certificate types and titles to which an extension in coordinator of work-based learning programs for career awareness may be attached.

Subdivision (f) of section 80-4.3 is amended to eliminate an unneeded reference to the types of programs that holders of the extension in coordinator work-based learning programs for career development are authorized to coordinate, to clarify the appropriate certificate types and titles to which the extension may be attached and to clarify that the holder of an extension in coordinator work-based learning programs may also coordinate career awareness programs.

Section 80-5.17 is amended to allow for the acceptance of certificates or authorizations to practice that the commissioner deems equivalent from another state or country that evidences comparable knowledge, skills, and abilities with those required for initial certification in New York State.

Text of proposed 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

Data, views or arguments may be submitted to: Johanna Duncan-Poitier, Senior Deputy Commissioner of Education - P16, Education Department, 2M West Wing, Education Bldg., 89 Washington Ave., Albany, NY 12234, (518) 474-3862, e-mail: p16education@mail.nysed.gov

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

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

Section 208 of the Education Law grants to the Board of Regents authority to award and confer certificates, diplomas and degrees.

Subdivision (1) of section 305 of the Education Law empowers the Commissioner of Education to be the chief executive officer of the state system of education and of the Board of Regents and authorizes the Commissioner of Education to enforce laws relating to the educational system and to execute educational policies determined by the Regents.

Subdivision (2) of section 305 of the Education Law authorizes the Commissioner of Education to have general supervision over all schools subject to the Education Law.

Subdivision (7) of section 305 of the Education Law authorizes the Commissioner of Education to annul upon cause shown to his satisfaction any certificate of qualification granted to a teacher.

Section 308 of the Education Law authorizes the Commissioner of Education to institute any proceedings or processes necessary to properly enforce and give effect to any law pertaining to the school system of the state or any part thereof or to any school district or city.

Subdivision (2) of section 3001 of the Education Law establishes certification by the State Education Department as a qualification to teach in the public schools of New York State.

Subdivision (1) of section 3004 of the Education Law authorizes the Commissioner of Education to prescribe, subject to the approval of the Regents, regulations governing the examination and certification of teachers employed in all public schools in the State.

Paragraph (b) of subdivision (1) of section 3006 of the Education Law provides that the Commissioner of Education may issue such teacher certificates as the Regents Rules prescribe.

Section 3007 of the Education Law authorizes the Commissioner of Education to endorse a diploma or certificate issued in another state.

Subdivision (1) of section 3009 of the Education Law provides that no part of the school moneys apportioned to a district shall be applied to the payment of the salary of an unqualified teacher, nor shall his salary or part thereof, be collected by a district tax except as provided in the Education Law.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment carries out the legislative objectives of the above-referenced statutes by establishing requirements for the certification of teachers for employment in New York State public schools.

3. NEEDS AND BENEFITS:

The purpose of the proposed amendment is to clarify existing standards and procedures that must be met by teachers (classroom teachers, school leaders and pupil personnel professionals) when seeking certification by the Board of Regents and the Commissioner of Education. The proposed amendment also provides the Commissioner with the flexibility to accept candidates who substantially meet certain certification requirements and/or who have a valid certificate from another state or an authorization to practice from another country evidencing knowledge, skills and abilities comparable to those required for certification in New York State. Specifically, the proposed amendment makes the following major changes:

The proposed amendment permits the Commissioner to extend the time validity of an expired provisional, initial or transitional certificate for an additional year, beyond the two-year extension currently provided for, if a candidate is faced with extreme hardship or other circumstances beyond the control of the individual. This change is needed to provide the Commissioner with the flexibility to extend the time validity of certain certificates in extreme circumstances.

The amendment also changes the date by which all applicants for certification as educational leaders must submit their applications to qualify for certification under the "old" certificate titles (school administrator and supervisor, school district administrator, and school business administrator) from September 2, 2006 to September 2, 2007. Currently, the regulation requires that candidates apply for the "old" certificate titles prior to September 2, 2006 although they have until September 2, 2007 to qualify for the certificates. This deadline has proven to be insufficient time for the Department to notify potential candidates and for candidates to submit their applications. Therefore, this amendment is needed to make September 2, 2007 the deadline by which candidates must have both applied and qualified for the "new" certificate titles.

For purposes of qualifying for a teaching certificate, the proposed amendment provides the Commissioner with the flexibility to accept a candidate's baccalaureate degree from a higher education institution that the Commissioner deems substantially equivalent to a baccalaureate degree from a regionally accredited institution of higher education. This change is needed to provide the Commissioner with the flexibility to accept a candidate who has received teacher preparation from a higher education institution that the Commissioner deems substantially equivalent to that of a regionally accredited institution.

The amendment also permits the Commissioner to accept academic preparation that the Commissioner deems to be substantially equivalent to that specified in regulation for a teaching certificate. Again, this change is needed to allow the Commissioner to accept coursework from a candidate that, while not technically meeting a specified requirement, satisfies the required competencies.

The proposed amendment also provides the Commissioner with the flexibility to accept paid full-time experience in lieu of the college-supervised practicum in the classroom teaching titles that require a practicum: literacy, library media specialist, and speech and language disabilities. This change is needed to provide an option, for example, for those out-of-state candidates who graduated from programs that did not include a practicum but who may have several years of professional experience or applicants who have completed programs years ago and practiced in non-public schools successfully for many years.

The amendment also establishes an application deadline of September 1, 2008 for a Statement of Continuing Eligibility (SOCE) in certain certificate/extension titles: gifted and talented, American Sign Language, and theater. SOCE was created in each of these areas when they were established as certificate or extension titles in 2004. SOCE allowed experienced teachers employed in the public schools at that time to continue to be qualified for employment. The proposed deadline for SOCE applications recognizes that all applications for an SOCE should have now been submitted.

For purposes of certification as a school building leader, a school district leader or school district business leader, the amendment permits the Commissioner to accept a candidate who has successfully completed an educational leadership program accredited by a United States Department of Education recognized accrediting body at a regionally accredited institution outside New York State. This is needed to provide the Commissioner with a mechanism to accept successful candidates who have completed programs that have been rigorously reviewed by national accrediting bodies and found to be of high quality in the field of school leadership.

The amendment sets forth the specific teaching certificate titles to which an extension as coordinator of work-based learning programs for career awareness may be appropriately attached and those teaching certificate titles for which an extension as a coordinator of work-based learning programs for career development may be attached. The current regulatory language lacks the specificity needed to advise candidates appropriately.

The amendment also clarifies that the holder of an extension as a coordinator of work-based learning programs for career development may also coordinate programs for career awareness. This clarification is needed to advise candidate's appropriately because the requirements for a coordinator of work-based learning programs include and are more rigorous than the requirements for career awareness.

The amendment also authorizes the Commissioner to accept an out-of-state certificate or an authorization to practice from another country that evidences comparable knowledge, skills, and abilities with those required for initial certification in New York State. This amendment is needed to provide the Commissioner with the flexibility to accept certificates or authorizations to practice presented by applicants from foreign countries or non-reciprocal states.

4. COSTS:

(a) Costs to State government: The amendment will not impose any additional costs on State government including the State Education Department. The amendment will not affect the State Education Department's staffing or resources in reviewing and processing applications for certificates under these provisions.

(b) Costs to local governments: The amendment will not impose any direct costs on local governments, including school districts and Boards of Cooperative Educational Services (BOCES).

(c) Cost to private regulated parties: The proposed amendment will not impose costs on private regulated parties, over and above existing costs for certification. The application fee for certification will continue to be \$100 (or \$50 for college recommended applicants).

(d) Costs to regulating agency for implementing and continued administration of the rule: As stated above in "Costs to State Government," the amendment will not impose any additional costs on the State Education Department.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment does not impose any mandatory program, service, duty, or responsibility upon local government, including school districts or BOCES.

6. PAPERWORK:

The amendment does not impose any additional paperwork requirements above and beyond the existing application requirements for candidates.

7. DUPLICATION:

The amendment does not duplicate any existing State or Federal requirements.

8. ALTERNATIVES:

As these amendments are technical in nature, no alternatives were considered.

9. FEDERAL STANDARDS:

There are no applicable standards of the Federal government establishing requirements for the certification of teachers in the public schools of New York State.

10. COMPLIANCE SCHEDULE:

The amendment would be effective on its stated effective date. Because of the nature of the proposed amendment, no additional period of time is needed to enable regulated parties to comply.

Regulatory Flexibility Analysis

The proposed amendment clarifies existing standards and procedures that must be met by teachers (classroom teachers, school leaders and pupil personnel professionals) when seeking certification by the Board of Regents and the Commissioner of Education. The proposed amendment pertains to certification requirements applicable to individuals. The proposed

amendment would have no effect on small businesses and does not regulate local governments.

The amendment will not impose any adverse economic impact, record-keeping, reporting, or other compliance requirements on small businesses or local governments. Because it is evident from the nature of the regulation that it does not affect small businesses or local governments, no further steps were needed to ascertain that fact and none were taken.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATE OF THE NUMBER OF RURAL AREAS:

The proposed amendment will affect candidates for certification (classroom teachers, school leaders and pupil personnel professionals) in all areas of New York State, including the 44 rural counties with fewer than 200,000 inhabitants and the 71 towns and urban counties with a population density of 150 square miles or less.

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

The purpose of the proposed amendment is to clarify existing standards and procedures that must be met by teachers (classroom teachers, school leaders and pupil personnel professionals) when seeking certification by the Board of Regents and the Commissioner of Education. The proposed amendment also provides the Commissioner with the flexibility to accept candidates who substantially meet certain certification requirements and/or who have a valid certificate from another state or an authorization to practice from another country evidencing knowledge, skills and abilities comparable to those required for certification in New York State.

The proposed amendment does not impose any additional paperwork requirements above and beyond the existing application requirements for certification. The amendment does not impose recordkeeping requirements or require applicants for certificates to retain professional services in order to comply.

3. COSTS:

The proposed amendment will not impose costs on private regulated parties, over and above the current costs for applications for teacher certification. The application fee for certification remains at \$100. The amendment will not impose any direct costs on local governments, including school districts and BOCES. The amendment will not impose any capital costs on regulated parties.

4. MINIMIZING ADVERSE IMPACT:

The amendment makes technical changes to the requirements for the certification of classroom teachers, school leaders, and pupil personnel professionals in New York State's public schools. The New York State Education Department does not believe that establishing different standards for candidates who live or work in rural areas is warranted. A uniform standard ensures the quality of certified teachers in all parts of the State.

5. RURAL AREA PARTICIPATION:

Comments on the proposed rule were solicited from the Department's Rural Education Advisory Committee. This is a group that advises the State Education Department on issues of concern to rural areas of New York State and includes representatives of school districts located in rural areas of the State.

The Department also requested comments from the State Professional Standards and Practices Board for Teaching. This is an advisory group to the Board of Regents and the Commissioner of Education on matters pertaining to teacher education, certification, and practice. The Board has representatives of school districts and BOCES located in rural areas of New York State.

Job Impact Statement

The purpose of the proposed amendment is to clarify existing standards and procedures that must be met by teachers (classroom teachers, school leaders and pupil personnel professionals) when seeking certification by the Board of Regents and the Commissioner of Education. The amendment also provides the Commissioner with the flexibility to accept teaching candidates who substantially meet the certification requirements and/or who have a valid certificate from another state or country evidencing knowledge, skills and abilities comparable to those required for certification in New York State.

Because it is evident from the nature of this regulation that it will have only a positive impact or no impact on jobs or employment opportunities, no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

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

Student Eligibility for the Higher Education Opportunity Program

I.D. No. EDU-26-07-00014-P

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

Proposed action: This rule is proposed pursuant to SAPA section 207(3), five-year review of existing rules. Amendment of section 27-1.1 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided); 6451(1)

Subject: Student eligibility for the Higher Education Opportunity Program.

Purpose: To update the current economic eligibility criteria for the Higher Education Opportunity Program at independent colleges and universities.

Text of proposed rule: Subdivision (b) of section 27-1.1 of the Rules of the Board of Regents is amended, effective October 4, 2007, as follows:

(b) Economically disadvantaged. (1) A student is economically disadvantaged if he or she is a member of a household supported by one member thereof with a total annual income which does not exceed the applicable amount set forth in the following tables; or of a household supported solely by one member thereof who is employed by two or more employers at the same time, if the total annual income of such household does not exceed the applicable amount set forth in the following tables [by more than \$1,800] *for the number of members in the household plus the second job allowance*; or of a household supported by more than one worker thereof, or a household in which one worker is the sole support of a one-parent family, if the total annual income of such household does not exceed the applicable amount set forth in the following tables [by more than \$4,800] *for the number of members in the household plus the employment allowance*. For the purposes of this subdivision, the number of members of a household shall be determined by ascertaining the number of individuals living in the student's residence who are economically dependent on the income, as defined in subdivision (c) of this section, supporting the student.

Table I

For students first entering college between [July 1, 2003 and June 30, 2004] *July 1, 2005 and June 30, 2008*

Number of members in household (including head of household)	Total annual income in preceding calendar year
1	[\$13,300] \$14,100
2	[18,400] 19,600
3	[21,100] 22,350
4	[26,200] 27,800
5	[31,000] 32,850
6	[36,350] 38,550
7 or more	[40,450] [40,450] 42,900 plus \$[4,100] 4,350 for each family member in excess of 7
<i>Second Job Allowance</i>	\$1,800
<i>Employment Allowance</i>	\$4,800

Table II

For students first entering college between [July 1, 2004 and June 30, 2005] *July 1, 2008 and June 30, 2009*

Number of members in household (including head of household)	Total annual income in preceding calendar year
1	[\$13,700] \$15,140
2	[18,950] 20,390
3	[21,700] 25,650
4	[26,950] 30,900
5	[31,900] 36,150
6	[37,450] 41,410
7 or more	[41,650] [41,650] 46,660 plus \$[4,200] 5,250 for each family member in excess of 7

<i>Second Job Allowance</i>	\$2,630
<i>Employment Allowance</i>	\$5,250

Table III

For students first entering college [on or after July 1, 2005] *between July 1, 2009 and June 30, 2010*

Number of members in household (including head of household)	Total annual income in preceding calendar year
1	[\$14,100] \$15,590
2	[19,600] 21,000
3	[22,350] 26,420
4	[27,800] 31,830
5	[32,850] 37,240
6	[38,550] 42,650
7 or more	[42,900] [42,900] 48,060 plus \$[4,350] 5,410 for each family member in excess of 7
<i>Second Job Allowance</i>	\$2,710
<i>Employment Allowance</i>	\$5,410

Table IV

For students first entering college on or after July 1, 2010

Number of members in household (including head of household)	Total annual income in preceding calendar year
1	\$16,060
2	21,630
3	27,210
4	32,790
5	38,360
6	43,960
7 or more	49,500 plus \$5,570 for each family member in excess of 7
<i>Second Job Allowance</i>	2,790
<i>Employment Allowance</i>	5,570

The income figures in Tables I, II [and], III and IV of this paragraph apply to the student applicant's income only when he or she is an independent student. For purposes of this Part, an independent student means a student who:

- (i) is 24 years of age or older by December 31st [of the academic year for which aid is requested] *of the program year*; or
- (ii) [meets the criteria set forth in one of the following clauses:
 - (a)] is an orphan or ward of the court *(A student is considered independent if he or she is a ward of the court or was a ward of the court until the individual reached the age of eighteen); or*
 - [(b)] (iii) is a veteran of the Armed Forces of the United States who has engaged in the active duty in the United States Army, Navy, Air Force, Marines, or Coast Guard and was released under a condition other than dishonorable; or
 - [(c)] (iv) is a married individual; or
 - [(d)] (v) has legal dependents other than a spouse; or
 - [(e)] (vi) is a student for whom an opportunity program and financial aid administrator has made a satisfactory documented determination of independence by reason of other extraordinary circumstances;
- (2) . . .
- (3) . . .
- (4) . . .
- (5) . . .

Text of proposed 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

Data, views or arguments may be submitted to: Johanna Duncan-Poitier, Senior Deputy Commissioner of Education - P16, Education Department, 2M West Wing, Education Bldg., 89 Washington Ave., Albany, NY 12234, (518) 474-3862, e-mail: p16education@mail.nysed.gov

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

Five-Year Review of Existing Rules

The proposed rule is needed in order to update the current criteria for determining student economic eligibility for the Higher Education Opportunity Program by: (1) taking into account inflationary conditions and changes in annual income; (2) accounting for New York State and local

taxes and regional maintenance costs; (3) assuring consistency across the State-supported postsecondary opportunity programs; (4) maintaining the continuing linkage of these eligibility criteria with federally approved methods of needs analysis; and (5) recognizing the costs associated with a household that is solely supported by one member who is employed by two or more employers.

The proposed changes in the economic income guidelines for 2008-2009, 2009-2010, and on or after July 2010 were developed with the goal of determining for each household size, with the exception of the household of one, the income under which the expected family contribution would calculate to be zero. The income level for the household of one was determined by calculating 150% of an income at poverty level as established by U.S. Department of Health and Human Services poverty guidelines. The guidelines are based on poverty measures issued by the U.S. Census Bureau. The development model assumes an inflation rate of three percent for each of the three years, a New York specific allowance for State and local taxes, standard federal deductions and exemptions and a neutral effect for assets. It also makes an income adjustment for a household supported solely by one member who works for two or more employers at the same time, to account for additional costs associated with such employment.

The proposed amendment is also needed to update the definition of an independent student, to be more consistent with the federal definition of independent student for purposes of the needs analysis for federal student financial aid programs.

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

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

Subdivision (1) of section 6451 of the Education Law establishes the Higher Education Opportunity Program to advance the cause of educational opportunity in nonpublic institutions of higher education for State residents who are "economically and educationally disadvantaged" as defined by the Board of Regents.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment carries out the legislative objectives set forth in the aforementioned statutes in that it will revise the current criteria for determining student economic eligibility for the Higher Education Opportunity Program.

3. NEEDS AND BENEFITS:

The proposed rule is needed in order to update the current criteria for determining student economic eligibility for the Higher Education Opportunity Program by: (1) taking into account inflationary conditions and changes in annual income; (2) accounting for New York State and local taxes and regional maintenance costs; (3) assuring consistency across the State-supported postsecondary opportunity programs; (4) maintaining the continuing linkage of these eligibility criteria with federally approved methods of needs analysis; and (5) recognizing the costs associated with a household that is solely supported by one member who is employed by two or more employers.

The amendment will update the existing definition of "economically disadvantaged," which was promulgated in 2002 and has become outdated because of inflationary factors. It will prevent a reduction in the pool of eligible students due to inflation and other factors. The amendment will ensure that the appropriate pool of students will be eligible for the program.

The proposed changes in the economic income guidelines for 2008-2009, 2009-2010, and on or after July 2010 were developed with the goal of determining for each household size, with the exception of the household of one, the income under which the expected family contribution would calculate to be zero. The income level for the household of one was determined by calculating 150% of an income at poverty level as established by U.S. Department of Health and Human Services poverty guidelines. The guidelines are based on poverty measures issued by the U.S. Census Bureau. The development model assumes an inflation rate of three percent for each of the three years, a New York specific allowance for State and local taxes, standard federal deductions and exemptions and a neutral effect for assets. It also makes an income adjustment for a household supported solely by one member who works for two or more employers at the same time, to account for additional costs associated with such employment.

The proposed amendment is also needed to update the definition of an independent student, to be more consistent with the federal definition of

independent student for purposes of the needs analysis for federal student financial aid programs.

The proposed amendment was developed by a statewide task force of representatives from the City University of New York, the State University of New York, independent colleges and universities and the State Education Department's Office of Higher Education. This task force met and reached a consensus on the proposed amendment.

4. COSTS:

a. Costs to the State government. The proposed amendment will not impose additional costs on State government. The amendment simply updates the income criteria for determining student eligibility for participation in the Higher Education Opportunity Program. State funding for this program is determined by an annual legislative appropriation, which determines the number of students that may participate.

b. Costs to local government. None.

c. Costs to private regulatory parties. The proposed amendment will not impose any capital costs on the nonpublic colleges and universities that operate a Higher Education Opportunity Program. It will impose minimal costs on them to update information brochures concerning the Higher Education Opportunity Program.

d. Costs to the regulatory agency. None. The proposed amendment, which simply updates the criteria for determining economic eligibility for participation in the Higher Education Opportunity Program, will not add any new responsibilities for the State Education Department to administer. The Department will administer the program using existing staff and resources.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment will not impose any new mandates on local governments.

6. PAPERWORK:

The proposed amendment does not include any new reporting requirements for regulated parties. The paperwork requirements for nonpublic institutions of higher education that participate in the program will not change. In addition, the amendment will not increase the paperwork requirements for students who apply to participate in the Higher Education Opportunity Program at nonpublic colleges and universities.

7. DUPLICATION:

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

8. ALTERNATIVES:

There are no viable alternatives to the proposed amendment at this time. The Task Force group that developed the economic eligibility levels in the proposed amendment discussed using U.S. Department of Health and Human Services poverty guidelines to determine eligibility for all household sizes at 200% of an income at poverty level. However, the task force determined that it needed to do additional research before recommending such an alternative approach.

9. FEDERAL STANDARDS:

The proposed amendment concerns the criteria for a State student aid program. While Federal standards are inapplicable, the Department considered and incorporated elements of the methodology approved by the U.S. Department of Education for needs analysis used for Federal student financial aid programs.

10. COMPLIANCE SCHEDULE:

Students first entering college between July 1, 2008 and June 30, 2009 will be subject to the amended economic criteria. Nonpublic institutions of higher education must comply with the regulation on its effective date. No additional period of time is necessary to permit regulated parties to meet the requirements of the proposed amendment.

Regulatory Flexibility Analysis

The proposed amendment concerns income criteria for determining student eligibility to participate in the Higher Education Opportunity Program at nonpublic institutions of higher education. It will affect students who want to participate in this program and nonpublic colleges and universities that administer the programs. It is evident from the subject matter of the amendment that it will have no effect on local governments.

The amendment will also have no effect on small businesses. All of institutions that participate in the program, except one, are not-for-profit colleges and universities. Accordingly, they are not small businesses. The one for-profit institution that participates in the program employs more than 100 individuals. Therefore, it is not a small business, as defined in section 102(8) of the State Administrative Procedure Act.

The amendment will not impose any adverse economic impact, record-keeping, reporting, or other compliance requirements on small businesses or local governments. Because it is evident from the nature of the proposed

amendment that it will not affect small businesses or local governments, no further steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis is not required and one has not been prepared.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment applies to nonpublic colleges and universities in New York State that contract with the State Education Department to operate Higher Education Opportunity Programs and students that apply to participate in the Higher Education Opportunity Programs. In the 2005-2006 academic year, 12 such colleges and universities were located in rural areas, defined as the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less. In that same year, 696 students participated in the Higher Education Opportunity Program at these colleges and universities.

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

The amendment updates the income criteria for determining student eligibility to participate in the Higher Education Opportunity Program, offered by nonpublic colleges and universities, including those located in rural areas. It changes income levels to account for inflation, among other factors. It also makes an income adjustment for a household supported solely by one member who works for two or more employers at the same time, to account for additional costs associated with such employment.

The proposed amendment also revises the definition of independent student to be more consistent with the federal definition of independent student for purposes of the needs analysis for federal student financial aid programs.

The amendment does not add or alter reporting or recordkeeping requirements for nonpublic colleges and universities that administer Higher Education Opportunity Programs, including those located in rural areas, or impose reporting or recordkeeping requirements for students that participate in such programs. In addition, the amendment will not require regulated parties to acquire professional services.

3. COSTS:

The proposed amendment will not impose any capital costs on the colleges and universities located in rural areas. It will only impose minimal costs on them to update informational brochures concerning the Higher Education Opportunity Program and the income guidelines.

4. MINIMIZING ADVERSE IMPACT:

The proposed amendment updates economic criteria for student eligibility to participate in the Higher Education Opportunity Program. The amendment does not make any differentiation in eligibility based upon the geographic location of the student. In the interests of equity, uniform economic criteria are established for all students across the State.

5. RURAL AREA PARTICIPATION:

A copy of the proposed amendment was shared with each of the nonpublic colleges and universities that operated Higher Education Opportunity Programs in 2005-2006, including the 12 located in rural areas. These institutions were asked to comment on the amendment.

In addition, comments on the proposed amendment were solicited from the Rural Education Advisory Committee, whose membership includes, among others, representatives of school districts, BOCES, business interests, and government entities located in rural areas.

Job Impact Statement

The proposed amendment concerns income criteria for determining student eligibility to participate in the Higher Education Opportunity Program, a program of student assistance administered by nonpublic colleges and universities. The amendment will not affect jobs and employment opportunities in New York State. Because it is evident from the nature of this amendment that it will not affect job and employment opportunities, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required, and one has not been prepared.

Department of Environmental Conservation

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Sanitary Condition of Shellfish Lands

I.D. No. ENV-26-07-00003-EP

Filing No. 594

Filing date: June 8, 2007

Effective date: June 8, 2007

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

Action taken: Amendment of Part 41 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 13-0307 and 13-0319

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

Specific reasons underlying the finding of necessity: Environmental Conservation Law § 13-0307 requires that the Department examine shellfish lands and certify those that are in such sanitary condition that shellfish may be taken therefrom and used as food; all other lands must be designated as uncertified.

To protect public health and to comply with ECL 13-0307, the Department's Bureau of Marine Resources conducts and maintains sanitary surveys of shellfish growing areas (SGA) in the marine district of New York State. Maintenance of these surveys includes the regular collection and bacteriological examination of water samples to monitor the sanitary condition of shellfish growing areas.

Recent sanitary surveys of shellfish lands in the Town of Southold show that changes in classification of certain shellfish lands are required. This rule will immediately designate shellfish lands that do not meet water quality standards as uncertified and close such lands to shellfishing. The rule will also certify (open) shellfish lands that were previously uncertified where water quality standards are now satisfied.

It is necessary to adopt this rule through emergency rule making to protect the public health and general welfare. The closure of shellfish lands which do not meet the bacteriological criteria for certification will help to ensure that shellfish found thereon are not harvested and marketed to the general public for consumption. Reopening of areas that meet criteria specified in Title 6 NYCRR Part 47 will preserve the general welfare by providing increased opportunity for shellfish harvesters and economic benefit to New York's shellfish industry.

Subject: Sanitary condition of shellfish lands.

Purpose: To protect consumers of shellfish.

Text of emergency/proposed rule: Clause 41.3(b)(7)(iii)(b) is repealed, and a new clause 41.3(b)(7)(iii)(b) is adopted to read as follows:

(b) *East Creek, Mud Creek, Haywater Cove, and Broadwater Cove.*

(1) *Broadwater Cove. During the period May 15th through October 31st, all that area of Broadwater Cove lying west of a line extending southerly from the southeast corner of the house located at 8000 Skunk Lane (local name) to the opposite shore.*

(2) *East Creek and Mud Creek. During the period January 1st through December 31st, both dates inclusive, all that area of East Creek and Mud Creek west and north of a line extending northerly from the southernmost dock on East Creek to an osprey nest platform on the opposite shoreline and continuing northeasterly to the southernmost end of the boat ramp at the western end of Mason Drive.*

(3) *East Creek, Mud Creek and Haywater Cove. During the period of May 1st through November 30th, both dates inclusive, all that area of East Creek, Mud Creek and Haywater Cove southerly of a line extending northerly from the southernmost dock on East Creek to an osprey nest platform on the opposite shoreline continuing northeasterly to the southernmost end of the boat ramp at the western end of Mason Drive and then proceeding southerly to the intersection of Haywaters Road and Landing Road (local names).*

(4) *Cutchogue Harbor. During the period of May 1st through November 30th, all that area of Cutchogue Harbor within 500 feet in all directions of the mouth of the East Creek, Mud Creek, Haywater Cove and Broadwater Cove Complex (local names).*

Clause 41.3(b)(7)(iii)(c) is repealed, and a new clause 41.3(b)(7)(iii)(c) is adopted to read as follows:

(c) *Wickham Creek. All that area of Wickham Creek including tributaries.*

This notice is intended to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire September 5, 2007.

Text of rule and any required statements and analyses may be obtained from: Melissa Albino, Department of Environmental Conservation, 205 N. Belle Meade Rd., Suite 1, East Setauket, NY 11733, (631) 444-0491, e-mail: maalbino@gw.dec.state.ny.us

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

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

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

Regulatory Impact Statement

Statutory authority:

The statutory authority for designating shellfish lands as certified or uncertified is Environmental Conservation Law (ECL) Section 13-0307. Subdivision 1 of Section 13-0307 of the ECL requires the Department to periodically conduct examinations of shellfish lands within the marine district to ascertain the sanitary condition of said lands. Subdivision 2 of this section requires that the Department certify which shellfish lands are in such sanitary condition that shellfish may be taken for human consumption. Such lands are designated as certified shellfish lands. All other shellfish lands are designated as uncertified.

The statutory authority for promulgating regulations with respect to the harvest of shellfish is ECL Section 13-0319.

Legislative objectives:

There are two purposes of the legislation: to protect public health and to ensure that shellfish lands are appropriately classified as certified or uncertified for the harvest of shellfish. This legislation requires the Department to examine shellfish lands and determine which shellfish lands meet the sanitary criteria for a certified shellfish land, as set forth in regulation - Part 47 of Title 6 NYCRR. Shellfish lands which meet criteria must be designated as certified. Shellfish lands which do not meet criteria must be designated as uncertified to prevent the harvest of shellfish from those lands.

Needs and benefits:

To protect public health and to comply with ECL 13-0307, the Bureau of Marine Resources' shellfish sanitation program conducts and maintains sanitary surveys of shellfish growing areas (SGA) in the marine district of New York State. Maintenance of these surveys includes the regular collection and bacteriological examination of water samples to monitor the sanitary condition of shellfish growing areas.

Annually, water quality evaluation reports are prepared by the staff of the shellfish sanitation program for each SGA which contains certified shellfish lands. These reports present the results of statistical analyses of water quality data gathered by the program, and annual updates to the shoreline pollution source surveys. Each report includes a summary and recommendations for the appropriate classification of that particular shellfish growing area. The report summary may state that all or portions of an SGA should be designated as uncertified for the harvest of shellfish or that all, or portions of, an SGA should be designated as certified for the harvest of shellfish based on criteria in 6 NYCRR Part 47. These reports are on file at the Bureau of Marine Resources office in East Setauket, NY.

In "Cutchogue Harbor SGA #27 Triennial Water Quality Data Evaluation" dated February 2007, data analyses demonstrate that water quality in the uncertified portion of Cutchogue Harbor known as Lower Mud Creek/Haywater Cove now meet bacteriological criteria for certified shellfish lands during a portion of the year as specified in 6 NYCRR Part 47, "Certification of Shellfish Lands." It recommends that this portion of Cutchogue Harbor be designated as certified for the harvest of shellfish during the months when water quality meets criteria. This change will open the area for a period from December 1 through April 30, thereby providing five additional months of harvesting opportunities each year.

Regulations which designate shellfish lands as certified, as is proposed for a portion of the Cutchogue Harbor SGA, benefit the general welfare by ensuring that shellfish resources on underwater lands which meet the sanitary criteria are available for both commercial and recreational use.

The classification of previously uncertified lands as certified may provide additional sources of income to shellfish diggers by increasing the amount of harvest area available.

In the "Cutchogue Harbor SGA #27 Triennial Water Quality Data Evaluation" report dated February 2007, data analyses demonstrate that water quality in a portion of the growing area known as Wickham Creek no longer meets bacteriological criteria for certified shellfish lands as specified in 6 NYCRR Part 47. It recommends that Wickham Creek be designated as uncertified throughout the year.

Regulations which designate shellfish lands as uncertified, as proposed for Cutchogue Harbor, are needed to prevent the harvest and subsequent sale for consumption of shellfish from lands which do not meet the criteria for certified shellfish lands. The direct harvest of shellfish for use as food is allowed from certified shellfish lands only. Shellfish harvested from uncertified shellfish lands have a greater potential to cause human illness due to the possible presence of pathogenic bacteria or viruses which may cause the transmission of infectious disease to the shellfish consumer.

Costs:

There will be no costs to state or local governments. No direct costs will be incurred by regulated commercial shellfish harvesters in the form of initial capital investment or initial non-capital expenses, in order to comply with these proposed regulations. The reopening of uncertified shellfish lands is likely to provide economic benefit to commercial shellfish harvesters whose livelihoods depend on access to certified shellfish lands.

The Department cannot provide an estimate of potential lost income to shellfish harvesters when areas are designated as uncertified, due to a number of variables that are associated with commercial shellfish harvesting; nor can the potential benefits be estimated when areas are reopened. Those variables are listed in the following three paragraphs.

As of December 31, 2006, the Department had issued 1,770 New York State shellfish digger's permits. However, the actual number of those individuals who harvest shellfish commercially full time is not known. Recreational harvesters who wish to harvest more than the daily recreational limit of 100 hard clams, with no intent to sell their catch, can only do so by purchasing a New York State digger's permit. The number of individuals who hold shellfish diggers permits for that type of recreational harvest is unknown. The Department's records do not differentiate between full-time and part-time commercial or recreational shellfishing.

The number of harvesters working in a particular area cannot be estimated for the reason stated above. In addition, the number of harvesters in a particular area is dependent upon the season, the amount of shellfish resource in the area, the price of shellfish and other economic factors, unrelated to the Department's proposed regulatory action.

The Department's actions to designate areas as certified or uncertified are not dependent on the amount of shellfish resources in a particular area. They are based solely on public health concerns and legal mandates.

This rulemaking does not impose any new costs on the Department. Administration and enforcement of the proposed amendment are covered by existing programs.

Local government mandates:

The proposed rule does not impose any mandates on local government.

Paperwork:

No new paperwork is required.

Duplication:

The proposed amendment does not duplicate any state or federal requirement.

Alternatives:

There are no significant alternatives. By law (ECL Section 13-0307), once the Department has determined that an area no longer meets the sanitary criteria for a certified shellfish land, the Department must designate that land as uncertified for the harvest of shellfish. This is necessary to protect public health. Conversely, once the Department has determined that an uncertified shellfish land meets the sanitary criteria, the Department must designate the land as certified and open the area to shellfish harvesting.

Federal standards:

There are no federal standards regarding the certification of shellfish lands. New York and other shellfish producing and shipping states participate in the National Shellfish Sanitation Program (NSSP) which provides guidelines intended to promote uniformity in shellfish sanitation standards among members. The NSSP is a cooperative program consisting of the federal government, states and the shellfish industry. Participation in the NSSP is voluntary - each state adopts its own standards. The U.S. Food and Drug Administration (FDA) evaluates state programs and standards rela-

tive to NSSP guidelines. Substantial non-conformity with NSSP guidelines can result in sanctions being taken by FDA and the NSSP, including removal of a state's shellfish shippers from the Interstate Certified Shellfish Shippers List. This would effectively bar a non-conforming state's product from interstate commerce.

Compliance schedule:

Immediate compliance with any regulation designating shellfish lands as uncertified is necessary to protect public health. Shellfish harvesters are notified of changes to SGA classification by mail either prior to, or concurrent with, the adoption of new regulations.

Compliance with new regulations designating areas as certified or uncertified does not require additional capital expense, paperwork, recordkeeping or any action by the regulated parties in order to comply, except that harvesters must observe the new closure lines. Therefore, immediate compliance may be readily achieved.

Regulatory Flexibility Analysis

Effect on small business and local government:

As of December 31, 2006, there were 1,770 licensed shellfish diggers in New York State. The number of permits issued for areas in the state is as follows: New York City, 53; Westchester, 2; Town of Hempstead, 145; Town of Oyster Bay, 176; Town of North Hempstead, 5; Town of Babylon, 69; Town of Islip, 110; Town of Brookhaven, 277; Town of Southampton, 185; Town of East Hampton, 239; Town of Shelter Island, 32; Town of Southold, 211; Town of Riverhead, 35; Town of Smithtown, 26; Town of Huntington, 194; other, 11.

Any change in the designation of shellfish lands may have an effect on shellfish diggers. Each time shellfish lands or portions of shellfish lands are designated as uncertified, there may be some loss of income for a number of diggers who may be harvesting shellfish from the lands to be closed. This loss is determined by the acreage to be closed, the type of closure (whether year-round or seasonal), the species of shellfish present in the area, its productivity, and the market value of the shellfish resource in the particular area.

When uncertified shellfish lands are found to meet the sanitary criteria for a certified shellfish land, and are then re-designated as certified, there is also an effect on shellfish diggers. More shellfish lands are made available for the harvest of shellfish, and there is a potential for an increase in income. Again, the effect of the re-opening of a harvesting area is determined by the shellfish species present, the area's productivity, and the market value of the shellfish resource in the area.

Changes in the classification of shellfish lands impose no additional requirements on local governments above what level of management and enforcement that they normally undertake; therefore, there should be no effect on local governments.

Compliance requirements:

There are no reporting or recordkeeping requirements for small businesses or local governments.

Professional services:

Small businesses and local governments will not require any professional services to comply with proposed rules.

Compliance costs:

There are no capital costs which will be incurred by small businesses or local governments.

Minimizing adverse impact:

The designation of shellfish lands as uncertified may have an adverse impact on commercial shellfish diggers. All diggers in the towns affected by proposed closures will be notified by mail of the designation of shellfish lands as uncertified, prior to the date the closures go into effect. Shellfish lands which fail to meet the sanitary criteria during specified times of the year will be designated as uncertified only during those times. At other times, shellfish may be harvested from those lands (seasonally certified). To further minimize any adverse effects of proposed closures, towns may request that uncertified shellfish lands be considered for conditionally certified designation or for a shellfish transplant project. Under appropriate conditions, shellfish may be harvested from uncertified lands and microbiologically cleansed in a shellfish depuration plant. Shellfish diggers will also be able to shift harvesting effort to nearby certified shellfish lands. There should be no significant adverse impact on local governments from most changes in the classification of shellfish lands.

Small business and local government participation:

Impending shellfish closures are discussed at regularly scheduled Shellfish Advisory Committee meetings. This committee, organized by the Department, is comprised of representatives of local baymen's associations and local town officials. Through their representatives, shellfish harvesters can express their opinions and give recommendations to the

department concerning shellfish land classification. Local governments, state legislators, and baymen's organizations are notified by mail and given the opportunity to comment on any proposed rulemaking prior to filing with the Department of State.

Economic and technological feasibility:

As specified above, there are no reporting, recordkeeping or affirmative acts that small businesses or local governments must undertake to comply with the proposed rules which result in the reclassification of shellfish harvesting areas as certified or uncertified. Similarly, small businesses and local governments will not have to retain any professional services or incur any capital costs to comply with such rules. As a result, it should be economically and technically feasible for small businesses and local governments to comply with this rule.

Rural Area Flexibility Analysis

Amendments to Part 41 will not impose an adverse impact on rural areas. Only the State's marine district will be directly affected by regulatory initiatives to open or close shellfish lands. The Department of Environmental Conservation has determined that there are no rural areas within the marine district, and no shellfish lands within the marine district are located adjacent to any rural areas of the state. The proposed regulations will not impose reporting, recordkeeping, or other compliance requirements on public or private entities in rural areas. Since no rural areas will be affected by amendments of Part 41 "Sanitary Condition of Shellfish Lands" of Title 6 NYCRR, the Department of Environmental Conservation has determined that a Rural Area Flexibility Analysis is not required.

Job Impact Statement

Nature of impact:

Environmental Conservation Law section 13-0307 requires that the Department examine shellfish lands and certify which shellfish lands are in such sanitary condition that shellfish may be taken therefrom for use as food. Shellfish lands that do not meet the criteria for certified (open) shellfish lands must be designated as uncertified (closed) to protect public health.

Rulemaking to amend 6 NYCRR 41, Sanitary Condition of Shellfish Lands, can potentially have a positive or negative effect on jobs for shellfish harvesters. Amendments to reclassify areas as certified may increase job opportunities, while amendments to reclassify areas as uncertified may limit harvesting opportunities.

The Department does not have specific information regarding the locations in which individual diggers harvest shellfish, and therefore is unable to assess the specific job impacts on individual shellfish diggers. In general terms, amendments of 6 NYCRR Part 41 to designate areas as uncertified can have negative impacts on harvesting opportunities. The extent of the impact will be determined by the acreage closed, the type of closure (year-round or seasonal), the area's productivity, and the market value of the shellfish. In general, any negative impacts are small because the Department's actions to designate areas as uncertified typically only affect a small portion of the shellfish lands in the state. Negative impacts are also diminished in many instances by the fact that shellfish harvesters are able to redirect effort to adjacent certified areas.

Categories and numbers affected:

Licensed commercial shellfish diggers can be affected by amendments to 6 NYCRR Part 41. Most harvesters are self-employed, but there are some who work for companies with privately controlled shellfish lands or who harvest surf clams or ocean quahogs in the Atlantic Ocean.

As of December 31, 2006, there were 1,770 licensed shellfish diggers in New York State. The number of permits issued for areas in the state is as follows: New York City, 53; Westchester, 2; Town of Hempstead, 145; Town of Oyster Bay, 176; Town of North Hempstead, 5; Town of Babylon, 69; Town of Islip, 110; Town of Brookhaven, 277; Town of Southampton, 185; Town of East Hampton, 239; Town of Shelter Island, 32; Town of Southold, 211; Town of Riverhead, 35; Town of Smithtown, 26; Town of Huntington, 194; other, 11. It is estimated that ten (10) to twenty-five (25) percent of the diggers are full-time harvesters. The remainder are seasonal or part-time harvesters.

Regions of adverse impact:

Certified shellfish lands that could potentially be affected by amendments to 6 NYCRR Part 41 are located in or adjacent to Nassau County, Suffolk County, and a portion of the Atlantic Ocean south and east of New York City. There is no potential adverse impact to jobs in any other areas of New York State.

Minimizing adverse impact:

Shellfish lands are designated as uncertified to protect public health as required by the Environmental Conservation Law. Some impact from

rulemakings to close areas that do not meet the criteria for certified shellfish lands is unavoidable.

To minimize the impact of closures of shellfish lands, the Department evaluates areas to determine whether they can be opened seasonally during periods of improved water quality. The Department also operates Conditional Harvesting Programs at the request of, and in cooperation with, local governments. Conditional Harvesting Programs allow harvest in uncertified areas under prescribed conditions, determined by studies, when bacteriological water quality is acceptable. Additionally, the Department operates transplant harvesting programs which allow removal of shellfish from closed areas for cleansing in certified areas, thereby recovering a valuable resource. Conditional and transplant programs increase harvesting opportunities by making the resource in a closed area available under controlled conditions.

In this particular rule-making, a number of the areas affected have only been closed seasonally. This is intended to minimize the adverse impact on individual shellfish diggers.

Self-employment opportunities:

A large majority of shellfish harvesters in New York State are self-employed. Rulemaking to change the classification of shellfish lands can have an impact on self-employment opportunities. The impact is dependent on the size and productivity of the affected area and the availability of adjacent lands for shellfish harvesting.

Department of Health

EMERGENCY RULE MAKING

Serialized Official New York State Prescription Form

I.D. No. HLT-42-06-00005-E

Filing No. 593

Filing date: June 8, 2007

Effective date: June 8, 2007

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

Action taken: Addition of Part 910; amendment of Parts 80 and 85 of Title 10 NYCRR; amendment of section 505.3 and repeal of sections 528.1 and 528.2 of Title 18 NYCRR.

Statutory authority: Public Health Law, section 21

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

Specific reasons underlying the finding of necessity: We are proposing that these regulations be adopted on an emergency basis because immediate adoption is necessary to protect the public health and safety and to meet statutory requirements. The budget proposal enacting Section 21 contains explicit authority for the Commissioner to promulgate emergency regulations. This was done recognizing the need to provide for the implementation of the use of statewide forged proof prescriptions by the April 19, 2006 date mandated by the law.

Immediate adoption of these regulations is necessary to allow the implementation of Section 21 of Public Health Law, achieve the health care cost savings and to enhance the quality of health care by preventing drug diversion resulting from forged or stolen prescriptions.

The practitioner groups affected by this proposal, PSSNY, MSSNY and the Health Plan Association of New York were consulted during budget negotiations. Their concerns are addressed in the statutory proposal set forth in the state budget and in these regulations.

Subject: Enactment of a serialized New York State prescription form.

Purpose: To enact a serialized New York State prescription form.

Substance of emergency rule: Part 910 (10 NYCRR)

These regulations are being proposed on an emergency basis to implement Section 21 of the Public Health Law. The purpose of the law is to combat and prevent prescription fraud by requiring the use of an official New York State prescription for all prescribing done in this state. Official prescriptions contain security features that will curtail alterations and forgeries that divert drugs to black market sale to unsuspecting patients and cost New York's Medicaid program and private insurers tens of millions of dollars annually in fraudulent claims.

The emergency regulations consist of a new Part 910 to Title 10 NYCRR. Section 910.1 defines terms used in the Part. Section 910.2 states requirements for practitioner prescribing, including that, until April 19, 2007, hospitals and comprehensive voluntary non-profit community diagnostic and treatment centers designated by the Department are exempted from the requirement for their staff practitioners to prescribe non-controlled substances on an official prescription form. The exemption will continue beyond April 19, 2007 if the hospital and the comprehensive voluntary non-profit community diagnostic and treatment center implements and utilizes an electronic prescribing system to transmit prescriptions to pharmacies capable of receiving them. The exemption also will continue beyond April 19, 2007 for those facilities approved by the Department that have implemented a computerized provider order entry system that generates paper prescriptions. This exemption will allow staff practitioners to issue printed prescriptions—which minimize medication errors due to misinterpretations of handwritten prescriptions for—non-controlled substances on the prescription form of the facility until the Department approves and provides an alternative form of serialized official New York State prescription. Section 910.3 covers registration with the Department, which practitioners and healthcare facilities are required to do to order official prescriptions. Section 910.4 states the manner in which official prescriptions will be issued by the Department, while section 910.5 lists the practitioner and facility requirements for safeguarding the official prescriptions against theft, loss or unauthorized use. Section 910.6 states pharmacy requirements for dispensing official prescriptions and out-of-state prescriptions, which may be dispensed in lieu of an official prescription. Section 910.6 also states pharmacy requirements for submission of official prescription data to the Department. Section 910.6 also authorizes pharmacies to fill prescriptions for non-controlled substances until October 19, 2006 that are not written on an official prescription provided that the pharmacy notify the Department of the prescribing practitioner so that the practitioner may be contacted and issued official prescriptions for subsequent prescribing.

Both 10 NYCRR and 18 NYCRR have been revised to reflect the above regulations, update outdated/obsolete sections and to allow for greater flexibility for changes in law. The following changes are proposed:

Section 505.3 (18 NYCRR)

Language included to reflect use of facsimile prescriptions.

Language included to allow electronically transmitted prescriptions.

Language included to mandate that all claims for payments of drugs or supplies under the Medicaid program shall contain the serial number of the Official NYS Prescription Form.

Delete language prohibiting telephone orders for OTCs.

Language amended—telephone prescriptions for non-controlled substances WILL NOT require a follow-up hard copy prescription (even with refills).

Delete Estimated Acquisition Cost—defined in Social Services Law section 367-a(9)(b)(ii).

Delete language referencing “triplicate” prescriptions and update to language consistent with Official NYS Prescription Form and Article 33 of the Public Health Law.

Delete language referencing other Sections that have been deleted (i.e. 10 NYCRR 85.25).

Delete language referencing dispensing fees—in Social Services Law section 367-a(9)(d).

Language is added to reference prescription drugs filled in compliance with section 6810 of the Education Law, Article 33 of the Public Health Law and new 10 NYCRR Part 910.

A change has been made to the prior version of the emergency filing for 18 NYCRR 505.3(b)(7). The words “or supplies” has been deleted since the enacting legislation (Section 21 of the Public Health Law) only mandated that forged proof prescriptions be utilized for prescription drugs. This change conforms the regulations to the law.

Part 528 (18 NYCRR)

Section 528.1 is deleted—obsolete listing of non-prescription drugs covered under the Medicaid program. Listing of reimbursable drugs and rate is available on-line at the NYS eMedNY website.

Section 528.2 is deleted—language regarding “dispensing fees include routine delivery charges” is moved to 18 NYCRR 505.3(f)(6). Compounding fee language in 18 NYCRR 505.3 [6] (3).

Part 85 (10 NYCRR)

Section 85.21 amended—OTC List—quantities and dosage forms have been deleted to allow greater flexibility in coverage. Remove OTC categories that are no longer marketed.

Section 85.22 amended—establishment of OTC prices amended to more accurately reflect OTC pricing (Ad Hoc Committee is obsolete) and removal of references to deleted Sections (i.e., 18 NYCRR 528.2 and 10 NYCRR 85.25)

Section 85.23 deleted—Revisions to list of OTCs and Maximum Reimbursable Prices—in Social Services Law 365-a(4)(a).

Section 85.25 deleted—Prescription drug list covered under Medicaid—obsolete. Drug list available on line at NYS eMedNY website.

Part 80 (10 NYCRR) Part 80 table of contents has been revised to reflect amendments in titles of sections of regulations.

Sections have been amended throughout Part 80 to revise the previous title of 'Bureau of Narcotic Control' and 'Bureau of Controlled Substances' to the current title of 'Bureau of Narcotic Enforcement'.

Sections have been amended throughout Part 80 to revise the previous title of 'Bureau of Narcotics and Dangerous Drugs' to the current title of 'Drug Enforcement Administration'.

Section 80.1—language added to define 'automated dispensing system'.

Section 80.5—language deleted for 3b Institutional Dispenser license due to registration of facilities to be issued official prescriptions. Language added for retail pharmacy license, installation, and operation of automated dispensing system in Residential Healthcare Facility (RHCF).

Section 80.11—language added to make requirements for supervising pharmacist of controlled substance manufacturer and distributor consistent with pharmacist licensure requirements in New York State Education Law.

Section 80.46—language added to require supervising physician countersignature of medical order of physician's assistant if deemed necessary by supervising physician or hospital to bring regulation into consistency with PHL 3703.

Section 80.47—language revised to except administration of controlled substances in emergency kits to patients in Title 18 adult care facilities.

Section 80.49—language revised from prescription serial number to pharmacy prescription number.

Section 80.50—language added to require pharmacies to maintain separate stocks of controlled substances received for use in automated dispensing system in RHCF and to authorize storage of non-controlled substances in such system.

Section 80.60—language added for female gender reference to practitioner.

Section 80.63—deleted definition of written prescription and added definition of out-of-state prescription. Language added to authorize printed prescriptions generated by computer or electronic medical record system. Language added regarding practitioner oral prescribing requirement.

Section 80.67—midazolam and quazepam added to list of benzodiazepine controlled substances, as per PHL 3306. Language added requiring quantity of dosage units to be indicated in both numerical and written word form. Language amended to include chorionic gonadotropin as controlled substance for prescribing up to a 3-month supply. Language added to assign code letters to medical conditions for prescribing more than a 30-day supply.

Section 80.67 (con't)—language deleted regarding Department's issuance of official New York State prescriptions, due to added language in section 80.72. Language deleted for face and back of prescription to facilitate timely pharmacist dispensing. Language added authorizing practitioner faxing of prescription for hospice or RHCF patient and for prescription to be compounded for direct parenteral administration to patient.

Section 80.68—language added for certain other controlled substances. Language deleted requiring pharmacist to endorse pharmacy DEA number on official NYS prescription to facilitate timely dispensing. Language added requiring electronic transmission of prescription data to Department.

Section 80.69—language added requiring quantity of dosage units to be indicated in numerical and written word form. Language added to assign letters for condition codes. Deleted reference to PHL sections 3335 and 3336, which were deleted by PHL section 21, and added reference PHL sections 3332 and 3333, which are now the relevant sections. Deleted written prescription and added official prescription. Deleted back of the prescription and face of the prescription to facilitate timely dispensing. Language added authorizing practitioner faxing of prescription for hospice or RHCF patient and for prescription to be compounded for direct parenteral administration to patient.

Section 80.70—Language added specifying oral prescriptions for 30-day supply or 100 dosage units does not apply to substance limited to 5-day supply by section 80.68. Deleted serial prescription number and added

pharmacy prescription number. Added female gender language in reference to pharmacist. Language added requiring filing of prescription information with Department.

Section 80.71—Deleted section (b) to reflect that practitioners are no longer required by PHL section 3331 to complete an official prescription when dispensing controlled substances. Corrected spelling of chorionic gonadotropin. Added reference to condition codes in sections 80.67 and 80.69. Added packaging and labeling requirements for practitioner dispensing of controlled substances. Added requirement for practitioners to submit dispensing information to Department by electronic transmission.

Section 80.72—deleted all references to practitioner dispensing and labeling requirements because practitioner dispensing now covered by section 80.71. Language added regarding practitioner registration with Department and Department issuance of official NYS prescription forms.

Section 80.73—added language specifying pharmacist dispensing of schedule II and controlled substances listed in section 80.67. Added female gender language in reference to pharmacist. Deleted requirement for pharmacist to endorse pharmacy DEA number on prescription for timely dispensing. Language added requiring pharmacy to verify identity of person picking up dispensed prescription. Language added requiring pharmacy electronic transmission of prescription data to Department.

Section 80.73 (con't)—language added specifying emergency oral prescriptions for schedule II and controlled substances listed in section 80.67 and filing of emergency oral prescription memorandum. Language added requiring pharmacy electronic transmission of oral prescription data to Department. Language added specifying partial filling of official prescription for schedule II and controlled substances listed in section 80.67. Language added authorizing pharmacist dispensing of faxed prescription and requiring delivery of original within 72 hours.

Section 80.74—language added in section title specifying pharmacist dispensing of controlled substances. Language added for prescription labeling requirements. Added female gender reference to pharmacist. Added requirement for filing prescription data with Department. Language added authorizing pharmacist dispensing of faxed prescription and requiring delivery of original within 72 hours.

Section 80.74 (con't)—language added for pharmacy requirement to verify identification of person picking up prescription. Deleted reference to schedule II controlled substances and those substances listed in section 80.67 because all controlled substances now require official NYS prescription. Deleted labeling requirement reference to section 80.72 and added reference to section 80.71.

Section 80.75—deleted language regarding requirement to purchase official prescriptions. Added language regarding registration and issuance of official prescriptions for institutional dispenser.

Section 80.78—Added a new section regarding pharmacist requirements for dispensing of out-of-state prescriptions for controlled substances, to be dispensed in conformity with provisions set forth for official prescriptions.

Section 80.84—deleted language requiring group practice providing treatment of opiate dependence with buprenorphine to be limited to 30 patients at any one time, making New York State regulations consistent with the federal Drug Addiction Treatment Act. Deleted language requiring practitioners and pharmacies to register with Department to prescribe and dispense buprenorphine. Deleted language requiring pharmacy to file prescription data and report loss of controlled substances because redundant. Deleted reference to PHL sections 3335 and 3336 because deleted by PHL 21 and added reference to PHL sections 3332 and 3333 because now relevant sections.

Section 80.106—added language requiring separate record-keeping for pharmacies installing automated dispensing system in RHCF.

Section 80.107—added language authorizing Department to notify practitioner of patient treatment with controlled substances by multiple practitioners, consistent with PHL section 3371.

Section 80.131—deleted written prescription, added official prescription and out-of-state prescription. Language added increasing oral prescription for hypodermic needles and syringes to quantity of one hundred hypodermic needles and syringes.

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-42-06-00005-P, Issue of October 18, 2006. The emergency rule will expire August 6, 2007.

Text of emergency rule and any required statements and analyses may be obtained from: William Johnson, Department of Health, Office of Regulatory Affairs, Corning Tower, Rm. 2438, Empire State Plaza, Al-

bany, NY 12237-0097, (518) 473-7488, fax: (518) 473-2019, e-mail: regsqna@health.state.ny.us

Regulatory Impact Statement

Statutory Authority:

Section 3308(2) of the Public Health Law authorizes and empowers the Commissioner to make any regulations necessary to supplement the provisions of Article 33 of the Public Health Law in order to effectuate its purpose and intent.

The state budget for SFY 2004-2005 enacted new Section 21 of the Public Health Law which mandates a statewide official prescription form for all prescriptions written in New York for the purpose of curtailing prescription fraud and enhancing patient safety. The law, Chapter 58 of the Laws of 2004, permits the Commissioner to promulgate emergency regulations in furtherance of this new section of law.

Legislative Objectives:

Article 33 of the Public Health Law, officially known as the New York State Controlled Substances Act, was enacted in 1972 to govern and control the possession, prescribing, manufacturing, dispensing, administering and distribution of controlled substances within New York. New Section 21 of the Public Health law mandates a statewide official prescription, supports electronic prescribing and facilitates the dispensing process.

Needs and Benefits:

This regulation will support the enactment of an official New York State prescription form, which will deter fraud by curtailing theft or copying of prescriptions by individuals engaged in drug diversion. These regulations have been drafted after discussions with such provider groups as the State Health Plan Association, Medical Society of the State of New York and the Pharmacist Society of the State of New York.

Regulations are being proposed to implement Section 21 of the Public Health Law (PHL). The purpose of the law is to combat and prevent prescription fraud by requiring an official New York State prescription for every prescription written in New York. Official prescriptions contain security features designed specifically to curtail alterations, counterfeiting, and forgeries, all of which divert drugs to black market sale to unsuspecting patients and cost New York's Medicaid program and private insurers tens of millions of dollars annually in fraudulent claims.

Regulations have been amended to reflect the implementation of the above Public Health Law and to update obsolete or outdated language in the existing regulations. The proposed regulations also include amendments to authorize a practitioner to deliver a controlled substance prescription to a pharmacy by facsimile transmission in specified circumstances and to authorize a pharmacist to dispense such faxed prescription. By facilitating timely prescribing and dispensing, such facsimile transmission will enhance healthcare for patients enrolled in hospice programs or residing in a Residential Healthcare Facility (RHCF) and for patients who require controlled substance prescriptions to be compounded for administration by parenteral infusion.

Regulations have also been amended to authorize the Department to license a retail pharmacy to install and operate an automated dispensing system in a RHCF, which will bring New York regulations into consistency with federal regulations. The installation and operation of such systems will significantly benefit patient care through timely and efficient dispensing of prescriptions for controlled substances. Automated dispensing systems will also lessen the cost of medications remaining from waste due to discontinued drug therapy and will simultaneously decrease the amount of such controlled substances that are susceptible to diversion.

These regulations are found in amendments to 10 NYCRR Part 80 and in the newly promulgated regulations in 10 NYCRR Part 910. Included in the Part 910 regulations is an exemption allowing hospital practitioners or practitioners in a comprehensive voluntary non-profit diagnostic and treatment center designated by the Department to prescribe non-controlled substances on a non-official hospital prescription until April 19, 2007. The exemption will continue beyond April 19, 2007 for hospitals and designated comprehensive voluntary non-profit diagnostic and treatment centers that implement and utilize an electronic prescription system to transmit prescriptions to pharmacies capable of receiving them. The exemption also will continue beyond April 19, 2007 for those facilities approved by the Department that have implemented a computerized provider order entry system that generates printed paper prescriptions. This exemption will address concerns expressed by the facilities regarding the expense of safeguarding official prescription paper and purchasing and installing additional dedicated computer printers in order to comply with the regulations. The exemption will allow staff practitioners to issue printed prescriptions for non-controlled substances on the prescription form of the facility until the Department approves and provides an alternative form of

serialized official New York State prescription. Printed prescriptions enhance patient care by minimizing medication errors due to misinterpretations of handwritten prescriptions.

Also included in the Part 910 regulations is an exemption allowing pharmacies to dispense prescriptions for non-controlled substances that are not issued on an official prescription until October 19, 2006 in order that optimum care may continue to be provided to patients. The regulation requires pharmacies to notify the Department so that the practitioner may be contacted and issued official prescriptions for all subsequent prescribing.

Title 18, Section 505, regulations have also been amended to clarify for providers that serial numbers reporting by billing providers is required in all instances where a prescriber or orderer of services used a serialized prescription. This change is requested in recognition of the opportunity serialized prescriptions offer to reduce the incidence of prescription theft. The reporting of prescription serial numbers on claims allows the MMIS claims system to provide feedback and alerts to pharmacy providers, at the point of service, about stolen prescriptions. Lack of serial numbers on a claim hampers this capability.

Costs:

Costs to Regulated Parties:

This program is being funded by an annual assessment on the State Insurance Department of \$16.9 million. The assessment funds the costs of providing 180 million official prescriptions annually as well as administrative and enforcement staffing to operate and enforce the program. The current fee to practitioners and institutions for the official prescription has been eliminated. Private insurers and the Medicaid program will realize, respectively, an estimated \$75 million and \$25 million in annual savings due to the reduction of fraudulent prescription claims.

The \$25 million estimated savings for the Medicaid program represents the 25% New York State share. \$50 million in estimated savings would accrue to the 50% federal government share of Medicaid, while \$25 million in estimated savings will accrue to the 25% local government share of Medicaid.

The allowance for electronic prescribing in the Medicaid program and the expedition of the dispensing process through the use of bar coding will save valuable professional time for practitioners and pharmacists.

There will be a slight expenditure to pharmacies for software adjustments, due to minor changes in reporting requirements for controlled substance prescriptions.

Costs to State and Local Government:

There will be no costs to state or local government. Savings to State government are estimated at \$25 million. Savings to local government, from reduction in subsidizing of prescription costs for patients in their Medicaid population, will result in an estimated \$25 million.

Costs to the Department of Health:

There will be no additional costs to the Department. The decrease in prescription fraud as a result of use of the official prescription will result in savings for the Department for the Medicaid, Elderly Pharmaceutical Insurance Coverage, and Empire programs. An increase in the efficiency of investigations made possible by the official prescription program will result in additional savings for the Department.

Local Government Mandates:

The proposed rule does not impose any new programs, services, duties or responsibilities upon any county, city, town, village, school district, fire district or other specific district.

Paperwork:

No additional paperwork is required. The use of a single prescription form for controlled substances and non-controlled substances will simplify paperwork and record keeping for practitioners and institutions. Currently, practitioners use their own prescription form as well as the official prescription. The official prescription will replace existing prescriptions that are currently used in addition to the official prescription. Encouragement of electronic prescribing will significantly reduce paperwork requirements for practitioners, institutions and pharmacists.

Duplication:

The requirements of this proposed regulation do not duplicate any other state or federal requirement.

Alternatives:

There are no alternatives that would support the approach to be taken under the regulations. The limitation on reporting requirements by pharmacies (only for controlled substances as opposed to requiring reporting on all prescriptions) was done after consultation with affected provider organizations.

As a result of consultations with the hospital community, hospitals were granted a one-year exemption, until April 19, 2007, from the requirement for their staff practitioners to prescribe non-controlled substance medications on the official prescription. The purpose of the exemption is to serve as an incentive for hospitals to develop electronic prescription systems. The exemption will be extended if the hospital implements and utilizes an electronic prescription system to transmit such prescriptions directly to a pharmacy in lieu of an official prescription. The exemption also will be extended beyond April 19, 2007 for a hospital approved by the Department that has implemented a computerized provider order entry system that generates printed paper prescriptions. This exemption will address concerns expressed by the facilities regarding the expense of safeguarding official prescription paper and purchasing and installing additional dedicated computer printers. The exemption will allow staff practitioners to issue printed prescriptions—which minimize medication errors due to misinterpretation of handwritten prescriptions—for non-controlled substances on a hospital prescription form until the Department approves and provides an alternative form of official New York State prescription.

Federal Standards:

The regulatory amendment does not exceed any minimum standards of the federal government.

Compliance Schedule:

These regulations will become effective immediately upon filing a Notice of Emergency Adoption with the Secretary of State.

Regulatory Flexibility Analysis

This proposed rule will affect practitioners, pharmacists, retail pharmacies, hospitals and nursing homes.

According to the New York State Department of Education, Office of the Professions, there are approximately 120,000 licensed and registered practitioners authorized to prescribe and order prescription drugs. According to the New York State Board of Pharmacy, there are a total of approximately 4,500 pharmacies in New York State. According to the New York State Education Department's Office of the Professions, there are approximately 18,000 licensed and registered pharmacists in New York.

Compliance Requirements:

The regulations follow the newly enacted Section 21 of the Public Health Law and require the use of the official New York State Prescription form. In addition to curtailing fraud and drug diversion, these regulations will expedite the prescribing and dispensing process. Practitioners, institutions and pharmacists will benefit from the following amendments;

- (1) Eliminating the fee to practitioners and institutions for official prescriptions;
- (2) Eliminating the requirement that pharmacists write the DEA number of the pharmacy on the official prescription;
- (3) Bar coding of the serial number on the official prescription to expedite the dispensing process; and
- (4) Eliminating multiple prescription forms practitioners currently use to prescribe drugs.

Currently, dispensing data is required from all Schedule II and benzodiazepine prescriptions. The only new requirement is the submission of dispensing data from the original dispensing of all prescriptions for controlled substances.

Professional Services:

No additional professional services are necessary.

Compliance Costs:

Pharmacies may require minor adjustments in computer software programming due to additional prescription data submission requirements.

Economic and Technological Feasibility:

The proposed rule is both economically and technologically feasible. The process utilizes existing electronic systems for reporting of dispensing by pharmacies. The regulations encourage the use of electronic prescribing by practitioners. Electronic prescribing is not only more efficient than the current paper process, it is also a secure procedure that will reduce prescription fraud. Electronic prescribing will protect the public health and result in substantial savings to the Medicaid program and private insurance as well as enhancing public safety.

Minimize Adverse Impact:

The regulations require only a minimal increase in reporting requirements. These requirements were negotiated with organizations representing the affected groups. The use of bar coding and the encouragement of electronic prescribing minimize any adverse impact.

Small Business and Local Government Participation:

During the drafting of the statute which is the basis of these regulations, the Department met with the Pharmacist Society of the State of New York (PSSNY), the Medical Society of the State of New York (MSSNY) and the Health Plan Association of New York. The regulations were drafted considering their comments. Local governments are not affected.

Rural Area Flexibility Analysis

Types and Estimated Numbers of Rural Areas:

The proposed rule will apply to participating pharmacies, practitioners and institutions located in all rural areas of the state. Outside of major cities and metropolitan population centers, the majority of counties in New York contain rural areas. These can range in extent from small towns and villages and their surrounding areas, to locations that are sparsely populated.

Compliance Requirements:

The only compliance requirements are the use of the official prescription provided free of charge and additional minimal reporting requirements by pharmacies. The regulations are in furtherance of new Section 21 of the Public Health Law authorizing a statewide official prescription aimed at reducing fraud. Additionally, the regulations assist practitioners and pharmacies by making the prescribing and dispensing process more efficient through the use of electronic prescribing.

Professional Services:

None necessary.

Compliance Costs:

The new law requires all pharmacies in New York State to electronically transmit information from controlled substance prescriptions to the Department on a monthly basis, for monitoring and analysis purposes in combating prescription fraud. Pharmacies may require minor adjustments in computer software programming due to this additional prescription data submission requirement.

Economic and Technological Feasibility:

The proposed rule is both economically and technologically feasible. The process will utilize existing electronic systems for reporting of dispensing information by pharmacies. The regulations encourage the use of electronic prescribing, which is more efficient and more secure than a paper process. Electronic prescribing will also enhance patient safety through a reduction in medication error due to legibility issues.

Minimize Adverse Impact:

The regulations require only a minimal increase in reporting requirements. This requirement is minimized by permitting pharmacies to scan the bar code of the prescription serial number onto the Medicaid claim form also through the allowance of electronic prescribing. Additionally, the benefits on regulated entities resulting from these regulations and described herein outweigh any adverse impact.

Rural Area Participation:

During the drafting of this regulation, the Agency met with and solicited comments from pharmacist, health plan and practitioner associations who represent these professions in rural areas. No particular issues relating to the effect of this program on rural areas was expressed.

Job Impact Statement

Nature of Impact: This proposal will not have a negative impact on jobs and employment opportunities. In benefiting the public health by ensuring that drug diversion does not occur through the use of forged or stolen prescriptions, the proposed amendments are not expected to either increase or decrease jobs overall. The fiscal savings to public and private insurers will result in an economic benefit to these groups and could have a positive influence on jobs. Additionally, the anticipated time saved by practitioners and pharmacists will benefit all parties involved as well as patients.

Insurance Department

EMERGENCY RULE MAKING

Rules Governing Individual and Group Accident and Health Insurance Reserves

I.D. No. INS-17-07-00002-E

Filing No. 592

Filing date: June 8, 2007

Effective date: June 8, 2007

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

Action taken: Repeal of Part 94 and addition of new Part 94 (Regulation 56) to Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 1303, 1304, 1305, 1308, 4117, 4217, 4310 and 4517

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

Specific reasons underlying the finding of necessity: Regulation No. 56 was originally effective Aug. 18, 1971 in its present form and has not been substantively amended since that time. In the intervening 31 years, the National Association of Insurance Commissioners has adopted new reserving tables for individual and group disability income insurance policies, popularly referred to as the Commissioners' Disability Tables ("CDT"). The current CDT was adopted in 1986 and is used widely across the country as the standard for holding reserves for individual and group disability insurance policies. It reflects both modern morbidity and claims experience and the judgement of actuaries and regulators who are knowledgeable about the current state of the disability insurance market.

However, New York authorized insurers are required to use the 1964 CDT because it was required by Regulation No. 56 (see, e.g., 11 NYCRR Part 94.1[a][4][iii][A]). Also, Regulation No. 56 did not apply to group insurance, providing little or no guidance to New York insurers that write this important form of protection. The effect of the application of this outdated regulation is that New York authorized insurers are required to hold reserves far in excess of the national standard for disability insurance active lives reserves, but below the prevailing standard for claims reserves. Most New York authorized insurers hold reserves in excess of the amount needed to pay claims due to the required use of the outdated tables. For these insurers, the adoption of the more recent tables will significantly reduce the cost of doing business and allow them to compete more effectively with insurers that are not subject to New York standards and to pass the cost savings on to consumers. For some insurers, this regulation may require an increase in reserves especially for coverages such as group health insurance for which there had been no standards previously. The adoption of these standards will help to ensure that such insurers remain financially capable of paying claims as they come due.

New York authorized insurers must file quarterly financial statements based upon minimum reserve standards in effect on December 31 of the preceding year. The filing date for the June 30, 2007 quarterly statement is Aug. 15, 2007. The insurers must be given advance notice of the applicable standards in order to file their reports in an accurate and timely manner.

The regulation was previously promulgated as an emergency measure on 19 occasions effective Dec. 31, 2002, March 24, 2003, June 17, 2003, Sept. 8, 2003, Dec. 2, 2003, Feb. 26, 2004, May 19, 2004, Aug. 11, 2004, Nov. 4, 2004, Jan. 26, 2005, April 21, 2005, July 15, 2005, Oct. 12, 2005, Jan. 6, 2006, April 5, 2006, June 29, 2006, Sept. 21, 2006, Dec. 14, 2006, and March 12, 2007. The original Pre-Proposal for Regulation 56 was sent to GORR on Jan. 28, 2003. Minor changes were made to the text in the March 24, 2003 and June 17, 2003 emergency regulations. Subsequently, the National Association of Insurance Commissioners ("NAIC") Accident & Health Working Group of the Life & Health Actuarial Task Force adopted changes to the NAIC's Health Insurance Reserves Model Regulation. These changes include sections discussing: disability income claim reserves, unearned premium reserves for Single Premium Credit disability income business, lapse and mortality rates for contract reserves for long term care insurance, as well as changes to the effective dates associated with these changes. Changes to the NAIC's Health Insurance Reserves Model Regulation were incorporated into the Feb. 26, 2004 emergency

regulation. In the July 15, 2005 version, the regulation was made applicable to Health and Property and Casualty insurers as well as life insurers.

The Revised Proposal was approved by GORR on Oct. 2, 2006 and a Notice of Proposed Rule Making was published in the *State Register* on April 27, 2007. The public comment period will end on June 9, 2007. In order to enable New York authorized insurers to file the June 30, 2007 quarterly financial statement based upon minimum reserve standards in effect on Dec. 31, 2006, the regulation must be continued on an emergency basis.

For all of the reasons stated above, an emergency adoption of this new Regulation No. 56 is necessary for the general welfare.

Subject: Rules governing individual and group accident and health insurance reserves.

Purpose: To prescribe rules and regulations for valuation of minimum individual and group accident and health insurance reserves including standards for valuing certain accident and health benefits in life insurance policies and annuity contracts.

Substance of emergency rule: The following is a summary of the substance of the rule:

Section 94.1 lists the main purposes of the regulation including implementation of sections 1303, 4117, 4217(d), 4517(d) and 4517(f) of the Insurance Law and prescribing rules for valuing certain accident and health benefits in the life insurance policies.

Section 94.2 is the applicability section. This section applies to both individual policies and group certificates. The regulation applies to all insurers, fraternal benefit societies, and accredited reinsurers doing business in the State of New York. It applies to all statutory financial statements filed after its effective date.

Section 94.3 is the definitions section.

Section 94.4 sets forth the general requirements and minimum standards for claim reserves, including claim expense reserves and the testing of prior year reserves for adequacy and reasonableness using claim runoff schedules and residual unpaid liability.

Section 94.5 sets forth the general requirements and minimum standards for unearned premium reserves.

Section 94.6 sets forth the general requirements and minimum standards for contract reserves.

Section 94.7 concerns increases to, or credits against reserves carried, arising from reinsurance agreements.

Section 94.8 prescribes the methodology of adequately calculating the reserves for waiver of premium benefit on accident and health policies.

Section 94.9 provides that a company shall maintain adequate reserves for all individual and group accident and health insurance policies that reflect a sound value being placed on its liabilities under those policies.

Section 94.10 provides the specific standards for morbidity, interest and mortality.

Section 94.11 allows for a four-year period for grading into the higher reserves beginning with year-end 2003 for insurers for which higher reserves are required because of this Part.

Section 94.12 establishes the severability provision of the regulation.

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. INS-17-07-00002-P, Issue of April 25, 2007. The emergency rule will expire August 6, 2007.

Text of emergency rule and any required statements and analyses may be obtained from: Andrew Mais, Insurance Department, 25 Beaver St., New York, NY 10004, (212) 480-5257, e-mail: amais@ins.state.ny.us

Regulatory Impact Statement

1. Statutory authority:

The superintendent's authority for the adoption of Regulation No. 56 (11 NYCRR 94) is derived from sections 201, 301, 1303, 1304, 1305, 1308, 4117, 4217, 4310 and 4517 of the Insurance Law.

These sections establish the superintendent's authority to promulgate regulations governing reserve requirements for insurers. Sections 201 and 301 of the Insurance Law authorize the superintendent to prescribe regulations accomplishing, among other concerns, interpretation of the provisions of the Insurance Law, as well as effectuating any power given to him under the provisions of the Insurance Law to prescribe forms or otherwise to make regulations.

Section 1303 covers loss or claim reserves for insurers.

Section 1304 of the Insurance Law enables the superintendent to require any additional reserves as necessary on account of life insurers' policies, certificates and contracts.

Section 1305 covers unearned premium reserves for insurers.

Section 1308 of the Insurance Law describes when reinsurance is permitted and the effect that reinsurance will have on reserves.

Section 4117 covers loss reserves for Property and Casualty (P&C) insurers.

Section 4217(d) provides that reserves for all individual and group accident and health policies shall reflect a sound value placed on the liabilities of such policies and permits the superintendent to issue, by regulation, guidelines for the application of reserve valuation provisions for these types of policies.

Section 4310 covers investments, financial conditions, and reserves for non-profit health plans.

For fraternal benefit societies, section 4517(d) provides that reserves for all individual accident and health certificates shall reflect a sound value placed on the liabilities of such certificates and permits the superintendent to issue, by regulation, standards for minimum reserve requirements on these types of certificates. Additionally, section 4517(f) provides that reserves for unearned premiums and disabled lives be held in accordance with standards prescribed by the superintendent for certificates or other obligations which provide for benefits in case of death or disability resulting solely from accident, or temporary disability resulting from sickness, or hospital expense or surgical and medical expense benefits.

2. Legislative objectives:

One major area of focus of the Insurance Law is solvency of insurers doing business in New York. One way the Insurance Law seeks to ensure solvency is through requiring all insurers licensed to do business in New York State to hold reserve funds necessary in relation to the obligations made to policyholders.

3. Needs and benefits:

The regulation is necessary to help ensure the solvency of insurers doing business in New York. The Insurance Law does not specify mortality, morbidity, and interest standards used to value individual and group accident and health insurance policies and relies on the superintendent to specify the method. Without this regulation, there would be no standard method for valuing such products and, in fact, the current regulation, absent the proposed rule, provides no guidance related to certain coverages such as group accident and health policies. This could result in inadequate reserves for some insurers, which would jeopardize the security of policyholder funds.

Additionally, the current regulation, absent the proposed rule, requires higher reserves than necessary for certain individual accident and health insurance policies. This proposed rule, by lowering such reserves for individual policies, will result in a lower cost of doing business in New York.

4. Costs:

Costs to most insurers licensed to do business in New York State will be minimal, including the cost to develop computer programs which calculate reserves for accident and health insurance due to several changes in the underlying reserve methodology and new morbidity tables. Companies that are domiciled in New York and are not licensed to do business in other states will be impacted the most by this adoption. Most insurers that are domiciled in New York and licensed to do business in other states already have in place identical or similar procedures for reserve requirements and morbidity tables due to adoption by many states of the Health Insurance Reserves Model Regulation of the National Association of Insurance Commissioners (NAIC). The adoption of this regulation by New York State improves reserve uniformity throughout the insurance industry. Therefore, minimal additional costs will be incurred in most cases. For some insurers doing business only in New York or in other states that have not adopted the NAIC model regulation, the adoption for the first time of standards for certain coverages such as group health insurance may require an increase in reserves and would therefore increase the insurer's cost of capital. In addition, an insurer that needs to modify its current systems could produce modifications internally or purchase software from a consultant, who would typically charge \$5,000 to \$10,000. Once the program has been developed, no additional systems costs should be incurred due to those requirements.

Costs to the Insurance Department will be minimal. There are no costs to other government agencies or local governments.

5. Local government mandates:

The regulation imposes no new programs, services, duties or responsibilities on any county, city, town, village, school district, fire district or other special district.

6. Paperwork:

The regulation imposes no new reporting requirements.

7. Duplication:

The regulation does not duplicate any existing law or regulation.

8. Alternatives:

The Department considered allowing an additional grade-in period, beyond the grade-in period currently cited in the emergency rule, for health and property and casualty insurers. The Department has decided against allowing an additional grade-in period since during an outreach effort to the property and health industries, only one insurer notified the Department that a material reserve increase would result. That insurer was notified of the proposed change to the rule during 2004 and has had ample time to prepare for the reserve change. Additionally, it is important that all insurers hold the correct amount of reserves as soon as possible and therefore be held to the same grade-in period.

The only other significant alternative to be considered was to keep the current version of Regulation No. 56, without adopting this proposed rule, which would result in different reserve requirements for those insurers licensed in New York.

9. Federal standards:

There are no federal standards in the subject area.

10. Compliance schedule:

Beginning with year-end 2003, where the requirements of this regulation produce reserves higher than those calculated at year-end 2002, the insurer may linearly interpolate, over a four year period, between the higher reserves and those calculated based on the year-end 2002 standards. Insurers must be in full compliance with this Part by year-end 2006. This allows insurers subject to the regulation ample time to achieve full compliance.

Regulatory Flexibility Analysis

1. Small businesses:

The Insurance Department finds that this rule will not impose any adverse economic impact on small businesses and will not impose any reporting, recordkeeping or other compliance requirements on small businesses. The basis for this finding is that this rule is directed at all insurance companies licensed to do business in New York State, none of which fall within the definition of "small business" as found in Section 102(8) of the State Administrative Procedure Act. The Insurance Department has reviewed filed Reports on Examination and Annual Statements of authorized insurers and believes that none of them fall within the definition of "small business", because there are none which are both independently owned and have under one hundred employees.

2. Local governments:

The regulation does not impose any impacts, including any adverse impacts, or reporting, recordkeeping, or other compliance requirements on any local governments.

Rural Area Flexibility Analysis

1. Types and estimated number of rural areas:

Insurance companies covered by the regulation do business in every county in this state, including rural areas as defined under SAPA 102(10).

2. Reporting, recordkeeping and other compliance requirements; and professional services:

The regulation establishes reserve requirements for individual and group accident and health policies and establishes standards for valuing certain accident and health benefits in life insurance policies and annuity contracts.

3. Costs:

Costs to most insurers licensed to do business in New York State will be minimal, including the cost to develop computer programs which calculate reserves for accident and health insurance due to several changes in the underlying reserve methodology and new morbidity tables. Companies that are domiciled in New York and are not licensed to do business in other states will be impacted the most by this adoption. Most insurers that are domiciled in New York and licensed to do business in other states already have in place identical or similar procedures for reserve requirements and morbidity tables due to adoption by many states of the Health Insurance Reserves Model Regulation of the National Association of Insurance Commissioners (NAIC). The adoption of this regulation by New York State improves reserve uniformity throughout the insurance industry. Therefore, minimal additional costs will be incurred in most cases. For some insurers doing business only in New York or in other states that have not adopted the NAIC model regulation, the adoption for the first time of standards for certain coverages such as group health insurance may require an increase in reserves and would therefore increase the insurer's cost of capital. In addition, an insurer that needs to modify its current systems could produce modifications internally or purchase software from a consultant, who would typically charge \$5,000 to \$10,000. Once the program has been

developed, no additional systems costs should be incurred due to those requirements.

4. Minimizing adverse impact:

The regulation does not impose any adverse impact on rural areas.

5. Rural area participation:

The regulation was drafted after consultation with member companies of the Life Insurance Council of New York (LICONY). A copy of the draft was distributed to LICONY in November, 2002. Additional changes were made to the text of the regulation based on changes made to the NAIC's Health Insurance Reserves Model Regulation in December 2003 and a revised draft of the regulation was distributed to LICONY in January 2004. The draft was sent to American Insurance Association (AIA), Property Casualty Insurers Association of America (PCI) and National Association of Mutual Insurance Companies (NAMIC) for property and casualty insurers and to selected health insurers during late 2004 and early 2005. In addition, a discussion of the proposed rule making was included in the Insurance Department's regulatory agenda which was published in the January 3, 2007 issue of the *State Register*.

Job Impact Statement

Nature of impact:

The Insurance Department finds that this rule will have little or no impact on jobs and employment opportunities. This regulation sets standards for setting reserves for insurers. Most insurers will be able to reduce reserves and a few may need to increase reserves but this is unlikely to impact jobs and employment opportunities.

Categories and number affected:

No categories of jobs or number of jobs will be affected.

Regions of adverse impact:

This rule applies to all insurers licensed to do business in New York State. There would be no region in New York which would experience an adverse impact on jobs and employment opportunities.

Minimizing adverse impact:

No measures would need to be taken by the Department to minimize adverse impacts.

Self-employment opportunities:

This rule would not have a measurable impact on self-employment opportunities.

EMERGENCY RULE MAKING

Minimum Standards for the Form and Content of Policies and Contracts

I.D. No. INS-26-07-00002-E

Filing No. 591

Filing date: June 7, 2006

Effective date: June 7, 2006

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

Action taken: Addition of sections 362-2.7(d), (e) and (f) and 362-2.8 to Title 11 NYCRR.

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

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

Specific reasons underlying the finding of necessity: Chapter 1 of the Laws of 1999 enacted the Healthy New York program, an initiative designed to encourage small employers to offer health insurance to their employees and to encourage uninsured individual proprietors and working uninsured individuals to purchase insurance coverage. The Federal Medicare Prescription Drug, Improvement and Modernization Act of 2003, Pub. L. No. 108-173, added a new section 223 to the Internal Revenue Code. The new section authorizes those insured by a high deductible health plan, as defined in the Federal legislation, to establish a tax-deductible health savings account to pay for certain medical expenses. In his 2006 State of the Union Address, President Bush emphasized the importance of high deductible health plans and health savings accounts (HSAs) in expanding health care options and reducing the number of the uninsured. Changes to the Federal law at the end of 2006 made high deductible health plans more advantageous for tax savings by removing many limitations and making certain retirement funds as eligible for deposit into an HSA. People with HSAs can now roll over funds from a health reimbursement arrangement, flex spending account, or individual retirement account into an HSA on a one-time basis.

Prior to Jan. 1, 2007, Healthy New York participants seeking comprehensive health insurance coverage could not access high deductible health plans and establish health savings accounts in accordance with the Federal standards. These employers and individuals were not eligible for the tax deductions they would otherwise enjoy for funds deposited into health savings accounts and used for qualified medical expenses. The funds deposited into the health savings accounts accrue tax-deferred until the account owner seeks reimbursement for medical expenses or reaches Medicare eligibility.

Health insurance costs have escalated dramatically in recent years, with some health plans implementing increases in the range of 25 percent to 30 percent. The increased cost of insurance has, in turn, contributed to a decline in the number of employers who offer insurance to their employees. Recent census data indicates that approximately 15 percent of New York's population is uninsured. A large portion of New York State's uninsured population is individuals who are self-employed or who work for small employers.

This amendment to Part 362 of 11 NYCRR requires health maintenance organizations and insurers participating in the Healthy New York program to offer high deductible health plans, as defined by the Federal Medicare legislation, to qualifying small employers and individuals. The high deductible health plans have lower premiums than the standard Healthy New York plans. The reduction in cost encourages more small businesses and individuals to purchase health insurance coverage and should therefore result in a decrease in the number of uninsured. In addition, the high deductible health plans purchased with the health savings accounts give New Yorkers access to another health insurance alternative that complies with federal standards. The new option also provides New Yorkers with access to a tax-advantaged method of purchasing health insurance that was previously not available to individuals.

Employers generally renew existing insurance arrangements or enroll in new insurance policies during the fall. These new policies become effective in January of the following year. In order for these high deductible health plans to be sold with a Jan. 1, 2007 effective date, the health plans had to be able to market them to employers along with other new product offerings in the fall. The prior emergency filings of this amendment required health plans to issue high deductible health plan contracts beginning Jan. 1, 2007. This amendment must be filed as an emergency measure in order to keep existing program requirements concerning high deductible health plans in place.

This emergency filing is necessary to continue the requirement that health plans provide new benefits under the program. A prior emergency filing of this amendment added the following new benefits to the Healthy New York program as of Jan. 1, 2007: diagnostic screening for prostate cancer and a limited number of post-hospital or post-surgical home health care and physical therapy services. The addition of the prostate cancer screening benefit facilitates prompt and early detection of prostate cancer, which in turn should decrease mortality and reduce treatment costs. Prior to Jan. 1, 2007, the Healthy New York program covered surgery and hospitalizations but did not cover subsequent home health care and physical therapy services. Consequently, Healthy New York enrollees experienced extended hospitalizations in order to receive therapy. It is anticipated that the addition of post-hospitalization and post-surgical home health and physical therapy services will result in shorter hospital stays and lower hospital costs, which will in turn reduce costs to the State.

Consequently, it is critical that this amendment be adopted as promptly as possible. For the reasons stated above, this rule must be promulgated on an emergency basis for the furtherance of the public health and general welfare.

Subject: Minimum standards for the form and content of policies and contracts subject to the provisions of section 4326 of the Insurance Law.

Purpose: To create additional health insurance options for qualifying small employers and individuals by requiring health maintenance organizations and participating insurers to offer high deductible health plans in conjunction with the Healthy New York Program.

Text of emergency rule: New subdivisions (d), (e), and (f) are added to section 362-2.7 to read as follows:

§ 362-2.7 Healthy New York benefit adjustments.

(d) Beginning January 1, 2007, qualifying health insurance contracts shall include a benefit for up to forty post-hospital or post-surgical home health care visits per calendar year.

(e) Beginning January 1, 2007, qualifying health insurance contracts shall include a benefit for up to thirty post-hospital or post-surgical physical therapy visits.

(f) Beginning January 1, 2007, qualifying health insurance contracts shall include a benefit for diagnostic screening for prostatic cancer consistent with the benefit set forth in section 4303(z-1) of the Insurance Law.

A new section 362-2.8 is added to read as follows:

§ 362-2.8 High Deductible Health Plan Under the Healthy New York Program.

(a) For purposes of this section:

(1) "High deductible health plan" shall mean a qualifying health insurance contract with a plan year deductible of at least \$1,150 for individual coverage and \$2,300 for family coverage. Out-of-pocket expenses, including the deductible and copayments, shall be capped at \$5,250 for individual coverage and \$10,500 for family coverage for the plan year.

(2) "Family coverage" means any coverage that is not self-only.

(b) Effective January 1, 2007, every health maintenance organization and insurer participating in the Healthy New York program shall offer a high deductible health plan with a plan year deductible of \$1,150 for individual coverage and \$2,300 for family coverage to qualifying small employers and qualifying individuals under the Healthy New York program in connection with a Health Savings Account (hereinafter "HSA") authorized by the Medicare Prescription Drug, Improvement and Modernization Act of 2003 (Pub. L. No. 108-173). The high deductible health plan shall be offered in addition to existing qualifying health insurance contracts. The health maintenance organization or participating insurer must provide qualifying small employers and qualifying individuals that select a high deductible health plan with a separate disclosure statement which prominently discloses the existence of the deductible.

(c) Health maintenance organizations and participating insurers may also offer additional high deductible health plans with deductibles exceeding the minimum amounts set forth in subdivision (a) of this section in connection with qualifying health insurance contracts. Any such additional options must contain the cap on out-of-pocket expenses set forth in subdivision (a) of this section.

(d) When necessary to meet the federal minimums for a high deductible health plan, each of the dollar amounts referred to in subdivision (a) of this section shall be adjusted by an amount which is consistent with the automatic cost-of-living adjustment as set forth in section 223(g) of the Internal Revenue Code, 26 USC section 223.

(e) The plan year deductible shall not apply to those services described in sections 4326(d)(7) and (8) of the Insurance Law, prostatic cancer screenings or routine prenatal care. Health maintenance organizations and participating insurers may also exempt from the deductible such other preventive services which would not jeopardize the eligibility of the high deductible health plan to be used in conjunction with an HSA.

(f) The calendar year prescription drug deductible set forth in section 4326(e)(5) of the Insurance Law shall not be applied in addition to the overall plan year deductible for the high deductible health plan.

(g) At the time of application, the health maintenance organization or insurer shall obtain a certification that the applicant intends to establish an HSA, or if applicable, HSAs. At the time of annual recertification, the qualifying small employer or individual shall submit a recertification confirming the status of the HSA or HSAs.

(h) A small employer or individual may choose between a high deductible health plan or a qualifying health insurance contract at the time of enrollment. Once enrolled, any change from one type of plan to another may occur only at the time of the annual recertification.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire September 4, 2007.

Text of emergency rule and any required statements and analyses may be obtained from: Andrew Mais, NYS Insurance Department, 25 Beaver Street, New York, NY 10004-23319, (212) 480-2285, e-mail: amais@ins.state.ny.us

Regulatory Impact Statement

1. Statutory authority: The superintendent's authority for the adoption of the third amendment to 11 NYCRR 362 is derived from sections 201, 301, 1109, 3201, 3217, 3221, 4235, 4303, 4304, 4305 and 4326 of the Insurance Law.

Sections 201 and 301 authorize the superintendent to prescribe regulations interpreting the provisions of the Insurance Law, effectuate any power granted to the superintendent under the Insurance Law, and prescribe forms.

Section 1109 authorizes the superintendent to promulgate regulations in effectuating the purposes and provisions of the Insurance Law and

Article 44 of the Public Health Law with respect to the contracts between a health maintenance organization (HMO) and its subscribers.

Section 3201 authorizes the superintendent to approve accident and health insurance policy forms for delivery or issuance for delivery in this state.

Section 3217 authorizes the superintendent to issue regulations to establish minimum standards, including standards of full and fair disclosure, for the form, content and sale of accident and health insurance policies.

Section 3221 sets forth the standard provisions to be included in group or blanket accident and health insurance policies written by commercial insurers.

Section 4235 defines group accident and health insurance and the types of groups to which such insurance may be issued.

Section 4303 governs the accident and health insurance contracts written by not-for-profit corporations and sets forth the benefits that must be covered under such contracts.

Section 4304 includes requirements for individual health insurance contracts written by not-for-profit corporations.

Section 4305 includes requirements for group health insurance contracts written by not-for-profit corporations.

Section 4326 authorizes the creation of a program to provide standardized health insurance to qualifying small employers and qualifying working uninsured individuals. Section 4326(g) authorizes the superintendent to modify the copayment and deductible amounts for qualifying health insurance contracts. Section 4326(g) also authorizes the superintendent to establish additional standardized health insurance benefit packages to meet the needs of the public after January 1, 2002.

2. Legislative objectives: The federal Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, added a new section 223 to the Internal Revenue Code. The new section authorizes those insured by a high deductible health plan, as defined in the federal legislation, to establish a tax-deductible health savings account to pay for certain medical expenses. Chapter 1 of the Laws of 1999 enacted the Healthy New York program, an initiative designed to encourage small employers to offer health insurance to their employees and to encourage individual proprietors and working uninsured individuals to purchase insurance coverage.

3. Needs and benefits: Currently, small employer and individual participants in the Healthy New York program seeking comprehensive health insurance coverage cannot purchase high deductible health plans and establish health savings accounts in accordance with federal standards. These participants in the Healthy New York program are not currently eligible for the tax deductions for funds deposited into health savings accounts and used for qualified medical expenses. This amendment will create products that are compatible with health savings accounts. Health savings accounts allow users to deposit pre-tax money into an account and withdraw the money tax-free for qualified medical expenses.

Due in part to the rising cost of health insurance coverage, many small employers are currently unable to provide health insurance coverage to their employees. The high cost of insurance prevents many individual proprietors and working individuals from purchasing their own coverage.

These amendments to Part 362 of 11 NYCRR will require HMOs and participating insurers to offer high deductible health plans using the Healthy New York small employer and individual programs. The high deductible health plans will have lower premiums than current Healthy New York benefit packages. The reduction in premium will encourage more small businesses and individuals to purchase comprehensive health insurance coverage. In addition, the high deductible health plans purchased for use with the health savings accounts will give New Yorkers access to another health insurance alternative that complies with recently-enacted federal standards. This new option will also provide New Yorkers with access to a tax-advantaged method of purchasing health insurance.

In addition, this amendment will provide for prostatic cancer screening and a limited home health care and physical therapy benefit. The addition of the prostate cancer screening benefit will facilitate prompt and early detection of prostate cancer, which in turn should decrease mortality and reduce treatment costs. The addition of post-hospitalization and post-surgical home health and physical therapy services will result in insureds being discharged from the hospital sooner now that they can obtain these services in an outpatient setting. Shorter hospital stays will reduce costs. The addition of the new benefits will in turn reduce costs to the State, because the State reimburses the health plans for certain claims.

4. Costs: This amendment imposes no compliance costs upon state or local governments. HMOs and participating insurers will incur some minor costs in drafting the contract riders that will create the high deductible

health plans and add the new benefits. The Department has provided HMOs and participating insurers with model language and forms to use in implementing the amendment. The Health Care Reform Act allocated a fixed amount to the Healthy New York program to encourage uninsured businesses and individuals to purchase health insurance. This amendment will not alter the amounts dedicated to the program. However, this amendment may decrease the per head cost to the State to be distributed from the overall allocation for the program for workers enrolled in Healthy New York because the addition of the home health care and physical therapy benefits will reduce hospitalization costs by allowing insureds to receive services in less costly settings. In addition, the prostatic screening benefit may reduce costs to the state by resulting in some instances of cancer being detected earlier, with fewer medical costs. The amendment creates a less expensive option under Healthy New York, which should attract additional people to the program and increase enrollment. The overall costs of the program are capped at the appropriated funding amounts.

5. Local government mandates: This amendment imposes no new mandates on any county, city, town, village, school district, fire district or other special district.

6. Paperwork: Healthy New York requires HMOs and participating insurers to report enrollment changes on a monthly basis and also requires an annual request for reimbursement of eligible claims. Twice a year, enrollment reports that discern enrollment on a county-by-county basis are submitted to the Insurance Department. This amendment will not impose any new reporting requirements, though it will require separate identification of enrollment in the high deductible health plan option.

7. Duplication: There are no known federal or other states' requirements that duplicate, overlap, or conflict with this regulation.

8. Alternatives: The adoption of this amendment will require high deductible health plans to be issued under the Healthy New York program for qualifying individuals and small employers. One alternative would be to not offer the high deductible health plan option. The Department has determined that this is not an attractive alternative, because without a high deductible health plan, these small businesses, individuals, and sole proprietors could not open health savings accounts. The Department also considered alternative levels of deductibles. However, deductible amounts lower than those chosen would either not qualify for use with health savings accounts, or would require revision soon after implementation due to deductible limit adjustments each year for use with health savings accounts. Another alternative considered by the Department was to require only one set of deductible amounts, rather than to allow additional amounts. After discussions with industry representatives, the flexibility to offer additional deductible amounts in qualifying health insurance contracts appeared to better serve the intended enrollees, and allowed the health plans to be creative in their product offerings. This amendment also adds prostatic cancer screening and a limited post-hospital and post-surgical physical therapy and home health care benefit to the Healthy New York program. Currently, the program does not cover these benefits. The Department has received extensive comments and suggestions from the health insurance industry in preparing these regulations. The Department has met several times with representatives from groups that represent the health maintenance organization and not-for-profit health insurance industry and has held numerous phone conferences. Some of these conversations have been with experts in high deductible health plans and health savings accounts. These industry representatives have provided the Department with comments and suggestions on the drafting of this regulation, including technical advice and cost analysis of the deductibles and benefits.

9. Federal standards: The federal Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, added a new section 223 to the Internal Revenue Code. The new section authorizes those insured by a high deductible health plan, as defined in the federal legislation, to establish tax-deductible health savings accounts to pay for certain medical expenses.

10. Compliance schedule: HMOs and participating insurers were required to comply by January 1, 2007.

Regulatory Flexibility Analysis

This amendment will not impose reporting, recordkeeping or other requirements on small businesses since the provisions of this Part apply only to health maintenance organizations (HMOs) and participating insurers. The Insurance Department has reviewed the filed Reports on Examination and Annual Statements of HMOs and participating insurers and concluded that none of them comes within the definition of "small business" contained in section 102(8) of the State Administrative Procedure Act,

because there are none that are both independently owned and that employ fewer than 100 persons.

This amendment will also have no adverse economic impact on local governments and does not impose reporting, recordkeeping or other compliance requirements on local governments. The basis for this finding is that this rule is directed at participating insurance companies and HMOs, none of which is a local government.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: Health maintenance organizations (HMOs) and participating insurers to which this regulation is applicable do business in every county of the State, including rural areas as defined under section 102(13) of the State Administrative Procedure Act. Small employers and individuals in need of health insurance coverage are located in every county of the State, including rural areas as defined under section 102(13) of the State Administrative Procedure Act.

2. Reporting, recordkeeping and other compliance requirements; and professional services: Healthy New York requires HMOs and participating insurers to report enrollment changes on a monthly basis and also requires an annual request for reimbursement of eligible claims. Twice a year, enrollment reports that discern enrollment on a county by county basis are submitted to the Insurance Department. This revision will not add any new reporting requirements, though it will require separate identification of enrollment in the high deductible health plan option. Nothing in this revision distinguishes between rural and non-rural areas. No special type of professional services will be needed in a rural area to comply with this requirement.

3. Costs: HMOs and participating insurers may incur some modest costs in drafting the contract riders that will create the high deductible plans and include the additional benefits. There are no costs to local governments. This amendment has no impact unique to rural areas.

4. Minimizing adverse impact: Because the same requirements apply to both rural and non-rural entities, the amendment will have the same impact on all affected entities.

5. Rural area participation: None.

Job Impact Statement

This amendment will not adversely affect jobs or employment opportunities in New York State. This amendment is intended to improve access to comprehensive health insurance for small employers and working individuals. This amendment provides qualifying small employers and individuals with the ability to obtain a federal tax deduction through the purchase of a high deductible health plan. It also reduces the cost of Healthy New York health insurance by adding a deductible and benefits that will reduce costs to the program, which will in turn improve access to health insurance by lowering health insurance premiums.

Office of Mental Health

EMERGENCY RULE MAKING

Comprehensive Outpatient Programs

I.D. No. OMH-26-07-00001-E

Filing No. 590

Filing date: June 7, 2007

Effective date: June 7, 2007

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

Action taken: Amendment of Parts 588 and 592 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 7.09(b) and 31.04(a); and Social Services Law, sections 364(3) and 364-a

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

Specific reasons underlying the finding of necessity: These amendments provide authority to simplify and make equitable Comprehensive Outpatient Program (COPS) funding and Non-COPS funding as authorized by the 2006-2007 enacted budget. Failure to initiate this program immediately would result in recipients losing access to services necessary to their health, safety and the general welfare.

Subject: Comprehensive outpatient programs.

Purpose: To equalize Comprehensive Outpatient Program (COPS) and Non-COPS funding.

Text of emergency rule: 1. Subdivision (g) of Section 588.13 of Title 14 NYCRR is amended to read as follows:

(g) Clinic, continuing day treatment, and/or day treatment programs for which an operating certificate has been issued and which are not designated as *Level I* comprehensive outpatient programs pursuant to Part 592 of this Title may qualify to become *Level II* comprehensive outpatient programs under such Part, and shall comply with the applicable provisions of such Part. [, may be eligible to receive supplemental medical assistance reimbursement for services rendered. In order to receive supplemental medical assistance reimbursement, a program shall:

(1) agree to provide initial assessment services to all patients referred from inpatient or emergency settings within five business days of referral from such setting;

(2) directly provide or arrange for the provision of case management, home visiting services and other clinically necessary mental health services to maintain patients in programs and minimize patients' absence from treatment;

(3) be determined to be in substantial compliance with all applicable regulations of the Commissioner of Mental Health;

(4) have received a current operating certificate that is of at least a total of six months duration; and

(5) be a current enrollee in good standing in the medical assistance program.]

2. Section 592.4 of Title 14 NYCRR is amended to read as follows:

§ 592.4 Definitions

(a) *Level I Comprehensive Outpatient Program* means a provider of services which has been licensed to operate an outpatient mental health program in accordance with Part 587 of Title 14 and has been annually designated by a local governmental unit to be eligible to receive supplemental medical assistance reimbursement for a specific program or specific programs under its auspice which agrees to provide the services required of a *Level I Comprehensive Outpatient Program as set forth in this Part*.

(b) *Level II Comprehensive Outpatient Program* means a provider of services, other than a *Level I Comprehensive Outpatient Program*, which has been licensed to operate a mental health clinic, day treatment or continuing day treatment program in accordance with Part 587 of this Title, which is not also licensed under Article 28 of the Public Health Law, and which agrees to provide the services required of a *Level II Comprehensive Outpatient Program as set forth in this Part*.

(c) Grant means the funds received by the provider pursuant to section 41.18, 41.23 or 41.47 of the mental hygiene law including State aid and any mandatory local contribution provided by a local government or a voluntary agency.

[(d) Provider, for the purpose of this Part, means the specific location of the licensed mental health outpatient program which received the mental health grant utilized in the initial calculation of the supplemental rate under the medical assistance program.

[(e) Eligible deficit means those funds received by the provider as a grant which are used as the basis for the supplemental Medicaid rate calculation in subdivision 592.8(c). The original grants may have been adjusted in accordance with this Part, where necessary.

[(f) Comprehensive outpatient program allocation means the maximum amount of comprehensive outpatient program reimbursement that a provider is allowed to retain in each local fiscal year.

3. The heading, and subdivision (a), of Section 592.5 of Title 14 NYCRR are amended to read as follows:

§ 592.5 Designation as a *Level I* comprehensive outpatient program.

(a) A *Level I* comprehensive outpatient program shall be designated by the local governmental unit in accordance with the criteria provided in section 592.7 of this Part. In order to receive supplemental medical assistance reimbursement, a program shall:

(1) be determined by the commissioner or his or her designee to be in substantial compliance with all applicable regulations of the Commissioner of Mental Health;

(2) have received a current operating certificate that is of at least a total of six months in duration; and

(3) be a current enrollee in good standing in the medical assistance program.

4. Subdivision (a) of Section 592.6 of Title 14 NYCRR is amended to read as follows:

(a) The local governmental unit shall designate and enter into written agreements with appropriate providers of services as *Level I* comprehensive outpatient programs. Such agreements shall, at a minimum reflect the requirements established in sections 592.6 and 592.7 of this Part;

5. The heading, subdivision (a), and paragraph (a)(2) of Section 592.7 of Title 14 NYCRR are amended to read as follows:

§ 592.7 *Level I* comprehensive outpatient program – criteria for designation and responsibilities

(a) In order to be designated as a *Level I* comprehensive outpatient program, a provider of services:

(2) shall have been designated as a *Level I* comprehensive outpatient program pursuant to subdivision 592.8(j) of this Part and shall:

6. Subdivisions (a), (c) (d), (h), (i), and (k) of Section 592.8 of Title 14 NYCRR are amended to read as follows:

(a) In addition to the medical assistance reimbursement rates available pursuant to Part[s 579 and] 588 of this Title, providers with at least one *Level I* comprehensive outpatient program are eligible to receive supplemental medical assistance reimbursement in accordance with the rules of this Part.

(c) The supplemental rate, for providers with at least one *Level I* comprehensive outpatient program, shall be calculated as follows:

(1) For outpatient mental health programs which are designated *Level I* providers pursuant to this Part, grants received for the local fiscal year ended in 2001 for upstate and Long Island based providers, and for the local fiscal year ended in 2001 for New York City based providers, shall be added, if applicable, to the annualized eligible deficit approved in the calculation of the previous supplemental rate.

(2) The sum of grants received by the provider, as recalculated under paragraph (1) of this subdivision, shall be divided by the projected number of annual visits to the provider's designated programs. The projected number of annual visits shall be calculated as follows:

(i) The combined total of outpatient mental health program visits reimbursed by medical assistance for each provider shall be calculated by using the average number of visits provided in the most recent three fiscal years multiplied by 90.9 percent. These visits shall include all visits reimbursed by Medicaid, including visits partially reimbursed by Medicare. Providers, who in the three most recent fiscal years earned less than the full Medicaid supplemental rate on visits partially reimbursed by Medicare, shall have the projected number of annual visits adjusted to reflect the lower supplemental revenue earned on Medicare/Medicaid dually eligible visits. The calculation of the Medicare/Medicaid adjusted visits shall be based on the percentage of Medicaid supplemental payments earned on Medicare/Medicaid dually eligible visits provided during the three most recent fiscal years and the number of dually eligible visits provided in the three most recent fiscal years. The Medicare/Medicaid adjusted visits are calculated by multiplying the projected annual volume of dually eligible visits by the average percentage of Medicaid supplemental revenue earned on these visits during the three most recent fiscal years.

(ii) Rates calculated pursuant to subparagraph (i) of this paragraph are subject to appeal by the local governmental unit, or by the provider with the approval of the local governmental unit. Appeals pursuant to this paragraph shall be made within one year after receipt of initial notification of the most recent supplemental reimbursement rate calculation. However, under no circumstances may the recalculated rate be higher than the rate cap set forth in paragraph (3) of this subdivision.

(3) The supplemental rate for a provider operating [an] a *licensed* outpatient mental health program shall be the lesser of the rate calculated in paragraph (2) of this subdivision or a rate cap as established by the Commissioner of Mental Health and approved by the Director of the Division of the Budget[, provided, however, the supplemental rate of an Article 31 provider which operates a comprehensive outpatient program shall not be less than an amount that, when added to the base fee, yields an amount that is less than the total of the corresponding fee and supplemental reimbursement for any provider which is not eligible to be designated as comprehensive outpatient program].

(d) In order to recoup supplemental payments for those visits in excess of 110% of the number of visits used to calculate the supplemental rate for a *Level I* provider, the Office of Mental Health may adjust the supplemental rates for the period in which the excess visits occurred. Such adjustments shall be made no more frequently than quarterly during the year.

(h) The Office of Mental Health may amend the supplemental rate and/or the comprehensive outpatient program allocation to account for program changes required by the Office of Mental Health, local governmental unit, or other administrative agency, or approved by the commissioner pursuant to Part 551 of this Title.

(1) When a *Level I* provider receives reimbursement under this part which is less than its comprehensive outpatient program allocation in a local fiscal year (beginning with Calendar Year 2001 for upstate or Long Island based providers or Local Fiscal Year 2000-01 for New York City based providers), the local governmental unit may, subject to the approval of the Commissioner of Mental Health and the Director of the Division of Budget, allocate any amount of the provider's comprehensive outpatient program reimbursement which is less than its comprehensive outpatient program allocation to [one or more designated *Level I* comprehensive outpatient programs within the same county beginning in the following fiscal year. In making such adjusted allocations, the local governmental unit shall consider the extent to which a provider receiving an additional allocation is in compliance with the program requirements set forth in Section 592.7 of this Part. This adjusted allocation process shall be accomplished through the revision of each affected provider's comprehensive outpatient program allocations for the previous fiscal year. In no case shall such adjusted allocation be less than the amount of comprehensive outpatient program reimbursement received by a provider consistent with its applicable comprehensive outpatient program allocation received in either the 2000 local fiscal year or the local fiscal year before the year in which such reimbursement is received, whichever amount is less.

(2) When a provider closes down one or more program location, but continues to operate the other locations of the designated program, the supplemental revenue to the designated program shall be reduced proportionately by the number of Medicaid visits associated with the closed location(s). The State share of the reduced Medicaid supplemental revenue may be allocated to the county in the form of additional local assistance grants, or the visits previously reimbursed to the closed program location(s) may be added to the visits of one or more other designated outpatient programs of the same outpatient category in the same county.

(i) When a designated *Level I* program has ceased or will cease to provide services or the local governmental unit has not designated an eligible or previously designated *Level I* program and discontinued all grants to that program, visits reimbursed under the medical assistance program to that program may be added to the visits of one or more other outpatient programs of the same outpatient category in the same county to be included in the supplemental rate adjustments pursuant to subdivisions (e) - (g) of this section subject to the following:

(1) the local governmental unit must recommend such consideration to the commissioner prior to June 1, 1991 for the initial year and the commencement of the local fiscal year in all succeeding years;

(2) the recommendation must specify the volume of visits to be allowed to each alternative provider;

(3) each alternative provider must be licensed in the same program category as the eligible provider;

(4) each alternative provider must be eligible to be designated prior to the local governmental unit's recommendation under this subdivision;

(5) the local governmental unit recommendation may be less than, but may not exceed, the volume of visits reimbursed, in the base year under the medical assistance program, to the provider not designated as a *Level I* comprehensive outpatient program;

(6) the allowance of additional visit volume approved by the commissioner under this subdivision may be less than the volume recommended by the local governmental unit where the calculated supplemental rate of payment for the alternative provider is greater than that for the provider not designated. In no instance will the supplemental revenue to all designated providers in the county exceed the estimated supplemental revenue to all eligible providers in the county; and

(7) if a program ceases to provide services in all program locations it shall not be eligible for designation as a *Level I* comprehensive outpatient program or for any additional local assistance grants for the period of at least one local fiscal year following the year during which the program ceased to provide services.

(j) When a [designated] *comprehensive outpatient* program has ceased or will cease to provide services and the local governmental unit determines that no existing, [designated] *comprehensive outpatient* program of the same outpatient category within the same county is capable of providing services to the clients of the program ceasing operation, the local governmental unit, with the approval of the commissioner, may designate any not-for-profit or municipally operated agency operating an outpatient mental health program of the same category as a comprehensive outpatient program. When no agency operating an outpatient program in the same category is available, the local governmental unit may, with the approval of the commissioner, designate an agency already designated in another

outpatient program category which has not previously been licensed in the category of the closing program. The designation of such program shall not be effective until the designated program commences operation within the designating county. Supplemental rates or supplemental rate adjustments for successor programs designated pursuant to this subdivision shall be calculated as follows:

(1) Supplemental rates shall be based upon the lesser of the successor program's budgeted eligible grant amount recommended by the local governmental unit and approved by the Office of Mental Health pursuant to Part 551 of this Title, or the supplemental revenue and Medicaid visit volume used to establish the supplemental rate for the closing provider for the year of closure.

(2) The rate established in paragraph (1) of this subdivision shall be approved on an interim basis until receipt of a consolidated fiscal report including one complete local fiscal year of operation as a comprehensive outpatient program, after which the Office of Mental Health shall recalculate the final supplemental rate or supplemental rate adjustments subject to the limitations in paragraph (1) of this subdivision.

(3) Such rates shall not be otherwise limited by the provisions of paragraphs (i)(3) and (4) of this section.

(k) Each general hospital, as defined by Article 28 of the Public Health Law, which is operated by the New York City Health and Hospitals Corporation, which received a grant pursuant to Section 41.47 of the Mental Hygiene Law for the local fiscal year ending in 1989 shall be designated as a *Level I* comprehensive outpatient program for all outpatient programs licensed pursuant to [Parts 585 and] *Part 587* of this Title. For purposes of calculating supplemental Medicaid rates pursuant to this Part, all such programs in the New York City Health and Hospitals Corporation are combined for a uniform supplemental Medical Assistance program rate.

7. Subdivisions (c) and (d) of Section 592.9 of Title 14 NYCRR are amended to read as follows:

(c) A program which the Commissioner determines has failed to substantially comply with the requirements of this section or any other requirements established by the local governmental unit shall be referred to the local governmental unit with a recommendation that it not be designated as a *Level I* comprehensive outpatient program for the subsequent local fiscal year.

(1) The local governmental unit may designate such provider of services as a *Level I* comprehensive outpatient program for the following local fiscal year, but shall notify the Commissioner of such designation and the reason(s) therefore.

(2) The Commissioner shall review such program prior to the end of the following local fiscal year. If the program is found to have continued to have failed to substantially comply with the requirements of this Part, or any other requirements established by the local governmental unit, the Commissioner shall instruct the local governmental unit that such provider of services shall not be designated as a *Level I* comprehensive outpatient provider for the next local fiscal year.

(3) A determination that a provider of services shall not be designated as a *Level I* comprehensive outpatient program does not affect the status of such provider of services as a licensed provider of outpatient.

(d) A provider of services that has been discontinued as a *Level I* comprehensive outpatient program pursuant to Paragraph (c)(2) of this section, may be designated by the local governmental unit as a *Level I* comprehensive outpatient program in the local fiscal year subsequent to the local fiscal year for which such designation was discontinued, providing that the local governmental unit shall provide assurances to the Commissioner that such program has taken such steps as are necessary to substantially comply with the requirements of this Part and all other requirements established by the local governmental unit.

8. A new Section 592.10 is added to Title 14 NYCRR to read as follows:

§ 592.10 Level II Comprehensive Outpatient Program

(a) A clinic, continuing day treatment, and/or day treatment provider, other than a provider licensed under Article 28 of the Public Health Law, that has not been designated as a *Level I* Comprehensive Outpatient Program pursuant to this Section shall be eligible to be a *Level II* Comprehensive Outpatient Program, and shall be eligible to receive supplemental medical assistance reimbursement for services rendered. In order to be a *Level II* Comprehensive Outpatient Program and receive supplemental medical assistance reimbursement, a program shall:

(1) agree to provide initial assessment services to all patients referred from inpatient or emergency settings within five business days of referral from such setting;

(2) directly provide or arrange for the provision of case management, home visiting services and other clinically necessary mental health services to maintain patients in programs and minimize patients' absence from treatment;

(3) be determined to be in substantial compliance with all applicable regulations of the Commissioner of Mental Health;

(4) have received a current operating certificate that is of at least a total of six months duration; and

(5) be a current enrollee in good standing in the medical assistance program.

(b) In order to recoup supplemental payments for those visits in excess of the number of visits used to calculate the supplemental rate under this section, the Office of Mental Health may adjust the supplemental rates for the period in which the excess visits occurred. Such adjustments shall be made no more frequently than quarterly during the year.

9. A new Section 592.11 is added to Title 14 NYCRR to read as follows:

§ 592.11 Comparability of fees

The sum of the base fee, as established in Section 588.13(a)(1) of this Part, and the supplement, calculated in accordance with Section 592.8 of this Part, received by a clinic treatment program that is not licensed under Article 28 of the Public Health Law and which has been designated as a Level I comprehensive outpatient program, shall not be less than the base fee and the supplement received by any Level II comprehensive outpatient provider in the region.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire September 4, 2007.

Text of emergency rule and any required statements and analyses may be obtained from: Dan Odell, Assistant Director, Bureau of Policy, Regulation and Legislation, Office of Mental Health, 44 Holland Ave., Albany, NY 12229, (518) 474-1331, e-mail: dodell@omh.state.ny.us

Consolidated Regulatory Impact Statement

1. Statutory Authority: Subdivision (b) of Section 7.09 of the Mental Hygiene Law grants the Commissioner of the Office of Mental Health the authority and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction.

Subdivision (a) of Section 31.04 of the Mental Hygiene Law empowers the Commissioner to issue regulations setting standards for licensed programs for the provision of services for persons with mental illness.

Subdivision (a) of Section 43.02 of the Mental Hygiene Law grants the Commissioner the power to set rates for facilities licensed under Article 31 of the Mental Hygiene Law.

Sections 364(3) and 364-a of the Social Services Law give the Office of Mental Health responsibility for establishing and maintaining standards for care and services eligible for Medicaid reimbursement in facilities under its jurisdiction, in accordance with cooperative arrangements with the Department of Health.

Chapter 54 of the Laws of 2006 provides funding appropriations in support of programs not formerly designated as Comprehensive Outpatient Programs. (Section 1, State Agencies, Office of Mental Health, line 44, page 277.)

2. Legislative Objectives: Articles 7 and 31 of the Mental Hygiene Law reflect the Commissioner's authority to establish regulations regarding mental health programs. Article 43 of the Mental Hygiene Law gives the Commissioner authority to set certain rates. Under Section 364(3) and 364-a of the Social Services Law, OMH is granted responsibility for standards of care for certain Medicaid funded programs under its jurisdiction.

3. Needs and Benefits: The intent and impact of this regulatory change is to simplify and make more equitable the Medicaid reimbursement which outpatient mental health providers receive. Every provider, and the clients they serve, will either be unaffected by or will benefit from these amendments.

Generally, outpatient Medicaid rates are separated into two components: a base fee and either a COPs supplement or a Non-COPs supplement. COPs providers generally receive a higher base rate than Non-COPs providers. Some providers received neither a COPs nor a Non-COPs component.

COPs providers are required to meet both higher standards than Non-COPs providers. They also must have received State deficit financing when the program was established in 1993. Many Non-COPs providers currently meet many of the standards applicable to COPs providers, but still cannot qualify for COPs reimbursement. These amendments attempt to mitigate this by combining all of the above providers into COPs, level-

ing up the base fees they receive, and allowing providers previously categorized as Non-COPs to bill for COPs-only visits on behalf of managed care recipients. Providers who were neither COPs nor Non-COPs will now be included as well.

In order to accomplish this, two levels, of COPs have been established by this rulemaking. The first level, Level I, contains the current nine special programmatic standards and deficit funding requirement of COPs. The second level, Level II, contains the five special programmatic standards for Non-COPs. Both tiers will receive the same base fees and operate under the same set of billing rules.

4. Costs:

(a) Costs to private regulated parties: There will be no mandated unreimbursed costs to the regulated parties.

(b) Costs to state and local government: The annual state cost for the program is estimated to be \$2,122,500.00. These additional funds are included in an appropriation for the State share of Medicaid. There is no local Medicaid share or other costs for this program.

(c) The cost projection was calculated by adding the \$2,000,000 available in the appropriation for leveling up to the \$122,500 available in the appropriation to address the non-COPS only adjustment, for a total of \$2,122,500.00.

5. Local government mandates: These regulatory amendments will not involve or result in any additional imposition of duties or responsibilities upon county, city, town, village, school or fire districts.

6. Paperwork: This rule should not substantially increase the paperwork requirements of affected providers.

7. Duplication: These regulatory amendments do not duplicate existing State or federal requirements.

8. Alternatives: The only alternative would be inaction. As this initiative has been established and funded in statute, this alternative was rejected, since it is contrary to the intent of the legislation.

9. Federal standards: The regulatory amendments do not exceed any minimum standards of the federal government for the same or similar subject areas.

10. Compliance schedule: The authority to establish and fund this initiative deemed effective on April 1, 2006, consistent with the enacted budget.

Consolidated Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not being submitted with this notice because the amended rule will not impose a significant negative economic impact on small businesses, or local governments. The establishment of this initiative, which equalizes Article 31 outpatient fees and non-COPS programs, is required by the enacted 2006-2007 state budget.

Consolidated Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not being submitted with this notice because the amended rules will have no negative impact on services and programs serving residents of rural counties. Recipients of services in the 44 counties designated as rural counties by the New York State Legislature, as well as non-rural counties will benefit from the establishment of this new statewide program.

Consolidated Job Impact Statement

The proposed amendments to 14 NYCRR will not adversely impact jobs or employment opportunities in New York, nor should these amendments impact existing employees of Comprehensive Outpatient Programs for adults (COPs), non-COPs programs, or other programs under the jurisdiction of OMH. The purpose of this rulemaking is to equalize funding for Article 31 outpatient fees and non-COPs programs, as required by the enacted 2006-2007 state budget.

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

Comprehensive Psychiatric Emergency Program (CPEP) Rates

I.D. No. OMH-26-07-00007-EP

Filing No. 598

Filing date: June 12, 2007

Effective date: June 12, 2007

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

Action taken: Amendment of Part 591 of Title 14 NYCRR.

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

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

Specific reasons underlying the finding of necessity: These changes must be made immediately in order to avoid a reduction in Comprehensive Psychiatric Emergency Program services which would otherwise take place.

Subject: Comprehensive Psychiatric Emergency Program (CPEP) rates.

Purpose: To increase the Medicaid reimbursement rates associated with CPEP programs.

Text of emergency/proposed rule: Section 591.5 of Part 591 of 14 NYCRR is amended as follows:

§ 591.5 Reimbursement for comprehensive psychiatric emergency programs.

Reimbursement for comprehensive psychiatric emergency programs under the medical assistance program shall be in accordance with the following fee schedule:

Brief emergency visit	\$[76.00] 80.18
Full emergency visit	[445.00] 470.82
Crisis outreach service visit	[445.00] 470.82
Interim crisis service visit	[445.00] 470.82

This notice is intended to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire September 9, 2007.

Text of rule and any required statements and analyses may be obtained from: Dan Odell, Assistant Director, Bureau of Policy, Regulation and Legislation, Office of Mental Health, 44 Holland Ave., Albany, NY 12229, (518) 474-1331, e-mail: cocsdso@omh.state.ny.us

Data, views or arguments may be submitted to: Joyce Donohue, Office of Mental Health, 44 Holland Ave., Albany, NY 12229, (518) 474-1331, e-mail: cocbjdd@omh.state.ny.us

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

Regulatory Impact Statement

1. Statutory authority: Subdivision (b) of Section 7.09 of the Mental Hygiene Law grants the Commissioner of the Office of Mental Health the authority and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction.

Subdivision (a) of Section 31.04 of the Mental Hygiene Law empowers the Commissioner to issue regulations setting standards for licensed programs for the provision of services for persons with mental illness.

2. Legislative objectives: Articles 7 and 31 of the Mental Hygiene Law reflect the Commissioner's authority to establish regulations regarding mental health programs.

3. Needs and Benefits: These amendments provide a cost of living adjustment (COLA) for the Office of Mental Health's Comprehensive Psychiatric Emergency Program (CPEP). Such COLA is required by Chapter 54 of the Laws of 2006, the enacted budget for State Fiscal Year 2006-07. The language authorizing the COLA for CPEP and certain other programs appears on pages 274-275 of Chapter 54 of the Laws of 2006. As required by the language of the enacted state budget, these rate increases' have been approved by the Director of the Division of the Budget.

4. Costs:
 a) Costs of regulated parties: There are no costs to providers associated with these amendments.

b) Costs to State and Local government and the agency: Implementation of the amendment to the Comprehensive Psychiatric Emergency Program rate has been budgeted to cost New York State \$117,943 annually, and appropriations for the state share of medicaid are included on page 273, line 20, of Chapter 54 of the Laws of 2005. There are no costs to local government.

5. Local government mandates: These regulatory amendments will not result in any additional imposition of duties or responsibilities upon county, city, town, village, school or fire districts.

6. Paperwork: This rule should not increase the paperwork requirements of affected providers.

7. Duplication: These regulatory amendments do not duplicate existing State or federal requirements.

8. Alternatives: The only alternative to the regulatory amendment which was considered was inaction. This alternative was rejected as inconsistent with statutory requirements of the enacted budget.

9. Federal standards: The regulatory amendments do not exceed any minimum standards of the federal government for the same or similar subject areas.

10. Compliance schedule: These regulatory amendments will be effective upon their adoption, and shall be deemed to have been effective on and after October 1, 2006.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not being submitted with this notice because the amended rule will not impose a significant economic impact on small businesses, or local governments. The rate increase associated with this rule is required by state statute, the enacted state budget for state fiscal year 2006-2007.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not being submitted with this notice because the amended rules will not impose any adverse economic impact on rural areas. This rule impacts Comprehensive Psychiatric Emergency Program (CPEP) rates. The impact of the rate change will be to increase the medicaid reimbursement rates associated with CPEP programs in rural and non-rural areas. This will support the continued provision of these vital programs which serve children, adolescents and adults.

Job Impact Statement

A Job Impact Statement is not being submitted with this notice because it is apparent from the nature and purpose of this rule that it involves adjustments to financing mechanisms for existing outpatient treatment programs and will not have a substantial adverse impact on jobs and employment activities.

Department of Motor Vehicles

NOTICE OF ADOPTION

Rear Object Detection Systems

I.D. No. MTV-15-07-00005-A

Filing No. 597

Filing date: June 12, 2007

Effective date: June 27, 2007

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

Action taken: Amendment of Part 58 of Title 15 NYCRR.

Statutory authority: Vehicle and Traffic Law, sections 215(a) and 375.10(p)

Subject: Rear object detection systems.

Purpose: To require all garbage trucks operated in Westchester County purchased on or after Jan. 1, 2008 to be equipped with mirrors or other rear detection devices as mandated by chapter 686 of the Laws of 2006.

Text or summary was published in the notice of proposed rule making, I.D. No. MTV-15-07-00005-P, Issue of April 11, 2007.

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

Text of 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

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Temporary Indicia of Registration and Inspection

I.D. No. MTV-15-07-00006-A

Filing No. 596

Filing date: June 12, 2007

Effective date: June 27, 2007

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

Action taken: Amendment of Part 21 of Title 15 NYCRR.

Statutory authority: Vehicle and Traffic Law, sections 215(a), 306(b) and 403-a

Subject: Temporary indicia of registration and inspection.

Purpose: To permit motorists to use temporary indicia of registration and inspection stickers for a period not to exceed 15 days when a registration or inspection sticker is lost, stolen, destroyed or mutilated. It also makes certain other minor changes to the language to make the text gender-neutral and clearer.

Text or summary was published in the notice of proposed rule making, I.D. No. MTV-15-07-00006-P, Issue of April 11, 2007.

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

Text of 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

Assessment of Public Comment

The agency received no public comment.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Motor Vehicle Accident Prevention Course

I.D. No. MTV-26-07-00006-P

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

Proposed action: Addition of Part 141 to Title 15 NYCRR.

Statutory authority: Vehicle and Traffic Law, sections 215(a), 399-1 and 399-n; and Insurance Law, section 2336

Subject: Motor vehicle accident prevention course by internet or other technologies (alternate delivery methods).

Purpose: To establish criteria for a PIRP course delivered with alternate technologies.

Substance of proposed rule (Full text is posted at the following State website: www.nysdmv.com): The following is a summary of 15 NYCRR Part 141, which establishes the Motor Vehicle Accident Prevention Course by Internet or Other Technologies (Alternate Delivery Methods (ADM)).

The rule establishes eligibility criteria to apply to deliver an ADM course.

The rule sets forth the minimum requirements essential for all ADM courses and the details of the application process. An application must be accompanied by a \$7,500 fee. A sponsor must post a \$100,000 bond or letter of credit.

DMV must be given access to all course materials and must be able to audit all ADM courses. Sponsoring agencies shall allow and cooperate with DMV or its designee's monitoring of ADM courses. If the Department is unable to engage a third party monitor, the sponsoring agencies shall be required to procure an independent third party monitor.

The rule requires course sponsors to evaluate the effectiveness of their ADM course.

The rule extensively sets forth the course requirements, including the length of the course, its content, customer support requirements, identity validation techniques, content questions that insure student participation, and proctored exam requirements, where appropriate.

The rule establishes information security guidelines for course sponsors and requirements for course administration.

The rule sets forth the basis for DMV to suspend or revoke approval of a sponsoring or delivery agency.

The rule establishes guidelines for acceptable advertising produced by the sponsors.

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: Ida L. Traschen, Supervising Attorney, 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.

Regulatory Impact Statement

1. Statutory authority: Section 2336 of the Insurance Law provides that the Department of Motor Vehicles will approve and monitor motor vehicle accident prevention courses for liability insurance premium reduction. Section 399-l of the Vehicle and Traffic Law, as added by Chapter 751 of the Laws of 2005, provides that the Commissioner may impose a fee of up

to \$7,500 for each applicant for the program. Section 399-n of such law provides that the Commissioner of Motor Vehicles is authorized to promulgate regulations in relation to the Accident Prevention Internet, and Other Technology Pilot Program. Such section provides that the regulations should insure that internet and other technologies can validate: student identity; student participation; course time requirements; and successful course completion. Such section also provides that the Commissioner may charge the sponsoring agency a fee of up to \$8 for each student who completes the Pilot Program course.

2. Legislative objectives: In enacting Article 12-B of the Vehicle and Traffic Law, the Legislature stated that its purpose was to further highway safety by preserving the quality and efficacy of the accident prevention course program by the establishment of strict criteria for initial and continual course sponsorship approval. Article 12-C of the Vehicle and Traffic Law expands upon the classroom course, authorized by Article 12-B, and authorizes the Commissioner of Motor Vehicles to "establish and implement a comprehensive pilot program to review and study internet, and other technologies as approved by the Commissioner, as a training method for the administration and completion of an approved accident prevention course for the purposes of granting point and insurance premium reduction benefits." (Vehicle and Traffic Law section 399-k) The Legislature specifically directed that the regulations address issues regarding validation of student identity, student participation throughout the course and student completion of the course. The proposed rule is in accord with the public policy objectives that the Legislature sought to advance in creating Article 12-C, since it creates comprehensive and detailed rules for establishing an internet/alternative technologies accident prevention course.

3. Needs and benefits: The proposed revisions are necessary to effectuate the provisions of Article 12-C of the Vehicle and Traffic Law, the Accident Prevention Course Internet and Other Technologies Pilot Program. Chapter 751 of the Laws of 2005 directed the Commissioner to promulgate any rules and regulations necessary to implement Article 12-C of the Vehicle and Traffic Law.

This proposed regulation is necessary to put sponsoring agencies on notice about the specific rules and guidelines governing an internet/alternative technologies accident prevention course. This proposal sets forth requirements relative to: course application procedures; third party monitoring; DMV audits; information security; course requirements; student validation techniques; suspension and revocation of sponsor's authority to give course; and advertising restrictions.

The regulation puts applicants on notice that the Commissioner shall only approve an application for an internet/alternative technologies course if such applicant has received approval to give the classroom accident prevention course, as set forth in Article 12-B of the Vehicle and Traffic Law.

The proposed regulation is also important because it informs the general public about the specifics of the internet/alternatives technologies program and gives assurances that the program is designed to prevent fraud and abuse.

4. Costs: a. To regulated parties: This is a voluntary program. No business is obligated to participate.

All businesses applying to sponsor an internet/alternative technologies course must pay a \$7,500.00 application fee to be deposited in the Accident Prevention Course Internet Technology Pilot Program Fund, as established in State Finance Law section 89-g. Vehicle and Traffic Law section 399-n(2) authorizes the Commissioner to impose a fee upon each approved sponsoring agency, which shall not exceed \$8.00 for each student who completes the accident prevention course. A business approved to sponsor an internet/alternative technologies course must post a \$100,000 bond or letter of credit. Interested sponsoring agencies estimate that a monitoring program would cost about \$5 to \$8 per student.

Prospective sponsors estimate that the implementation cost for the program will range from \$40,000 to \$72,000. The difference in cost is most likely attributed to the fact that some sponsors already have Internet/alternative programs in place while others are in the initial stages of development.

It is estimated that it will cost between \$10,000 and \$40,000 to hire a third party monitor, if DMV does not contract with such a monitor.

It is estimated that it will cost sponsors about \$30,000 to \$35,000 to evaluate their courses.

It is estimated that it will cost between \$3,000 and \$5,000 to maintain a course on an annual basis.

It is estimated that the use of biometric technology will be approximately ten dollars per student.

Cost to the public: The course fee charged to customers will be set by the marketplace. There is no minimum or maximum fee that must be assessed. Prospective sponsors estimate the cost to the public at \$15 to \$49.

b. Cost to agency: Cost to DMV would involve approximately 100 hours of staff time to review each application and curriculum. We would also need to provide security audits to monitor the program at an agency level. We estimate these costs at approximately \$45,000 the first year when the majority of applications would arrive, dropping to \$22,500 on an ongoing basis in subsequent years for administrative needs.

c. Source: DMV's Divisions of Program Regulation, Information Technology, and Field Investigation. Two potential sponsoring agencies submitted cost estimates. Their names are not disclosed so as not to diminish their competitive position.

5. Local government mandates: This proposal does not impose any mandates upon local governments.

6. Paperwork: The primary paperwork requirement is the initial application that all providers must complete to become an approved provider. In addition, the course providers are required to evaluate their course during the five year period. This will require the retention of data and submission of results to DMV within 60 days of the pilot program termination. Providers must also provide participating students with an online receipt, available for printing. A provider that wishes to substantively change the course must provide DMV with a proposed notice of change. The providers must also maintain records subject to DMV audit, submit copies of policies and procedures to DMV, maintain student completion records for five years, issue course completion certificates to the students, report successful completions to DMV, notify students of the requirements necessary to complete the course, and abide by DMV's advertising policies as established in Part 141.13 of this proposal.

7. Duplication: This proposal does not duplicate, overlap or conflict with any relevant rule or legal requirement of the State or federal governments.

8. Alternatives: Chapter 751 of the Laws of 2005 authorized the Department of Motor Vehicles to establish the Accident Prevention Course Internet and Other Technologies Pilot Program. In order to make this pilot program successful, the Department consulted widely with the current PIRP providers. The Department distributed a draft of this regulation for comment and incorporated some of the recommended changes into this final proposal. Two particular elements of this proposed rulemaking received extensive comments: one, the third party monitoring requirement and, two, the requirement to post a bond or letter of credit.

These two requirements stem from the Department's compelling need to design a pilot program that is free of abuse and fraud. When the Governor vetoed similar legislation in 1999 and 2004, he wrote, "I remain concerned about the potential for fraud and abuse inherent in home study programs. In addition to identification of the individual taking the course, it is necessary to ensure that such individual actually is viewing the course material." Keeping these concerns in mind, the Department designed a pilot program with flexibility to accommodate different sponsor courses, while establishing structures to insure the integrity of the courses.

The third party monitoring requirement represents one such structure. Chapter 751 provided that the Department would collect an application fee of up to \$7,500 and an \$8 to be paid by the sponsoring agency for each student taking the internet program. These fees were to be deposited in the Accident Prevention Course Internet, and other Technology Pilot Program fund, as established in section 89-g of the State Finance Law. The Department intended to take the money from this fund and use it to pay for a third party monitor that would be selected via the RFP-Contract process. This neutral monitor would oversee all of the internet programs. Unfortunately, the Legislature failed to appropriate such funds in the 2006 Budget. DMV is attempting again this year to obtain such appropriation. However, if such appropriation is not forthcoming, pursuant to this proposed rule, the sponsors will be required to obtain their own monitor, subject to DMV approval. Although this would be the less desirable alternative, the Department maintains that it is preferable to having no monitor at all.

This proposed rule also requires that course sponsors post a \$100,000 bond or letter of credit. Although some course sponsors noted objections to this requirement, the Department maintains that such bond or letter of credit provides crucial protection for consumers in the event the sponsor goes out of business or there is a data loss by such sponsor. Consumers could be reimbursed for course fees, for example, if the company goes out of business.

A no action alternative was not considered.

9. Federal standards: The proposal does not exceed any minimum standards of the federal government for the same or similar subject areas.

10. Compliance schedule: Compliance shall commence upon adoption of this regulation.

Regulatory Flexibility Analysis

1. Effect of rule: There are no local governments affected by this rule.

The Department estimates that each of the 13 currently approved classroom course sponsoring agencies will apply to participate in the voluntary technology pilot program. The proposed regulation does not require sponsors to continue delivering their classroom courses but, based on communications with sponsors, the Department estimates that at least 80% (10 of 13) will continue providing classroom courses through their established delivery agencies. There are approximately 3225 delivery agencies and 5900 instructors delivering classroom courses statewide. The Department considers approximately 85% of delivery agencies to be small businesses, the remainder being larger employers. The Department estimates that 6 of 13 sponsors are small businesses.

2. Compliance requirements: Participation in the pilot program is voluntary and is not limited to course sponsoring agencies that currently have a classroom course approved in New York State. Those choosing to apply will be required to use their existing classroom course to develop an Alternate Delivery Method, such as an Internet based course, CD-Rom/Video or other technology. Sponsors will be required to implement strategies to validate participant identity, time of registration, and participation throughout the 320 minute course, as well as securing all personal information.

The primary paperwork requirement is the initial application that all providers must complete to become an approved provider. In addition, the course providers are required to evaluate their course during the five year period. This will require the retention of data and submission of results to DMV within 60 days of the pilot program termination. Providers must also provide participating students with an online receipt, available for printing. A provider that wishes to substantively change the course must provide DMV with a proposed notice of change. The providers must also maintain records subject to DMV audit, submit copies of policies and procedures to DMV, maintain student completion records for five years, issue course completion certificates to the students, report successful completions to DMV, notify students of the requirements necessary to complete the course, and abide by DMV's advertising policies as established in Part 141.13 of this proposal.

3. Professional services: Sponsors may choose to contract with firms that provide Internet services and various technological solutions for verifying student identity participation as part of the overall development of their ADM course, especially in the development and initial implementation of the course. The sponsors may have to contract with an independent third party monitor if DMV does not enter into a contract with such a monitor.

4. Compliance costs: This is a voluntary program. No business is obligated to participate.

All businesses applying to sponsor an internet/alternative technologies course must pay a \$7,500.00 application fee to be deposited in the Accident Prevention Course Internet Technology Pilot Program Fund, as established in State Finance Law section 89-g. Vehicle and Traffic Law section 399-n(2) authorizes the Commissioner to impose a fee upon each approved sponsoring agency, which shall not exceed \$8.00 for each student who completes the accident prevention course. A business approved to sponsor an internet/alternative technologies course must post a \$100,000 bond or letter of credit.

Interested sponsoring agencies estimate that a monitoring program would cost about \$5 to \$8 per student. Prospective sponsors estimate that the implementation cost for the program will range from \$40,000 to \$72,000. The difference in cost is most likely attributed to the fact that some sponsors already have Internet/alternative programs in place while others are in the initial stages of development.

It is estimated that it will cost between 10,000 and 40,000 dollars to hire a third party monitor, if DMV does not contract with such a monitor.

It is estimated that it will cost sponsors about 30,000 to 35,000 dollars to evaluate their courses.

It is estimated that it will cost between 3,000 and 5,000 dollars to maintain a course on an annual basis.

It is estimated that the use of biometric technology will be approximately ten dollars per student.

5. Economic and technological feasibility: The Department believes that approximately 8 of the 13 current classroom providers are presently delivering Internet based, or other technology based courses in other states, or are developing courses for use in other states. The use of Internet and associated technologies in the delivery of myriad services, including driver

safety courses, has become commonplace in the modern world. Fifteen states have authorized the delivery of driver improvement course via these technologies with great success in terms of increased participation with minimal negative impact on classroom course attendance. Two such courses in California use a third party monitor. Sponsors that elect to participate in this voluntary pilot program will see an initial investment in technologies to validate student identity upon registration and validate identity and participation throughout the 320 minute course, as well as securing personal information obtained as part of the validation process.

6. Minimizing adverse impact: This is a voluntary 5-year pilot program and sponsoring agencies are not required to participate. The proposed regulation and associated specifications require commonly accepted, readily available technologies, and use standard policies for course accessibility, consumers with disabilities, privacy policies validation of a consumer's identity, and security of personal information. The proposed regulations allow flexibility for the sponsor in choosing their course delivery method, as well as their validation and security techniques, rather than requiring a specific model.

The Department evaluated concerns that not requiring sponsoring agencies to continue delivering the classroom course could negatively affect small business delivery agencies. Initial research has shown that many states have authorized the delivery of courses via these technologies with great success in terms of increased participation, with minimal negative impact on classroom course attendance. Sponsors have built their business through their delivery agencies and are seeking ways to involve their agencies in the pilot program in ways such as using them for in-person identity verification, point of sale for alternative delivery methods (such as CD-Rom), proctored testing locations, web-café type establishments where the technology course can be taken at a physical location, as well as remunerating delivery agencies that make website referrals to the sponsor's course.

As noted below, the Department consulted extensively with the affected businesses in order to draft regulations and specifications that met both industry needs and DMV's need to prevent fraud and abuse. We did receive feedback from several businesses, mentioned below, and made some revisions to both policy decisions and our initial draft regulation. For example, we created more flexibility in the validation scheme used to insure that a given individual is actually taking the course. We increased the time that a student has to complete the course, from three weeks to 30 days. The formula for calculating number of words per minute for the average reader was reduced from 150 words per minute to 100 words per minute. DMV agreed that it should develop the uniform post class survey. At the request of several sponsors, we agreed that a sponsor could post a letter of credit in lieu of the \$100,000 bond.

7. Small business and local government participation: The Department has consulted with the motor vehicle accident prevention course/driver safety course industry. Initially, we released a Request for Information to currently approved sponsoring agencies, potential applicants from other states, administrators from other state governments with technology courses, vendors of technology services, and potential course monitors. Feedback was incorporated into draft regulations and specifications, which were then re-circulated to the currently approved sponsoring agencies for comment. We received comments about the proposed regulations from 12 sponsors, whose names will not be disclosed so as not to impair their competitive position. Finally, four additional sponsors, representing two larger sponsors and two smaller sponsors were consulted by telephone for cost input and regulatory impact information.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not submitted with this proposal because it will not have an adverse or disproportionate impact on rural areas of the State.

Job Impact Statement

A Job Impact Statement is not submitted with this proposal because it will not have an adverse impact on job development or job creation in the State.

Public Service Commission

ERRATUM

A Notice of Adoption, pertaining to Submetering of Electricity by American Metering & Planning Services, Inc., published in the June 13, 2007 issue of the *State Register* contained an incorrect SAPA number. The correct SAPA number is (07-E-0160SA1).

Also, in the June 13, 2007 issue of the *State Register*, a Notice of Proposed Rule Making pertaining to Waiver of Rules by Empire Video Services Corporation, Town of Jerusalem contained an incorrect SAPA number. The correct SAPA number is (07-V-0578SA1).

The Department of State apologizes for any confusion this may have caused.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Tariff Revisions by Verizon New York Inc.

I.D. No. PSC-26-07-00015-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 grant or deny approval, in whole or in part, of filed tariff revisions submitted by Verizon New York Inc. (Verizon) that would revise tariff language and rates that apply to enhancements required in provisioning high voltage protection services in Verizon's P.S.C. No. 1 communications tariff.

Statutory authority: Public Service Law, section 92

Subject: Tariff revisions that apply to enhancements required in provisioning high voltage protection services in Verizon's P.S.C. No. 1 communication tariff.

Purpose: To consider whether to grant or deny approval, in whole or in part, of filed tariff revisions.

Substance of proposed rule: The Commission is considering whether to grant or deny approval, in whole or in part, of filed tariff revisions submitted by Verizon New York Inc. (Verizon) to revise tariff language and rates that apply to enhancements required in provisioning high voltage protection services in Verizon's PSC No. 1 Communications tariff.

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. Brillong, 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-0521SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Rehearing by Cable Telecommunications Association of New York, Inc.

I.D. No. PSC-26-07-00016-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, a petition for reconsideration of its May 9, 2007 order, filed by the Cable Telecommunications Association of New York, Inc. regarding municipal pole attachment rates.

Statutory authority: Public Service Law, section 22

Subject: Rehearing of May 9, 2007 order on municipal pole attachment rates.

Purpose: To consider a petition for rehearing.

Substance of proposed rule: The Commission is considering whether to approve or reject, in whole or in part, a petition for reconsideration of its May 9, 2007 order, filed by the Cable Telecommunications Association of New York, Inc. regarding municipal pole attachment rates.

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-E-1427SA2)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Follow-On Merger Credit by National Grid USA

I.D. No. PSC-26-07-00017-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, modify or reject, in whole or in part, the petition of Niagara Mohawk Power Corporation d/b/a National Grid to implement a follow-on merger credit associated with the recent acquisition by National Grid USA of the New England Gas Company assets of Southern Union Company.

Statutory authority: Public Service Law, section 66

Subject: The follow-on merger credit created by the recent acquisition by National Grid USA of the New England Gas Company assets of Southern Union Company.

Purpose: To determine the appropriate treatment for a follow-on merger credit.

Substance of proposed rule: The Commission is considering whether to approve, modify or reject, in whole or in part, the petition of Niagara Mohawk Power Corporation d/b/a National Grid to implement a Follow-on Merger Credit associated with the recent acquisition by National Grid USA of the New England Gas Company assets of Southern Union Company. Under the Merger Rate Plan approved by the Commission in Case 01-M-0075, Opinion No. 01-6, National Grid must credit the Deferral Account for electric operations and the Contingency Reserve Account for gas operations 50% of the net synergy savings. The net synergy savings, which is to be the amount identified by the state commission having jurisdiction over the rate (the Rhode Island Public Utility Commission (RIPUC), in this case) has not been so defined. National Grid proposed to reflect, at this time, the estimate of net synergy savings. When the RIPUC makes its final determination of net synergy savings National Grid proposes to update the credit to reflect the higher of either National Grid's estimates or the RIPUC determination.

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.

(01-M-0075SA34)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Reallocation of System Benefits Charge Funds by New York State Energy Research and Development Authority

I.D. No. PSC-26-07-00018-P

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

Proposed action: The Public Service Commission is considering directing the New York State Energy Research and Development Authority (NYSERDA) to propose the reallocation of approximately \$3 million of system benefits charge (SBC) funds, subject to possible reimbursement, to fund the initial development of a regional organization to carry out the regional greenhouse gas initiative (RGGI).

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

Subject: Reallocation of approximately \$3 million of SBC funds, subject to possible reimbursement, to fund the initial development of a regional organization to carry out the RGGI.

Purpose: To consider whether the commission should authorize the reallocation of approximately \$3 million of SBC funds to fund the initial development of a regional organization to carry out the RGGI. Some or all of the money used might be subject to reimbursement to NYSEDA from the other RGGI participants.

Substance of proposed rule: The New York State Energy Research and Development Authority (NYSERDA) is the Public Service Commission's (Commission) third-party administrator for fund related to the System Benefits Charge program (SBC). The Commission is considering, on its own motion, directing NYSEDA to propose the reallocation of approximately \$3 million of uncommitted SBC funds acquired through excess interest earnings, to be used by NYSEDA to contribute to the initial development of a regional organization to carry out the Regional Greenhouse Gas Initiative (RGGI). Some or all of the money so used might be subject to reimbursement to NYSEDA from the other RGGI participants.

The Commission may approve, reject, or modify, in whole or in part, its proposal to direct NYSEDA to request the reallocation of such funds to be used to fund the development of the RGGI regional organization.

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.

(05-M0090SA3)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Approval of New Types of Water Meters, and Auxiliary Devices by Aqua New York

I.D. No. PSC-26-07-00019-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a request filed by Aqua New York for the approval to use the Neptune Encoder R900i solid state register.

Statutory authority: Public Service Law, section 89(d)(1)

Subject: Approval of new types of water meters, and auxiliary devices.

Purpose: To permit water utilities in New York State to use the Neptune Encoder R900i for customer billing process.

Substance of proposed rule: The Commission will consider a request from Aqua New York for approval to use the Neptune Encoder R900i Module. The Neptune R900i is a multi-function solid state encoder meter register that is designed to provide rate of water flow, diagnostic testing, and leak and tamper indicator functions. The applicant claims that the Neptune R900i can be mounted to existing New York- approved water metering equipment to provide automatic meter readings that can be read from a hand-held unit, a fixed network or a utility vehicle.

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-W-0625SA1)

Racing and Wagering Board

EMERGENCY RULE MAKING

Post-Race Blood Gas Testing Procedures for Thoroughbred and Harness Race Horses

I.D. No. RWB-19-07-00004-4E

Filing No. 589

Filing date: June 7, 2007

Effective date: June 7, 2007

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

Action taken: Addition of sections 4043.8, 4043.9, 4043.10, 4038.19(g), 4120.13, 4120.14, 4120.15 and 4109.7(f) to Title 9 NYCRR.

Statutory authority: Racing, Pari-Mutuel Wagering and Breeding Law, sections 101, 207, 227, 301, 305 and 902

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

Specific reasons underlying the finding of necessity: In Jan. 2005, Federal prosecutors obtained indictments against 17 people related to the operation of an illegal gambling operation, including charges that a trainer had administered an alkalinizing agent to a horse in order to affect the outcome of a race, and subsequently the wagering on that race. In March 2006, trainer Gregory Martin admitted in Federal court that he administered a "milkshake" to a horse before the opening race at Aqueduct Raceway on Dec. 18, 2003. The horse went on to win by 10 lengths. According to an article in The Thoroughbred Times, Martin told the court that after he administered the milkshake to the horse, he contacted an associate with the understanding that such information would be passed along to other bettors in an alleged gambling ring. According to the Justice Department, this was not an isolated incident and such violations occurred regularly. This case has brought national attention to the issue of milkshaking and the need to adopt testing programs and penalties for such "milkshaking" practices. Clearly, the practice of milkshaking race horses is detrimental to the integrity of the sport of horse racing, erodes public confidence in pari-mutuel wagering events, and invites criminal abuse and exploitation.

Subject: Post-race blood gas testing procedures for thoroughbred and harness race horses.

Purpose: To detect and deter the prohibited practice known as "milkshaking."

Substance of emergency rule: 4043.8(a) Authorizes pre-race and post-race methods of testing thoroughbred racehorses to detect excess levels of total carbon dioxide (TCO₂), establishes the threshold for excess TCO₂ at 37 millimoles per liter, and 39 millimoles for horses that have been administered furosemide.

4043.8(b) Establishes procedures in cases where excess TCO₂ levels are found and an owner or trainer challenges the findings to assert a claim of naturally occurring excess TCO₂ levels in a horse.

4043.8(c) Establishes minimum standards for guarded quarantine of a thoroughbred race horse at a race track operated by a track association.

4043.8(d) Establishes minimum penalties for excess TCO₂ violations in a thoroughbred racehorse ranging from a minimum 60-day license suspension and \$1,000 fine for a first offense to a minimum one-year license suspension with a \$5,000 fine with a possible additional suspension term prescribed by the Board. Authorizes an additional two-year suspension for race-day medication violation. Includes provision for purse redistribution in case of a positive excess TCO₂ test.

4043.8(e) Directs that horses that are found to have excess TCO₂ levels will be disqualified, any monies won will be forfeited/redistributed and pre-race detention shall be imposed.

4043.9(a) Establishes pre-race detention procedures and requirements where a racehorse has been tested and found to have excess TCO₂ levels that are not physiologically normal, including a minimum six-month period of detention.

4043.9(b) Establishes pre-race detention where a trainer has had more than one racehorse under his or her care have excess TCO₂ levels in a 12-month period, including a minimum eight-month period of detention for all horses under the trainer's care.

4043.10 Establishes punishment for failure to cooperate in the thoroughbred TCO₂ testing program.

4038.19(g) Allows claimants in a claiming race to void a claim on a thoroughbred horse that is subsequently found to have excess TCO₂ levels that are not physiologically normal.

4120.13(a) Authorizes pre-race and post-race testing of harness racehorses to detect excess levels of total carbon dioxide (TCO₂), establishes the threshold for excess TCO₂ at 37 millimoles per liter, and 39 millimoles for horses that have been administered furosemide.

4120.13(b) Establishes procedures in cases where excess TCO₂ levels are found and an owner or trainer challenges the findings to assert a claim of naturally occurring excess TCO₂ levels in a horse.

4120.13(c) Establishes minimum standards for guarded quarantine of a harness racehorse at a race track operated by a track association.

4120.13(d) Establishes minimum penalties for excess TCO₂ violations in a harness racehorse ranging from a minimum 60-day license suspension and \$1,000 fine for a first offense to a minimum one-year license suspension with a \$5,000 fine with a possible additional suspension term prescribed by the Board. Authorizes an additional two-year suspension for race-day medication violations. Includes provision for purse redistribution in case of a positive excess TCO₂ test.

4120.13(e) Directs that horses that are found to have excess TCO₂ levels will be disqualified, any monies won will be forfeited/redistributed and pre-race detention shall be imposed.

4120.14(a) Establishes pre-race detention procedures and requirements where a racehorse has been tested and found to have excess TCO₂ levels that are not physiologically normal, including a minimum six-month period of detention.

4120.14(b) Establishes pre-race detention where a trainer has had more than one racehorse under his or her care have excess TCO₂ levels in a 12-month period, including a minimum eight-month period of detention for all horses under the trainer's care.

4120.15 Establishes punishment for failure to cooperate in the Board's TCO₂ testing.

4109.7(f) Allows claimants in a claiming race to void a claim on a harness racehorse that is subsequently found to have excess TCO₂ levels.

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 rule making, I.D. No. RWB-19-07-00004-P, Issue of May 9, 2007. The emergency rule will expire September 4, 2007.

Text of emergency rule and any required statements and analyses may be obtained from: Gail Pronti, Secretary to the Board, Racing and Wagering Board, One Broadway Center, Suite 600, Schenectady, NY 12305-2553, (518) 395-5400, e-mail: info@racing.state.ny.us

Regulatory Impact Statement

(a) Statutory authority. Racing, Pari-Mutuel Wagering and Breeding Law, sections 101, 207, 227, 301, 305 and 902.

(b) Legislative objectives. This amendment advances the legislative objective of regulating the conduct of pari-mutuel wagering in a manner designed to maintain the integrity of racing while generating a reasonable revenue for the support of government.

(c) Needs and benefits. This rulemaking is necessary to assure the public's confidence and continue the high degree of integrity in racing at the pari-mutuel betting tracks. Through pre-race and post-race testing, this rulemaking will detect and deter the administration of alkali agents to thoroughbred racehorses and harness racehorses for the purpose of affecting the performance of such horse during a pari-mutuel wagering race.

The administration of alkali agents into a racehorse is commonly known as "milkshaking," where a person administers a mixture of sodium bicarbonate, sugar and water to a horse prior to a race mitigate the effects of lactic acid on the horse's muscles during the race, thereby gaining an advantage. Lactic acid is a naturally occurring byproduct of intense muscular exercise in mammals, and the accumulation of lactic acid in such muscles causes fatigue. Some people associated with racehorses believe that the administration of an alkaline substance, such as bicarbonate of soda, can neutralize the effect of lactic acid in a horse's muscles. This has resulted in the use of alkalizing agents, or "milkshakes" which are administered to a racehorse in an attempt to alter the performance of the horse. Based on this belief, people have administered milkshakes to racehorses on the day of a race with the intent to gain a racing advantage.

This rulemaking is necessary to establish empirical standards and testing procedures for the enforcement of Board Rule 4043.3(d) and Board Rule 4120.3(d), which apply to thoroughbred and harness racehorses respectively and state "No person shall, attempt to, or cause, solicit, request, or conspire with another or others to . . . administer a mixture of bicarbonate of soda and sugar in any of their forms in any manner to a horse within 24 hours of a racing program at which such horse is programmed to race. It shall be the trainer's responsibility to prevent such administration."

Horses that have received an alkalizing agent will exhibit elevated levels of TCO₂ over and above normal levels. This rulemaking will establish the ion selective electrode method with a clinical auto analyzer as a standard means of detecting elevated TCO₂ in horses. The rule will establish a TCO₂ threshold of 37 millimoles per liter for horses who have not been administered furosemide (Lasix) prior to a race, and 39 millimoles for horses that have been administered furosemide prior to a race.

In January 2005, the U.S. Justice Department arrested a New York licensed thoroughbred trainer and a prominent New York harness driver and charged the two with milkshaking a thoroughbred at Aqueduct Raceway in December 2003 to increase the odds that the horse, A One Rocket, would win. According to the Justice Department, this was not an isolated incident and such violations occurred regularly. This case has brought national attention to the issue of milkshaking and the need to adopt testing programs and penalties for such "milkshaking" practices. Clearly, the practice of milkshaking race horses is detrimental to the integrity of the sport of horse racing, erodes public confidence in pari-mutuel wagering events, and invites criminal abuse and exploitation.

This rulemaking will benefit thoroughbred and harness racing by ensuring the betting public that horses that compete in pari-mutuel races have not been tampered with through the administration of alkali agents, thereby ensuring that no extraordinary advantage has been given to the horse through prohibited substances.

(d) Costs.

(i) Thoroughbred horse owners may be subject to the cost of a pre-race guarded quarantine imposed upon any single horse found to have excess TCO₂ levels that has not been determined to be physiologically normal for such horse. The licensed track association sponsoring the race is responsible for making available a pre-race quarantine stall, and for maintaining an access log system in either paper or electronic form. The length of time for such quarantine shall be determined by the stewards or judges, and will have an impact on the cost of guarded quarantine. The cost of a paper log is approximately \$10 retail for a ring binder and 500 pages of paper. The cost of an electronic record, such as a personal computer or laptop computer, starts at \$400 in ordinary retail stores.

(ii) There are no costs imposed upon the Racing and Wagering Board, the state or local government because the TCO₂ testing program will be implemented utilizing the Board's existing medication testing program, personnel and facilities.

(iii) The Board cannot fully provide a statement of costs the trainers for pre-race guarded quarantine because the actual cost of establishing a pre-race guarded quarantine varies greatly from location to location in New

York State, and the physical characteristics of the buildings within which a horse of quarantined. All horses that race at a New York State thoroughbred or harness racetrack are currently afforded stable space for free, so the only added cost that can be expected will be the cost of a guard. A pre-race guarded quarantine may require one guard per horse, or one guard for many horses, depending upon the access points that need to be controlled for an effective guarded quarantine. The Board's rulemaking requires that the subject horse is kept in an area where access to the subject horse is restricted to authorized licensed trainers, owners and veterinarians as submitted by the owner, that guards maintain a record of all licensed persons who have had access to the horse while in guarded quarantine, along with the time and purpose of the visit. In addition to the distinctive limitations that the guarded quarantine barn will have upon the cost, the wages of a guard varies depending upon the racetrack itself. According to track representatives, the hourly cost of guard may range from \$7 per hour up to \$20 per hour, depending on the individual racetrack, experience required for the specific duties (e.g. a stable guard who is responsible for surveillance only compared to a quarantine supervisor who is responsible for also identifying illegal paraphernalia, treatments or procedures) and local pay scale. The minimum time that a horse is to be quarantined is six hours, and the maximum time for quarantine is 72 hours.

(e) Paperwork. Owners of any horse that has been found to have an excess levels of TCO₂ will be required to submit a letter to the steward or judge of the track where the subject horse is to race, stating that the subject horse has a normally elevated level of TCO₂. Such a letter is necessary for a horse to continue racing while under a guarded quarantine. Track associations will be required to maintain access logs, either paper or electronic, for a period of 90 days after the guarded quarantine period.

(f) Local government mandates. This rulemaking will not impose any program, service, duty, or responsibility upon any county, city, town, village, school district fire district or other special district.

(g) Duplication. Since the New York State Racing & Wagering Board is exclusively responsible for the regulation of pari-mutuel wagering activities in New York State, there are no other relevant rules or other legal requirements of the state or federal government regarding total carbon dioxide testing of thoroughbred racehorses and harness racehorses in New York State.

(h) Alternative approaches. The Board did not consider any other significant alternatives because no other significant alternates are available. The rulemaking is based upon an established TCO₂ testing program already adopted and in use by the New Jersey Racing Commission. The testing procedure included in this rulemaking is the only TCO₂ test that has been reviewed and declared reliable by a state court, in this case, the New Jersey Supreme Court recognized the reliability of the Beckman test generally and as applied by the New Jersey Racing Commission (Campbell v. New Jersey Racing Commission, New Jersey Supreme Court, 169 N.J. 579, 781 A.2d 1035, October 11, 2001.) The TCO₂ threshold levels in this rule are supported by findings of the Canadian Pari-Mutuel Agency, which are published "Effects of Sampling and Analysis Times and Furosemide Administration on TCO₂ Concentrations in Stadardbred and Thoroughbred Horses." This paper was presented at the 13th International Conference of Racing Analysts and Veterinarians in Cambridge, U.K., in 2000 and published in the Conference Proceedings. The data in this study supports the thresholds of 37 mmol/L (non-furosemide) and 39 mmol/L (furosemide) which has been adopted in both Canada and Australia.

(i) Federal standards. There are no federal standards applicable to the subject area of state-regulated pari-mutuel wagering activity.

(j) Compliance schedule. The practice known as "milkshaking" of horses is already prohibited by rule under 9E NYCRR 4043.3 for thoroughbred racehorses and 9E NYCRR 4120.3 for harness racehorses. All of the provisions of this rulemaking shall be effective immediately upon filing with the Department of State.

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

This proposal does not require a Regulatory Flexibility Statement, Rural Area Flexibility Statement or Job Impact Statement as the amendment would expand the existing medication testing rules to include a test for alkalizing agents in thoroughbred and harness race horses. This testing will utilize the current framework for post-race testing. The pre-race testing component will merely require that a veterinarian take a few minutes to obtain a blood sample from a horse, which is a routine procedure and imposes no new burden upon regulated parties. These amendments do not impact upon State Administrative Procedure Act section 102(8), nor do they affect employment. The proposal will not impose an adverse economic impact on reporting, recordkeeping or other compliance require-

ments on small businesses in rural or urban areas nor on employment opportunities. The rule does not impose any significant technological changes on the industry for the reasons set forth above, because the Board rules has existing rules for post-race testing for the presence of performance altering drugs and other substances.

Department of State

EMERGENCY RULE MAKING

Accountability for the Administration and Enforcement of the New York State Uniform Fire Prevention Building Code

I.D. No. DOS-26-07-00004-E

Filing No. 595

Filing date: June 11, 2007

Effective date: June 11, 2007

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

Action taken: Amendment of sections 1201.2(d) and 1204.1; addition of section 1204.3(f)(4) and (h)(3); renumbering of section 1204.3(i) to (l); and addition of section 1204.3(i), (j) and (k) to Title 19 NYCRR.

Statutory authority: Executive Law, section 381

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

Specific reasons underlying the finding of necessity: This rule is adopted as an emergency measure to preserve the public safety and general welfare and because time is of the essence. This rule clarifies an existing rule, which provides that the State is accountable for administration and enforcement of the New York State Uniform Fire Prevention and Building Code (the "Uniform Code") with respect to buildings, premises and equipment in the custody of, or activities related thereto undertaken by, a State department, bureau, commission, board or authority, by expressly providing that the State will be responsible for administration and enforcement of the Uniform Code with respect to facilities to be included in the Statewide Wireless Network to be established and implemented by the Office for Technology. Adoption of this rule on an emergency basis preserves the public safety and general welfare by clarifying the responsibility for administration and enforcement of the Uniform Code with respect to the Statewide Wireless Network, and thereby permitting the immediate commencement of the review and permitting process incidental to the construction and implementation of the Statewide Wireless Network.

Subject: Accountability for the administration and enforcement of the New York State Uniform Fire Prevention and Building Code with respect to facilities to be included in the Statewide Wireless Network.

Purpose: To clarify that the State will be responsible for the administration and enforcement of the New York State Uniform Fire Prevention and Building Code with respect to facilities to be included in the Statewide Wireless Network.

Text of emergency rule: Subdivision (d) of section 1201.2 of Title 19 NYCRR is amended to read as follows:

(d) (1) The State shall be accountable for administration and enforcement of the Uniform Code with respect to buildings, premises and equipment in the custody of, or activities related thereto undertaken by, a State department, bureau, commission, board or authority.

(2) Without limiting the generality of the provisions of paragraph (1) of this subdivision, the State shall be accountable for administration and enforcement of the Uniform Code with respect to all statewide wireless network facilities (as that term is defined in subdivision (j) of section 1204.3 of Part 1204 of this Title) and all activities related thereto undertaken by the Office for Technology; provided, however, that nothing in this paragraph shall be construed as subjecting to the provisions of the Uniform Code any statewide wireless network facility that would not otherwise be subject to the provisions of the Uniform Code.

(3) In the case of a statewide wireless network facility (as that term is defined in subdivision (j) of section 1204.3 of Part 1204 of this Title) which is constructed or installed on or in a statewide wireless network supporting

building (as that term is defined in subdivision (k) of section 1204.3 of Part 1204 of this Title):

(i) the State shall be accountable for administration and enforcement of the Uniform Code with respect to such statewide wireless network facility and all activities related thereto undertaken by the Office for Technology, but the State shall not be accountable for administration and enforcement of the Uniform Code with respect to such statewide wireless network supporting building;

(ii) the governmental entity that would have been accountable for administration and enforcement of the Uniform Code with respect to such statewide wireless network supporting building if such statewide wireless network facility had not been constructed or installed thereon or therein shall remain accountable for administration and enforcement of the Uniform Code with respect to such statewide wireless network supporting building, but such governmental entity shall not be responsible for administration and enforcement of the Uniform Code with respect to such statewide wireless network facility; and

(iii) the State and such governmental entity shall consult with each other and fully cooperate with each other in connection with the performance of their respective administrative and enforcement obligations, and in particular, but not by way of limitation, the State shall make all records in its possession pertaining to such statewide wireless network facility available to such governmental entity upon request by such governmental entity, and such governmental entity shall make all records in its possession pertaining to such statewide wireless network supporting building available to the State upon request by the State. Nothing in this paragraph shall require the State to make available any record which, if disclosed, would jeopardize the capacity of the State, the Office for Technology, or any other State agency (as that term is defined in subdivision (h) of section 1204.3 of Part 1204 of this Part) to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures, or if access to such record could otherwise be denied under section 87 of the Public Officers Law.

Section 1204.1 Title 19 NYCRR is amended to read as follows:

Section 1204.1 Introduction. Section 381 of the Executive Law directs the Secretary of State to promulgate rules and regulations prescribing minimum standards for administration and enforcement of the New York State Uniform Fire Prevention and Building Code (Uniform Code). Section 1201.2(d) of this Title provides that the State shall be accountable for administration and enforcement of the Uniform Code with respect to buildings, premises, and equipment in the custody of, or activities related thereto undertaken by, a State agency and with respect to all statewide wireless network facilities and all activities related thereto undertaken by the Office for Technology. This Part establishes procedures for the administration and enforcement of the Uniform Code by state agencies. Buildings and structures exempted from the Uniform Code by other preclusive statutes or regulations are not subject to the requirements of this Part.

New paragraph (4) of subdivision (f) of section 1204.3 of Title 19 NYCRR is added to read as follows:

(4) Notwithstanding any other provision of this subdivision to the contrary and without regard to the criteria mentioned in paragraph (3) of this subdivision, for the purposes of this Part the Office for Technology shall be considered to have custody and effective control of all statewide wireless network facilities; provided, however, that nothing in this subdivision shall be construed as subjecting to the provisions of the Code any statewide wireless network facility that would not otherwise be subject to the provisions of the Code; and provided further that for the purposes of this Part, the Office for Technology shall not be considered to have custody or effective control of any statewide wireless network supporting building merely by reason of the construction or installation of any statewide wireless network facility thereon or therein.

New paragraph (3) of subdivision (h) of section 1204.3 of Title 19 of the NYCRR is added to read as follows:

(3) Without limiting the generality of paragraphs (1) and (2) of this subdivision, for the purposes of this Part and for the purposes of Part 1201 of this Title, the term "State agency" shall include the Office for Technology.

Subdivision (i) of section 1204.3 of Title 19 NYCRR is renumbered subdivision (l) and new subdivisions (i), (j), and (k) are added to read as follows:

(i) Statewide wireless network. An integrated statewide communications system intended to link state and local first responders to each other and to allow state and local first responders to communicate reliably during emergency situations, as contemplated by section 402(1)(a) of the State Technology Law. The term "statewide wireless network" shall in-

clude such communications system as originally developed and constructed and as thereafter extended, improved, upgraded, or otherwise modified from time to time.

(j) *Statewide wireless network facility.* Any tower, antenna, or equipment which is used or intended to be used in the operation of the statewide wireless network, and any building or structure which is constructed specifically for the purpose of supporting or containing any such tower, antenna, or equipment.

(k) *Statewide wireless network supporting building.* A building or structure which is not a statewide wireless network facility (i.e., which was not constructed specifically for the purpose of supporting or containing a tower, antenna, or equipment which is used or intended to be used in the operation of the statewide wireless network), but which has a statewide wireless network facility constructed or installed thereon or therein. For example, if a tower, antenna, and equipment used or intended to be used in the operation of the statewide wireless network, and a building or structure which will contain such equipment or support such tower, are constructed on the top of an existing office building, then:

(1) such office building would be a statewide wireless network supporting building;

(2) such office building would not be a statewide wireless network facility; and

(3) the tower, antenna, equipment, and building or structure constructed on the top of such office building would be a statewide wireless network facility.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire September 6, 2007.

Text of emergency rule and any required statements and analyses may be obtained from: Joseph Ball, Department of State, 41 State St., Albany, NY 12231, (518) 474-6740, e-mail: jball@dos.state.ny.us

Regulatory Impact Statement

1. STATUTORY AUTHORITY.

The statutory authority for this rule is section Executive Law section 381(1), which provides that the Secretary of State shall promulgate rules and regulations prescribing minimum standards for administration and enforcement of the New York State Uniform Fire Prevention and Building Code (the "Uniform Code"), and Executive Law section 381(2), which provides that every local government shall administer and enforce the Uniform Code "(e)xcept as may be provided in regulations of the secretary. . . ."

2. LEGISLATIVE OBJECTIVES.

"In general, section 381 of the Executive Law directs that the State's cities, towns and villages administer and enforce the New York State Uniform Fire Prevention and Building Code (Uniform Code). However, the statute contemplates the need for alternative procedures for certain classes of buildings based upon their design, construction, ownership, occupancy or use, and authorizes the Secretary of State to establish those procedures. . . ." 19 NYCRR section 1201.1.

Rules and regulations previously adopted by the Secretary of State pursuant to Executive Law section 381(2) provide that the State shall be accountable for administration and enforcement of the Uniform Code with respect to buildings, premises and equipment in the custody of, or activities related thereto undertaken by, a State department, bureau, commission, board or authority.

The rule now being adopted by the Secretary of State clarifies that the State will be accountable for administration and enforcement of the Uniform Code with respect to facilities in the Statewide Wireless Network to be constructed and implemented by the Office for Technology.

3. NEEDS AND BENEFITS.

The existing policy of this State, as reflected in the existing rules and regulations, is that the State shall be accountable for administration and enforcement of the Uniform Code with respect to buildings, premises and equipment in the custody of, or activities related thereto undertaken by, a State department, bureau, commission, board or authority. This rule will clarify that this policy shall apply to facilities in the Statewide Wireless Network to be constructed and implemented by the Office for Technology.

This rule will also address the situation that will arise when a governmental agency other than the State (a local government, in most cases) is responsible for administration and enforcement of the Uniform Code with respect to a particular building or structure, and a Statewide Wireless Network facility is to be constructed or installed in or on such building or structure. This rule will provide that in such a case: (1) the local government will continue to have responsibility for administration and enforce-

ment of the Uniform Code with respect to the building or structure; (2) the State will be responsible for administration and enforcement of the Uniform Code with respect to the Statewide Wireless Network facility to be constructed on installed in or on the building or structure; and (3) the local government and the State must consult and cooperate with each other with respect to their respective administrative and enforcement responsibilities, and must make their records available to each other on request. The rule would provide that the State would not be required to make available any record which, if disclosed, would jeopardize the capacity of the State, the Office for Technology, or any other State agency to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures, or if access to such record could otherwise be denied under section 87 of the Public Officers Law.

It is appropriate that the State have the responsibility for administration and enforcement of the Uniform Code with respect to the facilities that will be part of the Statewide Wireless Network. This will simplify and streamline the permitting process for all Statewide Wireless Network facilities to be constructed throughout the State. However, it may not be clear that the Office for Technology is a "department, bureau, commission, board or authority," as that phrase is currently used in 19 NYCRR section 1201.2(d), and it may not be clear that all facilities in the Statewide Wireless Network will be in the "custody" of the Office for Technology, as that term is currently used in 19 NYCRR section 1201.2(d). Since Statewide Wireless Network facilities will be constructed in numerous communities throughout the State, it is appropriate to provide those communities, as well as the Office for Technology, with a clear indication of the responsibility for administration and enforcement of the Uniform Code with respect to the Statewide Wireless Network facilities.

Adoption of this rule on an emergency basis preserves the public safety and general welfare by providing an immediately effective clarification of the responsibility for administration and enforcement of the Uniform Code with respect to the Statewide Wireless Network facilities. This will permit the immediate commencement of the review and permitting activities incidental to construction of the Statewide Wireless Network.

4. COSTS.

a. Cost to regulated parties for the implementation of and continuing compliance with this rule: This rule imposes no obligation on any private party.

b. Costs to the Department of State: The Department of State anticipates that it will incur no costs as a result of this rule.

c. Costs to other State agencies: This rule will clarify that the State will be responsible for administration and enforcement of the Uniform Code with respect to Statewide Wireless Network facilities. The Department of State anticipates that the Office of General Services ("OGS") will be the construction-permitting agency for Statewide Wireless Network facilities. The Department of State views this aspect of this rule more as a clarification of existing rules and regulations, rather than the creation of a new obligation that OGS would not otherwise have.

The Office for Technology will be required to comply with the Uniform Code in constructing any Statewide Wireless Network facility that is subject to the Uniform Code. However, this obligation exists under existing law and regulation, and not by reason of this rule.

d. Cost to local governments:

This rule will require local governments having the responsibility for administration and enforcement of the Uniform Code with respect to buildings and structures to consult and cooperate with the State, and to make their records available to the State, when a Statewide Wireless Network facility is constructed or installed in or on any such building or structure. However, the Department of State anticipates that existing staff in the code enforcement offices of the affected local governments will be able to provide the required consultation and cooperation, and the Department of State anticipates that this part of this rule will impose little or no new costs on local governments.

5. PAPERWORK.

This rule will clarify that the State, rather than local governments, will be responsible for administration and enforcement of the Uniform Code with respect to Statewide Wireless Network facilities. The Department of State anticipates that the amount of paperwork that will be required if the State is responsible for administration and enforcement of the Uniform Code will be no greater than the paperwork that would be required if local governments were given that responsibility.

6. LOCAL GOVERNMENT MANDATES.

As stated in subparagraph 6(d) (Costs to local governments) of this Regulatory Impact Statement, this rule will require local governments having the responsibility for administration and enforcement of the Uni-

form Code with respect to buildings and structures to consult and cooperate with the State, and to make their records available to the State, when a Statewide Wireless Network facility is constructed or installed in or on any such building or structure. However, the Department of State anticipates that existing staff in the code enforcement offices of the affected local governments will be able to provide the required consultation and cooperation.

7. DUPLICATION.

The Department of State is not aware of any relevant rule or other legal requirement of the State or Federal government which duplicates, overlaps or conflicts with this rule.

8. ALTERNATIVES.

Making local governments, and not the State, responsible for administration and enforcement of the Uniform Code with respect to Statewide Wireless Network facilities was considered but rejected for the reasons set forth in the Regulatory Impact Statement. The Department of State has not considered any other alternative to this rule.

9. FEDERAL STANDARDS.

The Department of State is not aware of any instance in which this rule exceeds any minimum standards of the federal government for the same or similar subject areas.

10. COMPLIANCE SCHEDULE.

This rule can be complied with immediately. The Office of General Services has the ability to act as the construction-permitting agency, and should be able to begin the required permitting process with little or no delay.

Regulatory Flexibility Analysis

1. EFFECT OF RULE.

This rule does not apply directly to any business. However, to the extent that any business becomes involved in the Uniform Code permitting process incidental to construction of any Statewide Wireless Network facility, such business will be indirectly affected by this rule, since this rule will provide that the State will be responsible for such permitting.

This rule will affect local governments in municipalities in which Statewide Wireless Network facilities are to be constructed, since this rule will clarify that the State, and not the local government, will be responsible for administration and enforcement of the Uniform Code with respect to such Statewide Wireless Network facilities.

This rule will provide that when a local government is responsible for administration and enforcement of the Uniform Code with respect to a particular building or structure and a Statewide Wireless Network facility is constructed or installed in or on such building or structure: (1) the local government will retain the responsibility for administration and enforcement of the Uniform Code with respect to the building or structure, (2) the State will have responsibility for administration and enforcement of the Uniform Code with respect to the Statewide Wireless Network facility constructed on installed in or on such building or structure, and (3) the local government and the State will be required to consult and cooperate with each other in connection with the performance of their respective administrative and enforcement obligations, and to make records available to each other upon request. (The rule would provide that the State would not be required to make available any record which, if disclosed, would jeopardize the capacity of the State, the Office for Technology, or any other State agency to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures, or if access to such record could otherwise be denied under section 87 of the Public Officers Law.)

2. COMPLIANCE REQUIREMENTS.

Any business involved in the construction of any Statewide Wireless Network facility will be required to comply with the Uniform Code (to the extent that the Uniform Code applies to such facility). However, that requirement exists under current law, not by reason of this rule. This rule will clarify that the State will be responsible for administration and enforcement of the Uniform Code with respect to such facility; this rule will not impose any new compliance requirement on any business.

This rule will clarify that the State, and not local governments, will be responsible for administration and enforcement of the Uniform Code with respect to Statewide Wireless Network facilities. This part of the rule imposes no compliance requirements on local governments.

This rule will provide that a local government that is responsible for administration and enforcement of the Uniform Code with respect to a building or structure shall retain such responsibility even if a Statewide Wireless Network facility is constructed or installed in or on such building or structure. This part of the rule imposes no new compliance requirements on local governments.

This rule will require a local government to consult and cooperate with the State, and to make its records available to the State, when the local government is responsible for administration and enforcement of the Uniform Code with respect to a particular building or structure and a Statewide Wireless Network facility is constructed or installed in or on such building or structure.

3. PROFESSIONAL SERVICES.

This rule imposes no new compliance requirements on businesses. Therefore this rule creates no new reporting, recordkeeping, or other requirements for business which would require professional services.

A local government will be required to consult and cooperate with the State, and to make its records available to the State, when (1) the local government is responsible for administration and enforcement of the Uniform Code with respect to a particular building or structure and (2) a Statewide Wireless Network facility is constructed or installed in or on such building or structure. The Department of State anticipates that existing staff in the code enforcement office of the local government will be able to provide the necessary consultation and cooperation. Therefore, except for such professional services as may be provided by existing staff, the Department of State anticipates that local governments will not require professional services to comply with this rule.

4. COMPLIANCE COSTS.

This rule imposes no new compliance requirements on businesses. Therefore this rule creates no new compliance costs for businesses.

This rule requires a local government to consult and cooperate with the State, and to make records available to the State, when (1) the local government is responsible for administration and enforcement of the Uniform Code with respect to a particular building or structure and (2) a Statewide Wireless Network facility is constructed or installed in or on such building or structure. The Department of State anticipates that existing staff in the code enforcement office of the local government will be able to provide the necessary consultation and cooperation. Therefore, the Department of State anticipates that local governments will incur little or no additional costs in complying with this consultation and cooperation requirement.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY.

The Department of State anticipates that the Office of General Services will serve as the construction-permitting agency in connection with the State's obligation to administer and enforce the Uniform Code with respect to Statewide Wireless Network facilities. The Department of State believes that the permitting process incidental to the construction of a Statewide Wireless Network will be facilitated and simplified if that process is centralized in a single State agency. Therefore, to the extent that any small business becomes involved in the permitting process, this rule should enhance the economic and technological feasibility of compliance with the permitting requirements by such business.

The Department of State anticipates that existing staff in the code enforcement offices of local governments will be able to provide the consultation and cooperation that this rule will require when (1) the local government is responsible for administration and enforcement of the Uniform Code with respect to a particular building or structure and (2) a Statewide Wireless Network facility is constructed or installed in or on such building or structure. The Department of State anticipates that it will be economically and technologically feasible for local governments to comply with this rule.

6. MINIMIZING ADVERSE IMPACT.

This rule imposes no new obligation on businesses of any size. Accordingly, this rule makes no special provisions for small businesses.

7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION.

The Department of State has notified local governments and other interested parties throughout the State of the provisions of this rule by publishing a notice of the previous emergency adoption of this rule in Building New York, a monthly electronic news bulletin covering topics related to the Uniform Code and the construction industry which is prepared by the Department of State and currently distributed to approximately 3,700 subscribers representing all aspects of the construction industry.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBERS OF RURAL AREAS.

This rule clarifies that the State will be responsible for the administration and enforcement of the New York State Uniform Fire Prevention and Building Code (the "Uniform Code") with respect to facilities to be included in the Statewide Wireless Network to be established by the Office

for Technology. This rule will apply uniformly throughout the State, including all rural areas of the State.

2. REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS.

This rule creates no new reporting, recordkeeping, or compliance requirement for any business. In particular, this rule creates no new reporting, recordkeeping, or compliance requirement for businesses located in rural areas.

Local governments that are responsible for administration and enforcement of the Uniform Code with respect to a particular building or structure will be required to consult and cooperate with the State, and to make its records available to the State, when a Statewide Wireless Network facility is constructed in or on such building or structure. This requirement will apply to all local governments, including local governments located in rural areas.

3. COSTS.

The Department of State anticipates that this rule will impose no new cost on any business. In particular, the Department of State anticipates that this rule will impose no new cost on businesses located in rural areas.

The Department of State anticipates that local governments, including local governments located in rural areas, will be able to use existing staff in their code enforcement offices to fulfill the consulting and cooperation requirements described in Section 2 (Reporting, recordkeeping and other compliance requirements) of this Rural Area Flexibility Analysis. Therefore, the Department of State anticipates that local governments, including local governments located in rural areas, will incur little or no additional costs in complying with this rule.

4. MINIMIZING ADVERSE IMPACT.

For the reasons discussed in Section 3 (Costs) of this Rural Area Flexibility Analysis, the Department of State anticipates that this rule will have little or no adverse impact on any business or local government. In particular, the Department of State anticipates that this rule will have little or no adverse impact on businesses or local governments located in rural areas. Accordingly, this rule makes no special provisions for regulated parties located in rural areas.

5. RURAL AREA PARTICIPATION.

The Department of State has notified local governments and other interested parties throughout the State of the provisions of this rule by publishing a notice of the previous emergency adoption of this rule in Building New York, a monthly electronic news bulletin covering topics related to the Uniform Code and the construction industry which is prepared by the Department of State and currently distributed to approximately 3,700 subscribers representing all aspects of the construction industry.

Job Impact Statement

The Department of State has determined that this rule will not have a substantial adverse impact on jobs or employment opportunities.

This rule amends the existing regulation that provides that the State shall be accountable for administration and enforcement of the New York State Uniform Fire Prevention and Building Code (the "Uniform Code") with respect to buildings, premises and equipment in the custody of, or activities related thereto undertaken by, a State department, bureau, commission, board or authority, and adds definitions of new terms. The purpose of this rule is to clarify that the State shall have responsibility for administration and enforcement of the Uniform Code with respect to facilities to be included in the statewide wireless network to be established by the Office for Technology.

This rule will simply clarify the responsibility for administration and enforcement of the Uniform Code with respect to the statewide wireless network. It is anticipated that rule will have no substantial adverse impact on jobs or employment opportunities related to the construction of the statewide wireless network. Rather, by providing that all review and permitting responsibilities will be vested in a single permitting agency, this rule should streamline the construction process, which may have a beneficial impact on jobs and employment opportunities related to the construction of the statewide wireless network.