

# RULE MAKING ACTIVITIES

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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.

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## Department of Correctional Services

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

#### Chateaugay Correctional Facility

**I.D. No.** COR-20-07-00001-P

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

**Proposed action:** Repeal of section 100.126(b) and addition of section 100.131 to Title 7 NYCRR.

**Statutory authority:** Correction Law, section 70

**Subject:** Chateaugay Correctional Facility.

**Purpose:** To amend the designation and classification for Chateaugay Correctional Facility.

**Text of proposed rule:** Subdivision (b) of section 100.126, in Title 7 NYCRR is hereby repealed and reserved.

A new section 100.131 is added to 7 NYCRR as follows:

§ 100.131 *Chateaugay Correctional Facility*

(a) *There shall be in the department an institution to be known as Chateaugay Correctional Facility, which shall be located in the town of Chateaugay in Franklin County, New York, and which shall consist of the property under the jurisdiction of the department.*

(b) *Chateaugay Correctional Facility shall be a correctional facility for males 16 years of age and older.*

(c) *Chateaugay Correctional Facility shall be classified as a medium security correctional facility to be used as a general confinement facility.*

**Text of proposed rule and any required statements and analyses may be obtained from:** Anthony J. Annucci, Department of Correctional Services, 1220 Washington Ave., Albany, NY 12226-2050, (518) 457-4951, 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 70 of Correction Law mandates that each correctional facility must be designated in the rules and regulations of the department and assigns the commissioner the duty to classify each facility with respect to the type of security maintained and the function as specified in Correction Law section 70(6).

##### Legislative Objective

By vesting the commissioner with this rule making authority, the legislature intended the commissioner to designate and classify correctional facilities in the best interest of the Public Safety and welfare as well as for the rehabilitation of the inmate population.

##### Needs and Benefits

Chateaugay Correctional Facility no longer functions as an alcohol substance abuse treatment correctional annex, therefore the designation and classification is being amended to properly reflect the new purpose and for appropriate listing in Part 100 of Title 7 NYCRR.

##### Costs

a. To agency, the state and local governments: None.

b. Costs to private regulated parties: None. The proposed amendment does apply to private regulated parties.

c. This cost analysis is based upon the fact that this proposal merely amends the designation and classification of Chateaugay Correctional Facility as required by Correction Law.

##### Local Government Mandates

There are no new mandates imposed upon local governments by these proposals. The proposed amendments do not apply to local governments. Chateaugay Correctional Facility is State funded and operated.

##### Paperwork

There are no new reports, forms or paperwork that would be required as a result of amending these rules.

##### Duplication

These proposed amendments do not duplicate any existing State or Federal requirement.

##### Alternatives

No alternatives are apparent and none have been considered. Due to the change in the facility purpose, the classification must also be changed pursuant to Correction Law section 70. The addition of section 100.131 is needed in order to properly designate Chateaugay Correctional Facility in Part 100 of Title 7 NYCRR.

##### Federal Standards

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

##### Compliance Schedule

The Department of Correctional Services will achieve compliance with the proposed rules 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, recordkeeping

or other compliance requirements on small businesses or local governments. This proposal merely amends the designation and classification of Chateaugay Correctional Facility.

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

A rural area flexibility analysis is not required for this proposal since it will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on rural areas. This proposal merely amends the designation and classification of Chateaugay Correctional Facility.

#### **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 amends the designation and classification of Chateaugay Correctional Facility.

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## Department of Economic Development

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### EMERGENCY RULE MAKING

#### **Empire State Commercial Production Tax Credit Program**

**I.D. No.** EDV-20-07-00002-E

**Filing No.** 449

**Filing date:** April 27, 2007

**Effective date:** April 27, 2007

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

**Action taken:** Addition of Part 180 to Title 5 NYCRR.

**Statutory authority:** L. 2006, chs. 62 and 440

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

**Specific reasons underlying the finding of necessity:** As a matter of public policy, the Legislature determined that a tax credit to eligible qualified commercial production companies would provide incentive for commercials to be made in New York.

**Subject:** Empire State Commercial Production Tax Credit Program.

**Purpose:** To promulgate regulations for the program to establish procedures for the allocation of commercial tax credits.

**Substance of emergency rule:** The Empire State commercial production tax credit program provides a three component tax credit program for eligible qualified commercial production companies. First, under the growth credit program, an eligible company may receive a 20% credit on qualified production costs provided the applicant has met the threshold test and shown that the total qualified production costs are greater in the calendar year for which they are applying than in the average of the three previous years. Assuming this test is met, the 20% credit is applied to the amount of total qualified production costs in the calendar year the applicant is applying that are greater than the total costs of the preceding year. There is a \$300,000 tax credit cap per applicant annually.

The second component program is referred to as the downstate credit program. This credit is 5% of the qualified production costs paid or incurred in the production of a qualified commercial within the metropolitan commuter transportation district. In order to be eligible for such credit, a qualified commercial production company must have qualified production costs in excess of \$500,000 in the metropolitan commuter transportation district during the calendar year and the credit shall be applied to only those costs exceeding such amount.

The third component program is referred to as the upstate credit program. This credit is 5% of the qualified productions costs paid or incurred in the production of a qualified commercial outside of the metropolitan commuter transportation district. In order to be eligible for such credit, a qualified commercial production company must have qualified production costs in excess of \$200,000 outside of the metropolitan commuter transportation district during the calendar year and the credit shall be applied to only those costs exceeding such amount.

This rule implements Chapter 62 of the laws of 2006. Part 180 of Title 5 NYCRR is hereby created and is summarized as follows:

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

Second, eligibility in the program is established through the definition of applicant. In order to be eligible to apply for the program, a business must be a qualified commercial production company or sole proprietor thereof that submits an application to the Office after it has completed a calendar year's worth of qualified commercials.

Third, an application process is created. An applicant must complete an application between the first day of business in January and April 1 of the year succeeding the year in which the commercial work was performed. The Office then reviews the application based on criteria set out in the proposed rule, including the completeness of the application and whether or not it meets the statutory requirements for qualification, including whether at least 75% of its production costs (excluding post-production) paid or incurred directly and predominantly in the actual filming or recording of each qualified commercial are qualified production costs, and whether its qualified production costs correspond to one or more of the three component tax credit programs.

Fourth, if the application is approved, the Office shall issue a certificate of tax credit to the applicant. If the application is disapproved, the applicant receives notice of its rejection from the program and may reapply at a later date.

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

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

**This notice is intended** to serve only as a notice of emergency adoption. This agency does not intend to adopt the provisions of this emergency rule as a permanent rule. The rule will expire July 25, 2007.

**Text of emergency rule and any required statements and analyses may be obtained from:** Thomas Regan, Department of Economic Development, 30 South Pearl St., Albany, NY 12245, (518) 292-5123, e-mail: tregan@empire.state.ny.us

#### **Regulatory Impact Statement**

##### STATUTORY AUTHORITY:

Section (8)(e) of Part V of Chapter 62 of the laws of 2006 which creates a new section 28 of the tax law as well as amends sections 210, 606, and 1310 thereof as well as Chapter 440 of the laws of 2006 which amends sections 28, 1201-a and 1310 require the Commissioner of Economic Development to promulgate rules and regulations by October 31, 2006 to establish procedures for the allocation of the Empire State commercial production tax credit, including provisions describing the application process, the due dates for such applications, the standards used to evaluate the applications, and the documentation provided to taxpayers to substantiate to the State Department of Taxation and Finance the amount of the tax credit for the program itself. Such legislation provides that, notwithstanding any other provisions to the contrary in the State Administrative Procedure Act, the rules and regulations may be adopted on an emergency basis.

##### LEGISLATIVE OBJECTIVES:

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

##### NEEDS AND BENEFITS:

The proposed rule is required to be promulgated by October 31, 2006 (see section 8(e) of Part V of Chapter 62 of the laws of 2006). It is necessary to administer properly the tax credit program. The statute itself does not set out the specifics of the program; rather, it deals primarily with its creation and calculation of the actual tax credit. There are several administrative benefits that would be derived from this proposed rule

making. First, the proposed rule establishes a clear and precise application process, complete with due process as there is an opportunity for applicants to appeal from denials of applications or a disagreement regarding the actual amount of the tax credit. Second, the proposed emergency rule describes in detail the standards to be used to evaluate applications created under this program. Third, it describes the documentation that will be provided to taxpayers to substantiate to the State Tax and Finance Department the amount of the tax credits allocation. Finally, it clarifies some existing definitions and creates several new definitions in order to help facilitate an effective and efficient administration of the program.

**COSTS:**

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

II. Costs to the regulating agency for the implementation and continued administration of the rule: There could be additional costs to the Department of Economic Development associated with the proposed rule making as the Office will need two additional employees to help with the program's newly created administrative process. Such costs are estimated to be \$120,000 in annual salary for both employees.

III. Costs to the State government: The program shall not allocate more than \$7 million in any calendar year. The program sunsets on December 31, 2011 so the overall cost to the State would not exceed \$35 million.

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

**LOCAL GOVERNMENT MANDATES:**

None.

**PAPERWORK:**

The proposed rule creates an application process for eligible applicants, including the creation of an application, certain tax certificates and forms relating to commercial expenditures.

**DUPLICATION:**

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

**ALTERNATIVES:**

No alternatives were considered in regard to creating a new regulation in response to the statutory requirement. The Department of Economic Development, through its Governor's Office for Motion Picture and Television Development, did an extraordinary amount of outreach to various interested parties before submitting this proposed rule. For example, the Department met with seven commercial industry producers to seek industry input. In addition, the Department met with both the CEO and the CFO of the Association of Independent Commercial Producers to solicit their comments. Furthermore, the Department was in close contact with representatives from the State Tax and Finance Department and the Mayor's Office of Film, Theatre and Broadcasting to coordinate the details of the proposed rule.

**FEDERAL STANDARDS:**

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

**COMPLIANCE SCHEDULE:**

The effected State agencies (Economic Development) and the business applicants will be able to achieve compliance with the proposed regulation as soon as it is implemented. In terms of compliance schedule, the statute (Chapter 62 of the laws of 2006) was signed into law on June 6, 2006. The statute gave the Department until October 31, 2006 to promulgate regulations to implement the program. The program applies to taxable years beginning on or after January 1, 2007 and expires on December 31, 2011.

**Regulatory Flexibility Analysis**

Participation in the Empire State commercial production credit program is entirely at the discretion of qualified commercial production companies. Neither Chapter 62 of the laws of 2006 nor the proposed regulations impose any obligation on any local government or business entity to participate in the program. The proposed regulation does not impose any adverse economic impact or compliance requirements on small businesses or local governments. In fact, the proposed regulation may have a positive economic impact on small businesses due to the possibility that these businesses may enjoy a commercial production tax credit if they qualify for the program's tax credit.

Because it is evident from the nature of the proposed rule that it will have either no impact or a positive impact on small businesses and local government, no further affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for

small business and local government is not required and one has not been prepared.

**Rural Area Flexibility Analysis**

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

**Job Impact Statement**

The proposed regulation creates the application process for the Empire State commercial production credit program. As a tax credit program, it is designed to impact positively the commercial industry doing business in New York State and have a positive impact on job creation. The proposed regulation will not have a substantial adverse impact on jobs and employment opportunities. Because it is evident from the nature of the proposed rulemaking that it will have either no impact, or a positive impact, on job and employment opportunities, no further affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

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## Education Department

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

**Contracts for Excellence**

**I.D. No.** EDU-20-07-00005-EP

**Filing No.** 452

**Filing date:** April 27, 2007

**Effective date:** April 27, 2007

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

**Action taken:** Addition of section 100.13 and amendment of section 170.12 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 101 (not subdivided), 207 (not subdivided), 215 (not subdivided), 305(1) and (2), 211-d(1-9); and L. 2007, ch. 57

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

**Specific reasons underlying the finding of necessity:** The proposed amendment is necessary to implement Education Law section 211-d, as added by Chapter 57 of the Laws of 2007, to establish allowable programs and activities, criteria for public reporting by school districts of their total foundation aid expenditures and other requirements for purposes of preparation of contracts for excellence by certain specified school districts.

Education Law section 211-d requires each school district: (1) that has at least one school currently identified as (i) requiring academic progress or (ii) in need of improvement or (iii) in corrective action or (iv) in restructuring; and (2) that receives an increase in either (i) total foundation aid compared to the base year in an amount that equals or exceeds either \$15 million dollars or 10 percent of the amount received in the base year, whichever is less, or (ii) a supplemental educational improvement plan grant, to prepare a contract for excellence, which shall describe how the total foundation aid and supplemental educational improvement plan grants shall be used to support new programs and new activities or expand the use of programs and activities demonstrated to improve student achievement. The statute requires the Commissioner to establish by regulation the allowable programs and activities for such purposes. The statute also requires the Commissioner to prescribe a format by which each affected school district shall publicly report its expenditures of total foundation aid.

State Administrative Procedure Act (SAPA) section 202 generally provides that a rule may not be adopted until at least 45 days after publication of a Notice of Proposed Rule Making in the State Register. Because the Board of Regents meets at fixed intervals, the earliest the proposed rule could be presented for adoption by the Board of Regents, after expiration of the 45-day public comment period prescribed by SAPA, is the July 25-27, 2007 Regents meeting. However, affected school districts need to know now what are the allowable programs and activities and other requirements necessary to implement Education Law section 211-d, so that they may timely prepare their contracts for the 2007-2008 school year pursuant to statutory requirements.

Emergency action to adopt the proposed rule is necessary for the preservation of the general welfare in order to immediately establish allowable programs and activities, criteria for public reporting by school districts of their total foundation aid expenditures, and other requirements for contracts for excellence under Education Law section 211-d, so that affected school districts may timely prepare such contracts for the 2007-2008 school year pursuant to statutory requirements.

It is anticipated that the proposed rule will be presented for adoption as a permanent rule at the July 25-27, 2007 meeting of the Board of Regents, which is the first scheduled Regents meeting after expiration of the 45-day public comment period prescribed by the State Administrative Procedure Act.

**Subject:** Contracts for excellence.

**Purpose:** To implement Education Law section 211-d, as added by chapter 57 of the Laws of 2007, by establishing allowable programs and activities, criteria for public reporting by school districts of their total foundation aid expenditures, and other requirements for purposes of preparation of contracts for excellence by certain specified school districts.

**Substance of emergency/proposed rule (Full text is posted at the following State website: [www.emsa.nysed.gov](http://www.emsa.nysed.gov)):** The State Education Department proposes to add a new section 100.13 and amend sections 170.12 of the Regulations of the Commissioner of Education, effective April 27, 2007. The proposed amendment is necessary to implement Education Law section 211-d, as added by Chapter 57 of the Laws of 2007, to establish allowable programs and activities, criteria for public reporting by school districts of their total foundation aid expenditures and other requirements for purposes of preparation of contracts for excellence by certain specified school districts. The following is a summary of the provisions of the proposed rule.

Section 100.13(a) provides definitions of: (1) total foundation aid; (2) supplemental educational improvement plan grant; (3) contract amount; (4) base year; (5) experimental programs; (6) highly qualified teacher; and (7) response to intervention program.

Section 100.13(b) establishes applicability provisions, consistent with Chapter 57 of the Laws of 2007, for purposes of determining whether a school district is required to prepare a contract for excellence. A contract for excellence shall be prepared by each school district: (1) that has at least one school currently identified pursuant to section 100.2(p) of the Commissioner's Regulations as: (a) requiring academic progress; or (b) in need of improvement; or (c) in corrective action; or (d) in restructuring; and (2) that receives: (a) an increase in total foundation aid compared to the base year in an amount that equals or exceeds either fifteen million dollars or ten percent of the amount received in the base year, whichever is less; or (b) a supplemental educational improvement plan grant. For the 2007-2008 school year, such increase in total foundation aid shall be the amount of the difference between total foundation aid received for the current year and the total foundation aid base as defined in Education Law section 3602(1)(j). In the city school district of the city of New York, a contract for excellence shall be prepared for the city school district and each community district that meets the above criteria.

Section 100.13(c) establishes the requirements for the preparation and submission of contracts of excellence. Each contract for excellence shall be in a format, and submitted pursuant to a timeline, as prescribed by the commissioner and shall:

(1) describe how the contract amount shall be used to support new programs and new activities or expand the use of programs and activities demonstrated to improve student achievement, from the allowable programs and activities and/or authorized experimental programs pursuant to section 100.13(d);

(2) specify the new or expanded programs, from the allowable programs and activities and/or authorized experimental programs pursuant to section 100.13(d), for which each sub-allocation of the contract amount shall be used and affirm that such programs shall predominately benefit students with the greatest educational needs including, but not limited to:

(a) limited English proficient students and students who are English language learners; (b) students in poverty; and (c) students with disabilities;

(3) state, for all funding sources, whether federal, state or local, the instructional expenditures per pupil, the special education expenditures per pupil, and the total expenditures per pupil, projected for the current year and estimated for the base year; provided that no later than February 1 of the current school year, the school district shall submit a revised contract stating such expenditures actually incurred in the base year;

(4) include any programmatic data projected for the current year and estimated for the base year, as the commissioner may require; and

(5) in the city school district of the city of New York, include a plan that meets the requirements of section 100.13(d)(2)(i)(a), to reduce average class sizes within five years for the following grade ranges: (a) prekindergarten through grade three; (b) grades four through eight; and (c) grades nine through twelve. Such plan shall be aligned with the capital plan of the city school district of the city of New York and include continuous class size reduction for low performing and overcrowded schools beginning in the 2007-2008 school year and thereafter and also include the methods to be used to achieve proposed class sizes, such as the creation or construction of more classrooms and school buildings, the placement of more than one teacher in a classroom or methods to otherwise reduce the student to teacher ratio. Beginning in the 2008-2009 school year and thereafter, such plan shall provide for reductions in class size that, by the end of the 2011-2012 school year, will not exceed the prekindergarten through grade 12 class size targets as prescribed by the commissioner after his/her consideration of the recommendation of an expert panel appointed by the commissioner to conduct a review of existing class size research.

The commissioner shall approve each contract meeting the provisions of section 100.13(c) and shall certify, for each contract, that the expenditure of additional aid or grant amounts is in accordance with Education Law section 211-d(2).

Section 100.13(d) establishes the allowable programs and activities, including experimental programs. Section 100.13(d)(1) establishes general requirements for allowable programs and activities, including that such programs and activities: (1) predominately benefit those students in schools identified as requiring academic progress, in need of improvement, in corrective action, or restructuring; (2) predominately benefit students with the greatest educational needs including, but not limited to: students with limited English proficiency and students who are English language learners; students in poverty; and students with disabilities; (3) be consistent with federal and State statutes and regulations governing the education of such students; (4) be developed in reference to practices supported by research or other comparable evidence in order to facilitate student attainment of State learning standards; (5) where applicable, be accompanied by high quality, sustained professional development focused on content pedagogy, curriculum development, and/or instructional design in order to ensure successful implementation of each program and activity; (6) ensure that expenditures of the contract amount shall be used to supplement and not supplant funds expended by the district in the base year for such purposes; (7) ensure that all additional instruction is provided by appropriately certified teachers or highly qualified teachers where required by section 120.6 of this Title, emphasizing skills and knowledge needed to facilitate student attainment of State learning standards; and (8) be coordinated with all other allowable programs and activities included in the district's contract for excellence as part of the district's comprehensive educational plan.

Section 100.13(d)(2) establishes criteria for specific allowable programs and activities, which shall include: (1) class size reduction for (a) the city school district of the city of New York and (b) all other school districts; (2) student time on task; (3) teacher and principal quality initiatives; (4) middle school and high school restructuring; and (5) full-day kindergarten or prekindergarten programs.

Section 100.13(d)(2)(i) describes the requirements for class size reduction, including special provisions for the New York City school district. The New York City school district must allocate some of its total contract amount to class size reduction according to a plan, included in their contract and approved by the Commissioner pursuant to section 100.13(c), to reduce the average class size for the following grade ranges: prekindergarten to grade three, grades four through eight, and grades nine through twelve, commencing in the 2007-2008 school year and ending in the 2011-2012 school year, to target levels recommended by an expert panel appointed by the Commissioner. School districts outside of the NYC school district shall establish class size reduction goals in the 2007-2008 school year and demonstrate measurable progress towards meeting such goals; and beginning with the 2008-2009 school year, shall demonstrate measur-

ble progress towards meeting the target levels recommended by an expert panel appointed by the Commissioner. The proposed rule also mandates that, in NYC school district, priority be given to prekindergarten through grade 12 students in schools requiring academic progress, correction, improvement or in restructuring and to overcrowded schools. Furthermore, it requires that classrooms created shall provide adequate and appropriate physical space to students and staff, among others. Class size reduction may be accomplished through the creation of additional classrooms and buildings, through assignment of more than one teacher to a classroom or, in the NYC school district, by other methods to reduce the student to teacher ratio, as approved by the Commissioner.

Section 100.13(d)(2)(ii) provides that allowable programs and activities related to student time on task may be accomplished by: (1) lengthened school days, (2) lengthened school years and (3) dedicated instructional time, including individual intervention, tutoring and student support services.

Section 100.13(d)(2)(iii) prescribes requirements for teacher and principal quality initiatives, including: (1) recruitment and retention of teachers, (2) mentoring for teachers and principals in their first or second year of a new assignment, (3) incentive programs for teacher placement, (4) instructional coaches, and (5) school leadership coaches. Districts shall ensure that a highly qualified teacher is in every classroom and an appropriately certified principal is assigned to every school.

Section 100.13(d)(2)(iv) provides that allowable programs and activities for middle and high school restructuring include: (1) instructional program changes to improve student achievement and attainment of the State learning standards and (2) structural organization changes. The section further requires that those districts choosing to make organization changes must also make instructional program changes.

Section 100.13(d)(2)(v) provides that allowable programs and activities for full-day kindergarten or prekindergarten programs include: (1) a minimum full school day program, (2) a minimum full school day program with additional hours for children and families, (3) a minimum full school day program with additional hours in collaboration with community based agencies (prekindergarten only), and (4) classroom integration programs for students with disabilities (specifically for full-day prekindergarten).

Section 100.13(d)(3) lists the following requirements for experimental programs, not included in the allowable programs and activities described above: (1) a maximum percentage of the contract amount that may be used for experimental programs, (2) a plan must be submitted to the Commissioner, (3) the program must be based on an established theoretical base supported by research or other comparable evidence, (4) the implementation plan for an experimental program must be accompanied by a program evaluation plan based on empirical evidence to assess the impact on student achievement, and (5) the experimental program shall be in partnership with an institution of higher education or other organization with extensive research experience and capacity.

Section 100.13(d)(3)(ii) states provides a maximum amount of up to \$30 million dollars or twenty-five percent of the contract amount, whichever is less, that a district may use in the 2007-2008 school year to maintain existing programs and activities listed in Education Law section 211-d(3)(a).

Section 100.13(e) establishes criteria for the development of a school district's contract for excellence pursuant to a public process, in consultation with parents or persons in parental relation, teachers, administrators, and any distinguished educator appointed pursuant to Education Law section 211-c, which shall include at least one public hearing. Special provisions for the NYC school district's development of the contracts are included.

Section 100.13(f) establishes requirements to assure procedures are in place by which parents or persons in parental relation may bring complaints concerning implementation of a district's contract for excellence, including special provisions for the NYC school district.

Section 100.13(g) establishes requirements for the public reporting by school districts of their school-based expenditures of total foundation aid.

Section 170.12 (e)(1), relating to requirements of an annual audit of school district records, is amended to provide that the annual audit also include a certification by the accountant or, where applicable, the NYC comptroller, in a form prescribed by the Commissioner, that the increases in total foundation aid and supplemental educational improvement plan grants have been used to supplement, and not supplant funds allocated by the district in the base year for such purposes.

**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 July 25, 2007.

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

**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 as its head, and authorizes the Board of 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 all public schools and the educational work of the State.

Education Law section 207 empowers 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.

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

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

Education Law section 211-d, as added by Chapter 57 of the Laws of 2007, requires each school district: (1) that has at least one school currently identified as (i) requiring academic progress or (ii) in need of improvement or (iii) in corrective action or (iv) in restructuring; and (2) that receives an increase in either (i) total foundation aid compared to the base year in an amount that equals or exceeds either \$15 million dollars or 10 percent of the amount received in the base year, whichever is less, or (ii) a supplemental educational improvement plan grant, to prepare a contract for excellence, which shall describe how the total foundation aid and supplemental educational improvement plan grants shall be used to support new programs and new activities or expand the use of programs and activities demonstrated to improve student achievement. The statute requires the Commissioner to establish by regulation the allowable programs and activities for such purposes and to prescribe a format by which each affected school district shall publicly report its expenditures of total foundation aid.

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

The proposed rule is consistent with the authority conferred by the above statutes and it is necessary to implement Chapter 57 of the Laws of 2007 by establishing criteria for allowable programs and activities, public reporting by school districts of their total foundation aid expenditures, and other requirements regarding contracts for excellence under Education Law section 211-d.

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

The proposed rule is needed to implement the statutory requirements. The rule establishes systems and processes that provide for transparency, simplicity and accountability in the use of additional aid to districts with the greatest concentrations of students in need who are at the same time, experiencing the greatest obstacles to improving their students' achievement. Moreover, it ensures that districts and schools use new funding on one or more of the following six programs and activities: class size reduction, increased time on task, middle and high school restructuring, full day prekindergarten and kindergarten, teacher and principal quality initiatives and experimental programs.

Research has substantiated that there are strong empirical rationales for the proposed actions enacted under the rule with regard to allowable programs and activities and overall educational achievement. For example, the STAR project was a large scale, four-year experimental study of the effect of reduced class sizes on student achievement in the state of Tennessee. In the formal program evaluation after the intervention, "Carry-over Effects of Small Classes", the research team of J.D Finn, B.D. Fulton, J.B. Zaharias, and B.A. Nye (the Peabody Journal, Vol. 67, No. 1, Fall

1989/1992) found that average pupil performance in the primary years can be increased significantly by reduced class size.

With regard to increased time on task, Aronson, Zimmerman and Carlos in their paper, "Improving Student Achievement by Extending School: Is It Just a Matter of Time?" (Office of Educational Research and Improvement, Washington, DC, 1998) found that time indeed does matter. Their paper reviews the research literature of at least three decades, on the relationship between time and learning. Time, they found, however, is no panacea: an increase in additional educational time only manifests itself in achievement gains when more time is used for instruction, particularly that material in which students are engaged.

The research literature examining the relationship between teacher quality and concomitant student achievement is very substantial. Rivers and Sanders' paper "Teacher Quality and Equity in Educational Opportunity: Findings and Policy Implications" (reprinted in Lance T. Izumi and Williamson Evers' *Teacher Quality*, Hoover Institution Press, 2002) is illustrative. Rivers and Sanders detail the results of their analysis of several years of individual teacher effects on Tennessee pupils. The authors found that differences in teacher ability are substantial. Their study also reveals that successful teachers can elicit significant gains from students of all ethnicities and income levels.

The research of Hayes Mizell and others is illustrative of the empirical rationale for the proposed rule requirement that grade change restructuring must be accompanied by instructional and/or content reforms. In his remarks as keynote speaker (titled "Still Crazy After All These Years: Grade Configuration and the Education of Young Adolescents") in October 2004, at the annual conference of the National School Board Association's Council of Urban Boards of Education, Mizell pointed out that many school systems think that for example, a conversion to a K-8 school will solve all their problems. Accordingly, they make the mistake he argued, of not dealing with the difficult, substantive issues of how to engage students in challenging academic work while also providing them with the personal and academic supports necessary to increase their level of proficiency.

Finally, the proposed rule's rationale for the integration of disabled preschool children in full day prekindergarten and kindergarten allowable programs and activities is based on the research of such authors as Jenkins, Odoms and Speltz. In their paper, titled "Effects of Social Integration on Preschool Children with Handicaps" (*Exceptional Children*, Vol. 55, 1989), they detail the results of a randomly assigned experiment of the inclusion of children with mild and moderate disabilities in classes of non-disabled pupils. What they found was that structuring social interaction between lower and higher performing students can result in benefits to the lower-performing students, particularly in terms of language development.

#### COSTS:

The rule is necessary to implement Chapter 57 of the Laws of 2007 and does not impose any significant, additional costs beyond those inherent in the statute.

##### a. Costs to State government:

None.

##### b. Costs to local governments:

The new requirements will result in additional costs to school districts, as follows:

##### (i) Sustained Professional Development

If it is assumed that there will need to be two extra days per year of sustained professional development for contract for excellence programs, for one to two dozen teachers per district at a cost of \$125 per teacher per day, it is estimated that there might be a total annual cost for all of the districts of \$400,000 per year (for purposes of this calculation, NYC was treated as thirty-four districts – one high school district, one special education district and thirty-two community school districts).

##### (ii) Other Costs

Depending on a district's selection of allowable programs and activities, it is possible that there will be additional costs. Particular activities where the cost imposed could be large include the following: the requirement that additional instruction under any allowable program must be provided by appropriately certified or highly qualified teachers; that allowable programs must be coordinated with school district comprehensive plans; determining if a student responds to scientific, research-base intervention; and analyzing, gathering and compiling the necessary research to support their proposed Contract for Excellence programs and activities. To estimate the total yearly costs associated with these items, it is estimated that each district (55 plus 34 for NYC (see above) for a total of 89 districts) hires two new, appropriately certified teachers at an annual cost of \$53,000 per teacher (salary plus benefits). This yields a total estimated, annual cost of \$9,435,000.

##### c. Costs to private, regulated parties:

There are no anticipated additional costs to private, regulated parties.

##### d. Costs to the Education Department of implementation and continuing compliance:

It is anticipated that there may be additional costs to the State Education Department for implementation and continuing compliance, relating to the convening of an expert panel by the Commissioner to determine class size ranges. The cost for this will vary depending on the "formality" of the process. If a study by an outside consultant or firm were commissioned by the panel, for example, the anticipated expense might be in the tens of thousands of dollars. A less formal process might only have costs for travel and necessary supplies.

#### LOCAL GOVERNMENT MANDATES:

Consistent with Chapter 57 of the Laws of 2007, the proposed rule requires that each district so identified prepare a contract for excellence. Allowable programs must be accompanied by sustained professional development and additional instruction provided under such programs must come from appropriately certified or highly qualified teachers. In addition, any allowable programs and activities shall be coordinated with the district's comprehensive education (improvement) plan. Moreover, depending on the allowable programs and activities chosen, the proposed rule mandates or requires certain actions. For example, those districts choosing to use contract for excellence funding for allowable programs and activities related to middle and high school restructuring must also make instructional changes, in addition to any grade span restructuring they may engage in (such as the conversion of a building housing pupils in grades 7-9 to the creation of a 9th grade academy).

#### PAPERWORK:

The rule is necessary to implement Chapter 57 of the Laws of 2007 and does not impose any significant reporting requirements beyond those inherent in the statute. School districts will submit their contracts to the Commissioner for approval, using an automated, web-based application.

#### DUPLICATION:

The proposed rule will not duplicate, overlap or conflict with any other State or federal statute or regulation, and is necessary to implement Education Law section 211-d, as added by Chapter 57 of the Laws of 2007.

#### ALTERNATIVES:

An alternative proposal which was considered was to create a fiscal and program accountability system similar to the comprehensive education plan (CEP) process for districts, not meeting their Adequate Yearly Progress (AYP) targets pursuant to the federal No Child Left Behind Act. However, a CEP-like process, which would have required large and comprehensive data collection and paperwork requirements, was rejected as too cumbersome, time-intensive and not flexible enough, relative to the simpler, automated, web-based application and monitoring approach enacted by this proposed rule.

#### FEDERAL STANDARDS:

The proposed rule is necessary to implement Chapter 57 of the Laws of 2006, and does not exceed any minimum federal standards. There are no substantive federal standards that are applicable to this proposal insofar as there is no federal equivalent of the contract for excellence.

#### COMPLIANCE SCHEDULE:

The proposed rule is necessary to implement Chapter 57 of the Laws of 2007. The guidelines supplied by the NYS Education Department require school districts to file their 2007-2008 Contracts for Excellence by July 1, 2007. The Education Department will review and approve such contracts on or about August 1, 2007.

#### **Regulatory Flexibility Analysis**

##### Small Businesses:

The proposed amendment is necessary to implement Education Law section 211-d, as added by Chapter 57 of the Laws of 2007, to establish allowable programs and activities, criteria for public reporting by school districts of their total foundation aid expenditures and other requirements for purposes of preparation of contracts for excellence by certain specified school districts. The proposed rule does not impose any adverse economic impact, reporting, record keeping or any other compliance requirements on small businesses. Because it is evident from the nature of the proposed rule that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

##### Local Governments:

#### EFFECT OF RULE:

The effects of the rule will be borne by local governments, specifically, school districts. The proposed rule applies to those (56) fifty-six school

districts in the State that have been determined to meet the statutory requirements in Education Law section 211-d necessitating the submission of a contract for excellence.

**COMPLIANCE REQUIREMENTS:**

The proposed rule mandates these affirmative acts, not imposed by the authorizing statute, on allowable program activities:

- (1) They must be consistent with federal and State statutes and regulations governing the education of students;
- (2) They be developed by reference to practices supported by research or evidence as to what will facilitate student attainment of the State standards;
- (3) They be accompanied by sustained professional development;
- (4) Any additional instruction provided under such programs must come from appropriately certified or highly qualified teachers; and
- (5) They must be coordinated with the district's comprehensive education (improvement) plan.

Furthermore, each of the six allowable programs and activities mandate and require certain affirmative acts in addition to or notwithstanding those requirements imposed by the authorizing statute.

School districts will submit their contracts to the Commissioner for approval, using an automated, web-based application.

**PROFESSIONAL SERVICES:**

Depending on which allowable programs and activities are chosen, districts may be required to hire or procure experts in: teacher professional development, curriculum and/or instructional design, school improvement and other related tasks and professional functions.

**COMPLIANCE COSTS:**

The rule is necessary to implement Chapter 57 of the Laws of 2007 and does not impose any significant, additional costs beyond those inherent in the statute.

The new requirements will result in additional costs to school districts, as follows:

(i) Sustained Professional Development

If it is assumed that there will need to be two extra days per year of sustained professional development for contract of excellence programs, for one to two dozen teachers per district at a cost of \$125 per teacher per day, it is estimated that there might be a total annual cost for all of the districts of \$400,000 per year (for purposes of this calculation, NYC was treated as thirty-four districts – one high school district, one special education district and thirty-two community school districts).

(ii) Other Costs

Depending on a district's selection of allowable programs and activities, it is possible that there will be additional costs. Particular activities where the cost imposed could be large include the following: the requirement that additional instruction under any allowable program must be provided by appropriately certified or highly qualified teachers; that allowable programs must be coordinated with school district comprehensive plans; determining if a student responds to scientific, research-based intervention; and analyzing, gathering and compiling the necessary research to support their proposed contract for excellence programs and activities. To approximate the total yearly costs associated with these items, it is estimated that each district (55 plus 34 for NYC (see above) for a total of 89 districts) hires two new, appropriately certified teachers at an annual cost of \$53,000 per teacher (salary plus benefits). This yields a total estimated, annual cost of \$9,435,000 for all contract districts.

**ECONOMIC AND TECHNOLOGICAL FEASIBILITY:**

The economic and technological feasibility of compliance with the rule by local governments is made easier by the fact that the rule imposes very few compliance and no paperwork requirements that are not already imposed by the authorizing statute. Moreover, those reporting requirements imposed by the statute are made feasible by the fact that they are generally automated and web-based, using data entry screens and edit checks. In addition, nothing in the rule prohibits local governments from using funds to procure professional services, such as certified professional accountants, software developers or experts in curriculum and instruction, or education research, all of whom may be necessary to meet the rule's requirements.

**MINIMIZING ADVERSE IMPACT:**

The proposed rule is necessary to implement Chapter 57 of the Laws of 2007 and is applicable to all identified school districts throughout the State. Consequently, the major provisions of the proposed rule are statutorily imposed and it is not feasible to establish differing compliance or reporting requirements or timetables or to exempt school districts from coverage by the rule. Nevertheless, a substantial effort was made to involve school districts, including those located in rural areas, in the development of this rule, and to the extent possible, the proposed rule has been

drafted incorporating their comments, to provide flexibility in implementing many of the provisions.

**LOCAL GOVERNMENT PARTICIPATION:**

Guidance memos to the regulated parties that are local governments – school districts and their component schools – were sent out from the Senior Deputy Commissioner for P-16 education of the State Education Department on April 4, and April 9, 2007. In these two documents, the Education Department sought the input, impact, questions and feedback of the proposed rule on districts as well as communicating in broad terms, how the contract would be implemented. Moreover, on April 12, 2007 districts were invited to meet with key Department stakeholders, including teleconferencing abilities for those district personnel unable to travel to Albany. In these memoranda, the Department communicated that staff in the Department's Office of School Operations and Management Services were available to respond to questions from 9 AM to 7:30 PM, from April 9-12. Copies of the proposed rule have also been provided to District Superintendents with the request that they distribute it to school districts within their supervisory districts for review and comment.

**Rural Area Flexibility Analysis**

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

The proposed rule applies to the school districts in the State, so identified pursuant to Education Law section 211-d as having to file a contract for excellence, 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. Eight (8) of the school districts that will have to file contracts for excellence for the 2007-2008 school year are rural school districts.

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

The proposed rule mandates these affirmative acts, not imposed by the authorizing statute, on allowable programs and activities:

- (1) They must be consistent with federal and State statutes and regulations governing the education of students;
- (2) They be developed by reference to practices supported by research or evidence as to what will facilitate student attainment of the State standards;
- (3) They be accompanied by sustained professional development
- (4) Any additional instruction provided under such programs must come from appropriately certified or highly qualified teachers; and
- (5) They must be coordinated with the district's comprehensive education (improvement) plan.

Depending on which allowable programs and activities are chosen, districts may be required to hire or procure experts in: teacher professional development, curriculum and/or instructional design, school improvement and other related tasks and professional functions.

School districts will submit their contracts to the Commissioner for approval, using an automated, web-based application.

**COSTS:**

The rule is necessary to implement Chapter 57 of the Laws of 2007 and does not impose any significant, additional costs beyond those inherent in the statute.

The new requirements will result in additional costs to school districts, as follows:

(i) Sustained Professional Development

If it is assumed that there will need to be two extra days per year of sustained professional development for contract of excellence programs, for 4 teachers per district at a cost of \$125 per teacher per day, it is estimated that there might be a total annual cost for all of the districts of \$8,000 per year.

(ii) Other Costs

Depending on a district's selection of allowable program and activity choices, it is possible that there will be additional costs. Particular activities where the cost imposed could be large include the following: the requirement that additional instruction under any allowable program must be provided by appropriately certified or highly qualified teachers; that allowable programs must be coordinated with school district comprehensive plans; determining if a student responds to scientific, research-based intervention; and analyzing, gathering and compiling the necessary research to support their proposed contract for excellence programs and activities. To approximate the total yearly costs associated with these items, it is estimated that each of the eight rural districts hires two new, appropriately certified teachers at an annual cost of \$53,000 per teacher (salary plus benefits). This yields a total estimated, annual cost of \$848,000 for all of the eight districts.

**MINIMIZING ADVERSE IMPACT:**

The proposed rule is necessary to implement Chapter 57 of the Laws of 2007 and is applicable to all identified school districts throughout the State. Consequently, the major provisions of the proposed rule are statutorily imposed and it is not feasible to establish differing compliance or reporting requirements or timetables or to exempt school districts in rural areas from coverage by the rule. Nevertheless, a substantial effort was made to involve school districts, including rural districts, in the development of this rule, and to the extent possible, the proposed rule has been drafted incorporating their comments, to provide flexibility in implementing many of the provisions.

#### RURAL AREA PARTICIPATION:

The proposed rule was submitted for discussion and comment to the Department's Rural Education Advisory Committee that includes representatives of school districts in rural areas as well as the Rural Schools Association. In addition, guidance memos dated April 4 and April 9, 2007 were provided to the field outlining changes in the law and providing a working draft outline of the contracts. School districts that are required to file a contract for excellence were also invited to participate in either the teleconference/meeting held on April 12th or a teleconference held on April 13th (Big 5 School districts only). During the period from April 9-12, the Education Department offered extended phone hours to provide further opportunity for comments and questions.

#### Job Impact Statement

The proposed amendment is necessary to implement Education Law section 211-d, as added by Chapter 57 of the Laws of 2007, to establish allowable programs and activities, criteria for public reporting by school districts of their total foundation aid expenditures and other requirements for purposes of preparation of contracts for excellence by certain specified school districts. The proposed amendment will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the rule that it will have a positive impact, or no impact, on jobs or employment opportunities, no further steps were needed to ascertain those facts and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Fingerprinting and Criminal History Record Check

I.D. No. EDU-20-07-00013-P

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

**Proposed action:** Amendment of sections 80-1.11, 87.1, 87.2, 87.4, 87.5, 87.6, 87.8 and addition of section 87.10 to Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207 (not subdivided), 305(30), 3001-d and 3035

**Subject:** Requirements relating to the fingerprinting and criminal history record of prospective employees of nonpublic and private elementary and secondary schools.

**Purpose:** To set forth the requirements and procedures for the fingerprinting and criminal history record check of prospective school employees of nonpublic and private elementary or secondary schools in order to implement the requirements of chapter 630 of the Laws of 2006.

**Substance of proposed rule (Full text is posted at the following State website: <http://www.highered.nysed.gov/part87amendment.htm>):** The Board of Regents proposes to amend Sections 80-1.11, 87.1, 87.2, 87.4, 87.5, 87.6, 87.8 and add Section 87.10 to the Regulations of the Commissioner of Education relating to the authorization of nonpublic and private elementary schools to apply to the Commissioner of Education for criminal history record checks on prospective employees.

Section 80-1.11 is amended to delete the exception from the requirements of Part 87 for a criminal history record check for individuals who apply for a permanent certificate and hold a valid provisional certificate, applied for prior to July 1, 2001, in the same title for which a permanent certificate is sought.

Section 87.1 is amended to clarify that the purpose of Part 87 is to set forth the requirements and procedures for the fingerprinting and criminal history record review for prospective school employees for service in covered schools, including any nonpublic or private elementary or secondary school that elects to fingerprint and seek a criminal history record review from the Department for its prospective employees.

Subdivisions (a), (b) and (d) of Section 87.2 are amended to clarify the definitions of clearance for certification, clearance for employment and conditional clearance for employment so that these definitions include

nonpublic or private elementary and secondary schools that elect to apply to the Department for criminal history record checks on prospective employees.

Subdivision (c) and (j) of Section 87.2 is amended to provide the statutory authority for conditional appointment and emergency conditional appointment for prospective employees of nonpublic or private elementary or secondary schools that elect to fingerprint and seek clearance from the Department for prospective employees beginning July 1, 2007.

Subdivision (e) of Section 87.2 is amended to include in the definition of a covered school any nonpublic or private elementary or secondary school that elects to fingerprint and seek clearance for prospective employees from the Department beginning July 1, 2007. It also clarifies that covered schools must be geographically located in New York State.

Subdivision (i) of Section 87.2 amends the definition of designated fingerprinting entity to include a nonpublic or private elementary or secondary school that elects to fingerprint and seek clearance from the Department for prospective employees beginning July 1, 2007.

Section 87.4 is amended to clarify that the requirements in Part 87 apply to prospective employees appointed to compensated positions in a nonpublic or private elementary or secondary school on or after July 1, 2007 if such school elects to fingerprint and seek clearance from the Department for prospective employees and does not apply to employees of such schools appointed prior to July 1, 2007. The proposed amendment further clarifies that prospective employees of nonpublic or private elementary or secondary schools who commence providing services on or after July 1, 2007 will be subject to the requirements of this section when such prospective school employees are: employees of a provider of contracted services to the covered school, or workers who are placed within the covered school under a public assistance employment program pursuant to title 9-B of article V of the Social Services Law, directly or through contract, or in compensated positions at the covered school not appointed by official action of the governing body of such covered school.

Subdivisions (a) and (b) of Section 87.4 are amended to clarify that all prospective school employees who are not in the SED criminal history file shall be fingerprinted. These amendments further clarify that school employees shall request that the designated fingerprinting entity transmit a sufficient number of fingerprints to the Department. Previously, this section required two sets of completed fingerprint cards, but the Department may need more or less than two sets to perform their criminal history record check.

Paragraph (5) of subdivision (a) and paragraph (3) of subdivision (b) of Section 87.4 are deleted to conform with current practice and procedures.

Section 87.5 is amended to permit the Department to consider not only the criminal history record, but any related information obtained by the Department pursuant to the review of such record when the criminal history record check reveals that the prospective school employee was convicted of a crime or has a pending criminal charge.

Sections 87.5 and 87.6 are also amended to reflect the new title of the executive director of the Office of Teaching Initiatives to the Assistant Commissioner of the Office of Teaching Initiatives.

Section 87.8 is amended to provide that the fee for a criminal history record search may also be paid by credit card. This amendment also changes the term school district in this section to covered school to conform with the terms of the regulation.

Section 87.10 is added to provide special requirements for nonpublic or private elementary or secondary schools that elect to fingerprint and seek clearance for prospective employees beginning July 1, 2007. Specifically, this section requires that any nonpublic or private elementary or secondary school that elects to submit to the Department requests for criminal history record review of prospective employees to notify the Assistant Commissioner of the Office of Teaching Initiatives, or his designee, of its intent to elect to fingerprint and seek clearance on a form prescribed by the Department through the Department's TEACH online services system. It further requires that any nonpublic or private elementary or secondary school that elects to submit requests for safety to do so for each prospective employee and to develop a policy for the safety of the children who have contact with an employee holding conditional appointment or emergency conditional appointment.

**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](mailto:legal@mail.nysed.gov)

**Data, views or arguments may be submitted to:** Johanna Duncan-Poitier, Senior Deputy Commissioner of Education - P16, Education Depart-

ment, 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**

##### 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 (a) of subdivision (30) of section 305 of the Education Law authorizes the Commissioner of Education to promulgate regulations to authorize the fingerprinting of prospective employees of nonpublic and private elementary and secondary schools, and for the use of information derived from searches of the records of the Division of Criminal Justice Services ("DCJS") and the Federal Bureau of Investigation ("FBI") based on the use of such fingerprints. This paragraph also requires the Commissioner, in cooperation with DCJS to promulgate a form to be provided to nonpublic or private elementary or secondary schools in connection with the submission of fingerprints and a form for the recordation of allegations of child abuse in an educational setting.

Paragraph (b) of subdivision (30) of Section 305 of the Education Law requires the Commissioner of Education, in cooperation with DCJS to promulgate a form to be provided to all prospective employees of nonpublic and private elementary and secondary schools that elect to fingerprint and seek clearance for prospective employees to inform the prospective employee that the Commissioner is authorized to request his or her criminal history information and that the employee has the right to obtain, review and seek correction of such information.

Paragraph (c) of subdivision (30) of Section 305 of the Education Law requires the prospective employer to obtain the signed, informed consent of the prospective employee on a form supplied by the Commissioner of Education.

Paragraph (d) of subdivision (30) of Section 305 of the Education Law requires the Commissioner to develop forms to be provided to all nonpublic or private elementary and secondary schools that elect to fingerprint their prospective employees, to be completed and signed by prospective employees when conditional appointment or emergency conditional appointment is offered.

Subdivision (2) of section 3001-d of the Education Law authorizes nonpublic or private elementary or secondary schools to apply to the Commissioner for criminal history record checks on prospective employees.

Paragraph (a) of subdivision (3) of section 3001-d authorizes a nonpublic or private elementary or secondary school to conditionally appoint a prospective employee. A request for conditional clearance may be forwarded to the Commissioner with the prospective employee's fingerprints.

Paragraph (b) of subdivision (3) of section 3001-d authorizes a nonpublic or private elementary or secondary school to make an emergency conditional appointment when an unforeseen emergency vacancy has occurred.

Paragraph (c) of subdivision (3) of section 3001-d requires each nonpublic or private elementary or secondary school, which elects to fingerprint prospective employees, to develop a policy for the safety of the children who have contact with an employee holding conditional appointment or emergency conditional appointment.

Subdivision (4) of section 3001-d authorizes the Commissioner to charge additional fees to applicants for certificates in an amount equal to the fees established pursuant to law by the division of criminal justice services and the federal bureau of investigation for the searches authorized by this section.

Subdivision (1) of section 3035 of the Education Law authorizes the Commissioner of Education to submit to DCJS two sets of fingerprints for prospective school employees along with processing fees, for the purpose of obtaining criminal history records from DCJS and the FBI.

Paragraph (a) of subdivision (3) of section 3035 of the Education Law requires the Commissioner of Education to promptly notify the nonpublic or private elementary or secondary school when the prospective school employee is cleared for employment based on his or criminal history and provides a prospective school employee who is denied clearance the right to be heard and offer proof in opposition to such determination in accordance with the Regulations of the Commissioner of Education.

Paragraph (b) of subdivision (3) of section 3035 of the Education Law requires the Commissioner of Education to promptly notify the prospective

employee and the appropriate nonpublic or private elementary or secondary school when a prospective employee is conditionally cleared for employment based upon his or her criminal history or that more time is needed to make the determination.

##### 2. LEGISLATIVE OBJECTIVES:

The proposed amendment carries out the objectives of the above-referenced statutes by establishing requirements and procedures necessary to implement the statutory requirements prescribed in Chapter 630 of the Laws of 2006. That statute authorizes nonpublic and private schools to require their prospective school employees to be fingerprinted, to undergo a criminal history check, and be cleared for employment by the State Education Department.

##### 3. NEEDS AND BENEFITS:

The purpose of the proposed amendment is to set forth requirements and procedures for the fingerprinting and the criminal history record check of prospective nonpublic and private school employees in order to implement the requirements set forth in sections 305, 3001-d and 3035 of the Education Law, as amended by Chapter 630 of the Laws of 2006. Specifically, the proposed amendment makes the following major changes:

In order to conform the regulations to the requirements set forth in Sections 305, 3001-d and 3035 of the Education Law, as amended by Chapter 630 of the Laws of 2006, the proposed amendment revises the definitions in Part 87 for clearance for employment, conditional appointment, conditional clearance for employment and covered school to permit nonpublic and private schools to seek such clearances and appointments from the Department beginning July 1, 2007. The proposed amendment also authorizes nonpublic or private elementary or secondary schools to be a designated fingerprinting entity if they choose to fingerprint prospective school employees.

The proposed amendment further clarifies that the fingerprinting and criminal history record check requirements under Part 87 apply to all prospective school employees appointed to compensated positions in a nonpublic or private elementary school that elects to fingerprint and seek clearance from the Department for prospective employees on or after July 1, 2007 and not to prospective employees appointed to such schools prior to July 1, 2007.

The amendment authorizes the Department to consider the criminal history record and any related information obtained by the Department pursuant to such review, when the criminal history record check reveals that the prospective school employee was convicted of a crime or has a pending criminal charge.

The proposed amendment also makes technical changes to the due process requirements of Part 87 to reflect the change in title of the executive director of the Office of Teaching Initiatives to the Assistant Commissioner of the Office of Teaching Initiatives. The amendment also clarifies that the Department will accept a credit card for the fee charged for a criminal history information request under Part 87 to conform with current practice.

In order to implement the requirements of Chapter 630 of the Laws of 2006, the proposed amendment also requires that beginning July 1, 2007, any nonpublic or private elementary or secondary school that elects to fingerprint and seek clearance from the Department for prospective employees must notify the Assistant Commissioner of the Office of Teaching Initiatives, or his designee, on forms provided by the Department of its intent to seek clearance from the Department through the Department's TEACH online services system.

The amendment further clarifies that any nonpublic or private elementary or secondary school that elects to submit requests for criminal history record review to the Department for prospective employees shall do so with respect to each such prospective employee and shall develop a policy for the safety of the children who have contact with an employee holding conditional appointment or emergency appointment.

##### 4. COSTS:

(a) Costs to State government: The proposed amendment implements specific statutory mandates. Accordingly, the costs of the proposed amendment are directly attributable to the statutory requirements. The State Education Department has requested an appropriation of \$380,000 to administer the new statutory requirements.

(b) Costs to local government: The proposed amendment implements specific statutory directives, applicable to nonpublic and private schools. All of the additional requirements in the proposed amendment are imposed by Chapter 630 of the Laws of 2006. Accordingly, the proposed amendment will not result in additional costs upon local government beyond those imposed by the statute.

(c) Costs to private regulated parties: As stated above, the proposed amendment implements the requirements of Chapter 630 of the Laws of 2006. The costs to private regulated parties are also attributable to the statute.

Chapter 630 of the Laws of 2006 authorizes nonpublic or private elementary and secondary schools to elect to have their prospective employees to be fingerprinted and undergo a criminal history review by the Department. The Department estimates that approximately 10,000 individuals will be fingerprinted each year and undergo a criminal history record check and a review for purposes of clearance for employment. The statute authorizes the Commissioner of Education to collect a fee for the criminal history check in an amount equal to the fees established pursuant to law by the Division of Criminal Justice Services ("DCJS") and the Federal Bureau of Investigation ("FBI") for the criminal history search. The proposed amendment mirrors this statutory language. The combined fee for the search by DCJS and the FBI is currently \$99. Under the proposed regulatory framework, an individual who was fingerprinted and is in the Department's criminal history file will not have to pay any fee for additional clearances for employment.

(d) Costs to the regulatory agency: As stated above in "Costs to State Government," the proposed amendment will not impose additional costs on the Department beyond those required by Chapter 630 of the Laws of 2006.

#### 5. LOCAL GOVERNMENT MANDATES:

The proposed amendment does not impose additional requirements beyond those prescribed in the statute.

#### 6. PAPERWORK:

The proposed amendment does not impose additional requirements beyond those prescribed in the statute.

#### 7. DUPLICATION:

The proposed amendment does not duplicate other requirements of State and Federal government.

#### 8. ALTERNATIVES:

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

#### 9. FEDERAL STANDARDS:

There are no Federal requirements relating to the subject matter of the proposed amendment.

#### 10. COMPLIANCE SCHEDULE:

Consistent with the effective date of the statute, the proposed amendment applies to employees appointed by official action of the governing body of any nonpublic or private elementary or secondary school after July 1, 2007 if such school has provided written notice to the Department that it elects to have their prospective employees fingerprinted and undergo a criminal history record review by the Department.

### **Regulatory Flexibility Analysis**

#### (a) Small Businesses:

##### 1. EFFECT OF RULE:

The proposed amendment to the Regulations of the Commissioner of Education applies to each of the approximately 2,100 nonpublic and private schools located in New York State that apply to the Commissioner of Education for criminal history record checks on prospective employees. The Department estimates that of these 2,100 nonpublic and private schools, approximately 110 of these are for-profit businesses with less than 100 employees.

##### 2. COMPLIANCE REQUIREMENTS:

Chapter 630 of the Laws of 2006 amends sections 305 and 3035 and adds a new section 3001-d to the Education Law to authorize nonpublic and private elementary or secondary schools to require their prospective employees to be fingerprinted and undergo a criminal history record check by the Department. The purpose of the proposed amendment is to implement these requirements. It does not impose additional requirements beyond those prescribed in Chapter 630 of the Laws of 2006.

In order to conform the regulations to the requirements set forth in Sections 305, 3001-d and 3035 of the Education Law, as amended by Chapter 630 of the Laws of 2006, the proposed amendment revises the definitions in Part 87 for clearance for employment, conditional appointment, conditional clearance for employment and covered school to permit nonpublic and private schools to seek such clearances and appointments from the Department beginning July 1, 2007. The proposed amendment also authorizes nonpublic or private elementary or secondary schools to become a designated fingerprinting entity if they choose to fingerprint prospective school employees.

The proposed amendment further clarifies that the fingerprinting and criminal history record check requirements under Part 87 apply to all

prospective school employees appointed to compensated positions in a nonpublic or private elementary school that elects to fingerprint and seek clearance from the Department for prospective employees on or after July 1, 2007 and not to prospective employees appointed to such schools prior to July 1, 2007.

The amendment authorizes the Department to consider the criminal history record and any related information obtained by the Department pursuant to such review, when the criminal history record check reveals that the prospective school employee was convicted of a crime or has a pending criminal charge.

The proposed amendment also makes technical changes to the due process requirements of Part 87 to reflect the change in title of the executive director of the Office of Teaching Initiatives to the Assistant Commissioner of the Office of Teaching Initiatives. The amendment also clarifies that the Department will accept a credit card for the fee charged for a criminal history information request under Part 87 to conform with current practice.

In order to implement the requirements of Chapter 630 of the Laws of 2006, the proposed amendment further requires that beginning July 1, 2007, any nonpublic or private elementary or secondary school that elects to fingerprint and seek clearance from the Department for prospective employees must notify the Assistant Commissioner of the Office of Teaching Initiatives, or his designee, on forms provided by the Department of its intent to seek clearance from the Department through the Department's TEACH online services system.

The amendment further clarifies that any nonpublic or private elementary or secondary school that elects to submit requests for criminal history record review to the Department for prospective employees shall do so with respect to each such prospective employee and shall develop a policy for the safety of the children who have contact with an employee holding conditional appointment or emergency appointment.

##### 3. PROFESSIONAL SERVICES:

The proposed amendment would not require a nonpublic or private school to hire additional professional services. However, if a nonpublic or private school chooses to become a designated fingerprinting entity so that it can fingerprint prospective employees, such schools may have to hire staff to do this function or may train existing staff to do the fingerprinting.

##### 4. COMPLIANCE COSTS:

The proposed amendment implements specific statutory directives, applicable to nonpublic or private elementary or secondary schools that elect to fingerprint and seek clearance from the Department for their prospective employees. The requirements set forth in the proposed amendment are imposed by Chapter 630 of the Laws of 2006. Chapter 630 of the Laws of 2006 authorizes nonpublic or private elementary and secondary schools to elect to have their prospective employees to be fingerprinted and undergo a criminal history review by the Department. The Department estimates that approximately 10,000 individuals will be fingerprinted each year and undergo a criminal history record check and a review for purposes of clearance for employment. The statute authorizes the Commissioner of Education to collect a fee for the criminal history check in an amount equal to the fees established pursuant to law by the Division of Criminal Justice Services ("DCJS") and the Federal Bureau of Investigation ("FBI") for the criminal history search. The proposed amendment mirrors this statutory language. The combined fee for the search by DCJS and the FBI is currently \$99. Under the proposed regulatory framework, an individual who was fingerprinted and is in the Department's criminal history file will not have to pay any fee for additional clearances for employment.

Accordingly, the proposed amendment will not result in additional costs beyond those imposed by the statute.

##### 5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment will not impose any new technological requirements on nonpublic or private schools. Economic feasibility is addressed above under compliance costs.

##### 6. MINIMIZING ADVERSE IMPACT:

The proposed amendment implements the requirements of Chapter 630 of the Laws of 2006. The intent of the statute is to help ensure the safety of school children by requiring prospective nonpublic and private school employees to be subject to a criminal history record check. Because of the nature of the proposed amendment, imposing different standards for nonpublic and private elementary and secondary schools that are small businesses would be inappropriate.

##### 7. SMALL BUSINESS PARTICIPATION

Comments on the proposed regulation were solicited from nonpublic and private elementary or secondary schools across the State, including those that are considered small businesses.

## (b) Local Governments:

The purpose of the proposed amendment is to set forth the requirements and procedures for the fingerprinting and the criminal history record check of prospective nonpublic and private school employees in order to implement the requirements set forth in sections 305, 3001-d and 3035 of the Education Law, as amended by Chapter 630 of the Laws of 2006. The proposed amendment will not impose an adverse economic impact or reporting, recordkeeping, or other compliance requirements on local governments. Because it is evident from the nature of the proposed rule that it does not affect local governments, no further steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for local governments is not required and one has not been prepared.

**Rural Area Flexibility Analysis**

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

The proposed amendment applies to all nonpublic and private schools in the State and their prospective employees, 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. The Department estimates that there are approximately 2,100 nonpublic and private elementary or secondary schools located in such counties.

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

The proposed amendment does not impose additional requirements beyond those prescribed in Chapter 630 of the Laws of 2006. As required by Chapter 630, the proposed amendment authorizes a nonpublic or private elementary or secondary school to require prospective school employees to be fingerprinted and cleared for employment by the Department, in the same manner as previously prescribed for employees of public schools, charter schools and boards of educational cooperative services pursuant to Chapter 180 of the Laws of 2000, as previously implemented in Part 87 of the Regulations of the Commissioner of Education.

In order to conform with the new requirements set forth in sections 305, 3001-d and 3035 of the Education Law, as amended by Chapter 630 of the Laws of 2006, the proposed amendment revises the definitions in Part 87 for clearance for employment, conditional appointment, conditional clearance for employment and covered school to permit nonpublic and private schools to seek such clearances and appointments from the Department beginning July 1, 2007. The proposed amendment also authorizes nonpublic or private elementary or secondary schools to become a designated fingerprinting entity if they choose to fingerprint prospective school employees.

The proposed amendment further clarifies that the fingerprinting and criminal history record check requirements under Part 87 apply to all prospective school employees appointed to compensated positions in a nonpublic or private elementary school that elects to fingerprint and seek clearance from the Department for prospective employees on or after July 1, 2007 and not to prospective employees appointed to such schools prior to July 1, 2007.

The amendment also authorizes the Department to consider the criminal history record and any related information obtained by the Department pursuant to such review, when the criminal history record check reveals that the prospective school employee was convicted of a crime or has a pending criminal charge.

The proposed amendment also provides technical changes to the due process requirements of Part 87 to reflect the change in title of the executive director of the Office of Teaching Initiatives to the Assistant Commissioner of the Office of Teaching Initiatives. In addition, in order to conform with current practice, the amendment also clarifies that the Department will accept a credit card for the fee charged for a criminal history information request under Part 87.

In order to implement the requirements of Chapter 630 of the Laws of 2006, the proposed amendment also requires that beginning July 1, 2007, any nonpublic or private elementary or secondary school that elects to fingerprint and seek clearance from the Department for prospective employees shall notify the Assistant Commissioner of the Office of Teaching Initiatives, or his designee, on forms provided by the Department of its intent to seek clearance from the Department through the Department's TEACH online services system.

The proposed amendment further clarifies that any nonpublic or private elementary or secondary school that elects to submit requests for criminal

history record review to the Department for prospective employees shall do so with respect to each such prospective employee and shall develop a policy for the safety of the children who have contact with an employee holding conditional appointment or emergency appointment.

## 3. COSTS:

The proposed amendment implements specific statutory requirements for nonpublic and private schools and their prospective employees. All of the additional requirements are imposed by Chapter 630 of the Laws of 2006. Accordingly, the proposed amendment will not result in additional costs on these entities beyond those imposed by the statute. The Department estimates that about 10,000 individuals each year will be fingerprinted and undergo the criminal history record check. The statute authorizes the Commissioner of Education to collect a fee for the criminal history check in an amount equal to the fees established pursuant to law by the Division of Criminal Justice Services and the FBI for the criminal history search. The combined fee for the search by DCJS and the FBI is currently \$99. Under the proposed regulatory framework, an individual who was fingerprinted and is in the Department's criminal history file will not have to pay a fee for additional clearances for employment and/or certification.

The proposed amendment would not require a nonpublic or private school to hire additional professional services. However, if a nonpublic or private school chooses to become a designated fingerprinting entity so that it can fingerprint prospective employees, such schools may have to hire staff to do this function or may train existing staff to do the fingerprinting.

## 4. MINIMIZING ADVERSE IMPACT:

The proposed amendment implements the requirements of Chapter 630 of the Laws of 2006. The statute makes no exception and does not impose different requirements for nonpublic and private schools located in rural areas, or for prospective school employees who live or work in rural areas. The proposed amendment has been carefully drafted to implement the statutory mandates. The intent of the statute is to help ensure the safety of school children by requiring prospective nonpublic and private school employees to be subject to a criminal history record check. Because of the nature of the proposed amendment, imposing different standards for rural entities would be inappropriate.

## 5. RURAL AREA PARTICIPATION:

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

**Job Impact Statement**

The purpose of the proposed amendment is to set forth requirements and procedures for the fingerprinting and the criminal history record check of prospective nonpublic and private school employees in order to implement the requirements set forth in sections 305, 3001-d and 3035 of the Education Law, as amended by Chapter 630 of the Laws of 2006. Because the proposed amendment simply implements the statutory requirements, it will not have any impact on jobs and employment opportunities beyond the impact of the statute.

In any event, the requirements set forth in Chapter 630 of the Laws of 2006 will not have a substantial adverse impact on jobs and employment opportunities. First, the requirements of Chapter 630 do not affect the number of jobs or the number of employment opportunities. The statutory requirements will only impact whether a particular individual is qualified to obtain a position in a nonpublic or private elementary or secondary school. Secondly, the statutory requirements are not expected to cause a significant number of individuals to be found not qualified for school positions. According to the Division of Criminal Justice Services, only three to four percent of the general population has a criminal record. Of these, the Department estimates that only a small percentage, less than 25 percent, will have a sufficient criminal history that to warrant a denial of clearance for employment based on the standards set forth in Correction Law Section 752 and the factors specified in Correction Law Section 753. Also, the requirements of the statute only apply to nonpublic or private elementary or secondary schools that elect to have the Commissioner review their prospective employee's criminal history record.

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

## Department of Health

### EMERGENCY RULE MAKING

#### Non-Prescription Emergency Contraceptive Drugs

**I.D. No.** HLT-20-07-00009-E

**Filing No.** 453

**Filing date:** April 30, 2007

**Effective date:** April 30, 2007

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

**Action taken:** Amendment of section 505.3(b)(1) of Title 18 NYCRR.

**Statutory authority:** Public Health Law, sections 201(1)(v) and 206(1)(f); Social Services Law, section 363-a(2)

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

**Specific reasons underlying the finding of necessity:** We are proposing that this regulatory amendment be adopted on an emergency basis because emergency contraceptive drugs have been approved by the Federal Food and Drug Administration as a non-prescription drug for women 18 years of age and older. Medicaid law requires a written order for non-prescription drugs. A written order requires that a qualified medical practitioner provide the pharmacy with a written, telephone or fax order for a specific drug for a specific patient. This requirement can delay the use of non-prescription emergency contraceptive drugs. Such drugs are effective if taken within 72 hours of unprotected intercourse but are most effective if taken sooner, ideally within 12 hours. The requirement for a written order impedes earliest access to the drug and reduces the effectiveness of the drug.

The FDA approval of emergency contraceptive drugs as non-prescription drugs is limited to women 18 years of age and older. New York State Medicaid will limit dispensing of this drug to 6 courses of treatment in any 12 month period without a prescription or written order for women 18 years of age and older.

**Subject:** Non-prescription emergency contraceptive drugs.

**Purpose:** To allow access to Federal Drug Administration approved non-prescription contraceptive drugs to be dispensed by a pharmacy without a fiscal order for women 18 years of age and older.

**Text of emergency rule:** Paragraph (1) of subdivision (b) of Section 505.3 is amended to read as follows:

(b) Written order required. (1) Drugs may be obtained only upon the written order of a practitioner, except for *non-prescription emergency contraceptive drugs as described in subparagraph (i) of this paragraph, and for telephone and electronic orders for drugs filled in compliance with this section and 10 NYCRR Part 910.*

(i) *Non-prescription emergency contraceptive drugs for recipients 18 years of age or older may be obtained without a written order subject to a utilization frequency limit of 6 courses of treatment in any 12 month period.*

[(i)] (ii) The ordering/prescribing of drugs is limited to the practitioner's scope of practice.

[(ii)] (iii) The ordering/prescribing of drugs is limited to practitioners not excluded from participating in the medical assistance program.

**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 July 28, 2007.

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

#### Regulatory Impact Statement

Statutory Authority:

The authority for the proposed rule is contained in Sections 363, 363-a and 365-a of the Social Services Law (SSL). Section 363 of the SSL states that the goal of the Medicaid program is to make available to everyone, regardless of race, age, national origin or economic standing, uniform, high quality medical care. Section 363-a of the SSL designates the Department of Health (Department) as the single state agency for the administration of the Medicaid program and provides that the Department shall make

such regulations, not inconsistent with law, as may be necessary to implement the provisions of the program. Section 365-a(2)(g) of the SSL defines "medical assistance" as including prescription and non-prescription drugs.

Legislative Objective:

The proposed rule meets the legislative objective of providing timely access to medically necessary care for indigent Medicaid recipients 18 years of age and older who require emergency contraception. The proposed rule will exempt Federal Food and Drug Administration (FDA) approved over-the-counter drugs for emergency contraception from the Department's regulations which require that a pharmacy have a written order from a practitioner prior to dispensing drugs to Medicaid recipients.

Needs and Benefits:

Emergency contraceptive drugs have been available for some time by prescription only. In August of 2006, the FDA approved emergency contraceptive drugs as non-prescription drugs ("over-the-counter") when used by women 18 years of age and older. According to current State Medicaid regulations, 18 NYCRR Section 505.3(b)(1), pharmacies must have a written order (also known as a fiscal order) from a practitioner prior to dispensing an over-the-counter drug to a Medicaid recipient. The regulations do provide an exception, however, for telephone orders from a practitioner which comply with the provisions of the Education Law with respect to such orders. The requirement for a written order necessitates that the recipient visit or call a licensed practitioner prior to going to the pharmacy and then either bring the written order to the pharmacy, have the pharmacist and the practitioner talk on the phone, or have the practitioner send the order by fax. The Department wants to avoid any time barriers to accessing emergency contraceptive drugs since the drugs are most effective in preventing pregnancy if taken within 72 hours after an act of unprotected sex. The Department is eliminating the written order requirement specifically for FDA approved over-the-counter emergency contraceptive drugs dispensed for use by women 18 years of age and older. Women under 18 years of age must still obtain and present a prescription which meets the requirements of section 6810 of the Education Law in order to obtain these drugs.

Costs:

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

There would be no increased costs to the pharmacies for implementation of and continuing compliance with this rule.

Costs to State Government:

Because the Department is eliminating the requirement that there be a written order of a practitioner prior to dispensing this over-the-counter drug, payment for emergency contraceptive drugs under New York's Medicaid program will no longer comply with the federal requirement for such an order. The Department, therefore, proposes using 100% State funds for payment for these drugs. The agency will absorb costs associated with system changes to remove these claims from the federal payment program. These costs are considered minimal. It is estimated that the additional annual cost of payment for emergency contraceptive drugs to the State will be \$1.5 million. These costs to the State will be offset, however, by estimated cost avoidance from reduced births and deliveries attributed to increased access to emergency contraceptive drugs.

The Department examined two years of Medicaid claim data for emergency contraceptive drugs (date of payment from December 1, 2004 to November 30, 2006). The data was extracted from the eMedNY Data warehouse. The Department made the assumption that costs for these drugs would roughly double after this regulation became effective with 100% of rebate adjusted costs being assumed by the State.

Gross annual savings estimates of approximately \$3.2 million were calculated using birth and delivery costs determined in a recent New York State Department of Health, Office of Medicaid Management study. This study analyzed New York State Department of Health vital statistics and New York State Department of Health Medicaid claim data pertaining to prenatal care, delivery and other associated health care costs. Assuming that eliminating the fiscal order mandate would double prescriptions for contraceptive drugs, the Department used claim data for the one year period December 1, 2005 to November 30, 2006 and assumed that approximately 2 in 100 of these claims would have resulted in a birth and delivery cost. The Department used a two year period to determine the expected ongoing increase in the cost of these drugs. The Department only used the one year period (December 1, 2005 to November 30, 2006) to calculate savings, which had the effect of creating a more conservative savings estimate. The gross annual savings in the cost of prenatal care, delivery and other health care costs associated with delivery using this methodology would be \$3.2 million, with approximately \$1.5 million each representing

the federal and state share of savings. There is no local share in savings because of the local share cap which is set at calendar year 2005 (trended) levels.

**Costs to Local Government:**

There will be no cost to local government.

**Local Government Mandates:**

The proposed regulatory amendment will not impose any program service, duty, or responsibility upon any county, city, town, village, school district, fire district or other special district.

**Paperwork:**

This regulatory amendment will decrease paperwork for medical providers and pharmacies since a fiscal order is not needed for this drug for women 18 years of age or older.

**Duplication:**

This regulatory amendment does not duplicate, overlap or conflict with any other State or federal law or regulations.

**Alternatives:**

Currently, a written order of a practitioner is required by federal regulations (42 CFR 440.120(a)(3)) and State Medicaid regulations for the dispensing of emergency contraceptive drugs. The Department considered another proposal to eliminate the need for each recipient to obtain an individual written order from a practitioner for emergency contraceptive drugs. That alternative was to replace the requirement for a fiscal order with a "non-patient specific order" as provided for in section 6909(5) of the Education Law. The non-patient specific order would be written by a qualified medical practitioner in agreement with a specific pharmacy to dispense emergency contraception as an over-the-counter drug to any eligible woman 18 years of age and older who requests it. The order is not patient specific so it would eliminate the delay in treatment inherent in requiring the recipient to obtain a written order. The Department determined this alternative would not likely be available without a statutory amendment because the Education Law and regulations limit its use to situations involving immunizations, emergency treatment of anaphylaxis, purified protein derivative tests and HIV testing.

**Federal Standards:**

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

**Compliance Schedule:**

The proposed regulatory amendment will become effective upon filing with the Department of State.

**Regulatory Flexibility Analysis**

A Regulatory Flexibility Analysis is not required because the proposed rule will not have a substantial adverse impact on small businesses or local governments.

**Rural Area Flexibility Analysis**

A Rural Area Flexibility Analysis is not required because the proposed rule will not have any adverse impact on rural areas.

**Job Impact Statement**

A Job Impact Statement is not required because the proposed rule will not have any adverse impact on jobs and employment opportunities.

**Specific reasons underlying the finding of necessity:** Insurance Law and regulations require certain health insurance policies to provide coverage for surgical services. 11 NYCRR 52.16(c)(5) permits insurers to exclude coverage for surgery that is considered to be cosmetic. Articles 49 of the Insurance Law and Public Health Law, enacted after Section 52.16, provide for internal and external appeal when services are denied as not medically necessary.

It is the Insurance Department's position that whenever surgery is a covered benefit under a policy, a determination that the surgery is cosmetic is a medical necessity determination subject to the utilization review and external review requirements of Title I and Title II of Article 49 of the Insurance Law or Public Health Law. It has come to the Department's attention that insurers and health maintenance organizations (HMOs) have been inconsistent as to what they consider to be medically necessary surgery or cosmetic surgery and some insureds have not been provided with the right to utilization review and external appeal for denials of surgical services. If the appropriate appeal rights are not given, an insured may be unable to obtain medically necessary health care services, adversely affecting the health of the insured.

To establish uniformity, ensure that consumers are protected, and address concerns of health plans, a new part 56 is added to 11 NYCRR and the cosmetic surgery exclusion in Part 52.16(c)(5) is amended. These two regulations clarify that denials for the reason that services are considered cosmetic are subject to the utilization review and external appeal requirements of Article 49 of the Insurance Law or Public Health Law. Part 56 further provides that a request for coverage of surgery, other than a request for pre-authorization, that is solely identified by a code on a designated list, and is submitted without medical information, may be denied by a health plan without subjecting the request to Title I and Title II of Article 49 of the Insurance Law or Public Health Law if certain conditions are met.

The requirements established in these regulations are the result of a collaborative effort among the New York Health Plan Association, the New York State Conference of Blue Cross and Blue Shield Plans, the New York State Department of Health and the New York State Insurance Department. Health plans are aware of the requirements in these regulations and have advised the Insurance Department that they would like to begin implementation through revised subscriber contracts. The Insurance Department has already received and approved subscriber contracts from health plans that include the process outlined in Part 56 and the amended Part 52. Promulgating Part 56 and the amended Part 52 on an emergency basis will ensure that all subscriber contracts that are being filed and approved are consistent with regulatory requirements and will enable health plans to make all contract changes in one filing.

Moreover, these amendments will ensure that all health plans are following the same requirements and that access to utilization review and external appeal by insureds will not be dependent on the particular health insurance policy the insured may have. These amendments will further ensure that insureds will be able to obtain medically necessary surgical services so that the health of insureds is not compromised.

For the reasons stated above, the immediate adoption of this regulation is necessary for the preservation of the general welfare. The regulation must be kept in effect on an emergency basis pending GORR approval to go forward with formal adoption of the regulation.

**Subject:** Rules relating to processing of claims.

**Purpose:** To clarify when plans may exclude coverage for cosmetic surgery.

**Text of emergency rule:** A new Part 56 is added to read as follows:

*Section 56.0 Preamble. Section 52.16(c)(5) of Part 52 of this Title (Regulation 62), permits insurers and health maintenance organizations (HMOs) that are required to provide coverage for surgical services, to exclude coverage of cosmetic surgery. Part 52 does not define cosmetic surgery, but does provide examples of two types of reconstructive surgeries that may never be considered cosmetic. Subsequent to the promulgation of Part 52, Title I and Title II of Article 49 of the Insurance Law and Public Health Law were enacted that require medical necessity denials to be subject to utilization review and external appeal. The Insurance Department has found inconsistencies among insurers and HMOs as to when denials of surgery are considered medical necessity denials and subject to utilization review and external appeal. Section 56.3 of this Part and an amended section 52.16(c)(5) of Part 52 of this Title clarify that, whenever surgery is a covered benefit under certain policies, a determination that the surgery is cosmetic is a medical necessity determination subject to the utilization review and external review requirements of Titles I and II of Article 49 of the Insurance Law and Public Health Law, except in certain cases when the claim or request for surgery is identified by one of the*

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## Insurance Department

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### EMERGENCY RULE MAKING

**Rules Relating to Processing of Claims**

**I.D. No.** INS-20-07-00003-E

**Filing No.** 450

**Filing date:** April 27, 2007

**Effective date:** April 27, 2007

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

**Action taken:** Addition of Part 56 (Regulation 183) to Title 11 NYCRR.

**Statutory authority:** Insurance Law, art. 49, sections 201, 301, 1109, 3201, 3216, 3217, 3221, 4235, 4303, 4304, 4305 and 4802

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

codes in subdivision (f) of section 56.3 of this Part and is submitted without medical information.

Section 56.1 Applicability. This Part shall be applicable to policies that provide hospital, surgical or medical expense coverage.

Section 56.2 Definitions. The following words or terms shall have the following meanings when used in this Part:

(a) Health care professional means an appropriately licensed, registered or certified health care professional pursuant to title eight of the education law or a health care professional comparably licensed, registered or certified by another state.

(b) Health care provider means a health care professional or a facility licensed pursuant to article 28, 36, 44 or 47 of the public health law or a facility licensed pursuant to article 19, 23, 31 or 32 of the mental hygiene law.

(c) Health plan means an insurer or health maintenance organization (HMO) that has issued a policy that provides hospital, surgical or medical expense coverage.

(d) Medical information means any medical data, written explanation from a health care professional, or medical record.

Section 56.3 Claim review requirements for surgical services.

(a) A claim or request for coverage of reconstructive surgery when such service is incidental to or follows surgery resulting from trauma, infection or other diseases of the involved part, and reconstructive surgery because of congenital disease or anomaly of a covered dependent child that has resulted in a functional defect shall not be considered by a health plan to be cosmetic. Reconstructive surgery may however be reviewed for medical necessity subject to the requirements of Title I and Title II of Article 49 of the Insurance Law or Public Health Law.

(b) A claim or request for coverage of surgery other than for the surgical services described in subdivision (a) or (c) of this section that is considered by a health plan to be cosmetic shall be reviewed for medical necessity subject to the requirements of Title I and Title II of Article 49 of the Insurance Law or Public Health Law.

(c) A claim or request for coverage of surgery, other than a request for pre-authorization, that is solely identified by one of the codes in subdivision (f) of this section and is submitted to a health plan without any accompanying medical information, may be denied by a health plan as cosmetic without subjecting the request to the requirements of Title I and Title II of Article 49 of the Insurance Law or Public Health Law, provided that:

(1) notice of the denial includes a clear statement describing the basis for the denial;

(2) notice of the denial includes a statement that the insured has a right to a medical necessity review if the insured or the insured's health care provider believes the claim or request involves issues of medical necessity and submits medical information;

(3) if a medical necessity review is requested and medical information is submitted, the health plan treats the request as a utilization review appeal pursuant to section 4904 of the Insurance Law or Public Health Law; and

(4) if the health plan denies coverage of the procedure after receipt of medical information, the health plan issues a final adverse determination in compliance with section 4904(c) of the Insurance Law and section 410.9(e) of Part 410 of this Title (Regulation 166) or section 4904(3) of the Public Health Law and 10 NYCRR 98-2.9(e), as applicable.

(d) If an initial claim or request for a procedure listed in subdivision (f) of this section is submitted to a health plan with accompanying medical information, the claim or request shall be reviewed in compliance with Title I and Title II of Article 49 of the Insurance Law or Public Health Law.

(e) If an initial claim or request for a procedure listed in subdivision (f) of this section is submitted to a health plan as a pre-authorization request without accompanying medical information, the necessary information shall be requested as required by section 4905(k) of the Insurance Law or section 4905(11) of the Public Health Law and the claim or request shall be reviewed in compliance with Title I and Title II of Article 49 of the Insurance Law or Public Health Law.

(f) Common Procedural Terminology (CPT code [copyright]) and Description

- 11200 Removal of skin tags, multiple fibrocutaneous tags, any area; up to and including 15 lesions
- 11201 Removal of skin tags; each additional 10 lesions
- 11950 Subcutaneous injection of filling material (eg, collagen); 1 cc or less
- 11951 Subcutaneous injection of filling material (eg, collagen); 1.1 to 5.0 cc

- 11952 Subcutaneous injection of filling material (eg, collagen); 5.1 to 10.0 cc
- 11954 Subcutaneous injection of filling material (eg, collagen); over 10.0 cc
- 15775 Punch graft for hair transplant; 1 to 15 punch grafts
- 15776 Punch graft for hair transplant; more than 15 punch grafts
- 15780 Dermabrasion; total face (e.g. for acne scarring, fine wrinkling, rhytids, general keratosis)
- 15781 Dermabrasion, segmental, face
- 15782 Dermabrasion, regional, other than face
- 15783 Dermabrasion, superficial, any site, (eg, tattoo removal)
- 15786 Abrasion; single lesion (eg, keratosis, scar)
- 15787 Abrasion; each additional four lesions or less
- 15788 Chemical peel, facial; epidermal
- 15789 Chemical peel, facial; dermal
- 15790 Chemical peel; total face
- 15791 Chemical peel; face, hand or elsewhere
- 15792 Chemical peel, nonfacial; epidermal
- 15793 Chemical peel, nonfacial; dermal
- 15810 Salabrasion; 20 sq cm or less
- 15811 Salabrasion; over 20 sq cm
- 15819 Cervicoplasty
- 15820 Blepharoplasty, lower eyelid;
- 15821 Blepharoplasty, lower eyelid; with extensive herniated fat pad
- 15824 Rhytidectomy; forehead
- 15825 Rhytidectomy; neck with platysmal tightening (platysmal flap, P-flap)
- 15826 Rhytidectomy; glabellar frown lines
- 15828 Rhytidectomy; cheek, chin, and neck
- 15829 Rhytidectomy; superficial musculoaponeurotic system (SMAS) flap
- 15832 Excision, excessive skin and subcutaneous tissue (including lipectomy); thigh
- 15833 Excision, excessive skin and subcutaneous tissue (including lipectomy); leg
- 15834 Excision, excessive skin and subcutaneous tissue (including lipectomy); hip
- 15835 Excision, excessive skin and subcutaneous tissue (including lipectomy); buttock
- 15836 Excision, excessive skin and subcutaneous tissue (including lipectomy); arm
- 15837 Excision, excessive skin and subcutaneous tissue (including lipectomy); forearm or hand
- 15838 Excision, excessive skin and subcutaneous tissue (including lipectomy); submental fat pad
- 15839 Excision, excessive skin and subcutaneous tissue (including lipectomy); other area
- 15876 Suction assisted lipectomy; head and neck
- 15877 Suction assisted lipectomy; trunk
- 15878 Suction assisted lipectomy; upper extremity
- 15879 Suction assisted lipectomy; lower extremity
- 17340 Cryotherapy (CO<sub>2</sub> slush, liquid N<sub>2</sub>) for acne
- 17360 Chemical exfoliation for acne (eg, acne paste, acid)
- 17380 Electrolysis epilation, each 1/2 hour
- 19316 Mastopexy
- 19355 Correction of inverted nipples
- 21120 Genioplasty; augmentation (autograft, allograft, prosthetic material)
- 30430 Rhinoplasty, secondary; minor revision (small amount of nasal tip work)
- 36468 Single or multiple injections of sclerosing solutions, spider veins (telangiectasia); limb or trunk
- 36469 Single or multiple injections of sclerosing solutions, spider veins (telangiectasia); face
- 36470 Injection of sclerosing solution; single vein
- 36471 Injection of sclerosing solution; multiple veins, same leg
- 69090 Ear piercing
- 69300 Otoplasty, protruding ear, with or without size reduction
- S0800 Laser in situ keratomileusis
- S0810 Photorefractive keratectomy
- S0812 Phototherapeutic keratectomy
- 65760 Keratomileusis
- 65765 Keratophakia
- 65767 Epikeratoplasty
- 65771 Radial keratotomy

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**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 July 25, 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) 480-2285, e-mail: amais@ins.state.ny.us

**Consolidated Regulatory Impact Statement**

1. Statutory Authority: The Superintendent's authority for the addition of Part 56 to Title 11 NYCRR (Regulation 183) and for the Thirty-fifth Amendment to Part 52 of Title 11 NYCRR (Regulation 62) is derived from Sections 201, 301, 1109, 3201, 3216, 3217, 3221, 4235, 4303, 4304, 4305 and 4802 and Article 49 of the Insurance Law.

Sections 201 and 301 authorize the Superintendent to effectuate any power granted to the Superintendent under the Insurance Law, and to prescribe forms or otherwise make regulations.

Section 1109 authorizes the Superintendent to promulgate regulations affecting HMOs and effectuating the purposes and provisions of the Insurance Law and Article 44 of the Public Health Law.

Section 3201 authorizes the Superintendent to approve accident and health insurance policy forms for delivery or issuance for delivery in this state.

Sections 3216 and 3217 authorize the Superintendent to issue regulations to establish minimum standards for the form, content and sale of health insurance. Section 3221 sets forth standard health insurance policy provisions.

Section 4235 establishes requirements for group accident and health insurance.

Article 43 of the Insurance Law sets forth requirements for non-profit medical and dental indemnity corporations and non-profit health or hospital corporations, including requirements pertaining to minimum benefits of individual and small group contracts. Sections 4303, 4304 and 4305 set forth required benefits and standard provisions in group, blanket and group remittance contracts.

Section 4802 establishes the grievance procedures for all insurers which offer a managed care product.

Article 49 establishes the utilization review and external review requirements for all insurers subject to Article 32 or 43 of the Insurance Law or any organization licensed under Article 43 of the Insurance Law.

2. Legislative Objectives: The statutory sections mentioned above contain standard provisions for accident and health insurance coverage and set forth the Superintendent's power to promulgate regulations governing minimum standards for the form, content and sale of such coverage. The promulgation of Regulation 183 and the amendment to Section 52.16(c)(5) of Regulation 62 further the legislative goal of having meaningful health insurance coverage available to the insurance-buying public in this state while at the same time providing reasonable regulation to ensure consistency in the application of permissible exclusions in such coverage.

The cosmetic surgery exclusion set forth in Regulation 62 predates Article 49 of the Insurance Law and Article 49 of the Public Health Law, which provide for internal and external appeal of medical necessity denials. Subsequent to the promulgation of Article 49, the Insurance Department has found inconsistencies among health maintenance organizations (HMOs) and insurers as to what they consider to be medically necessary surgery and what they consider to be cosmetic. The Insurance Department and Health Department have advised health plans that cosmetic surgery denials must be subject to the utilization review and external review requirements. However, some health plans have questioned the Department's position in cases involving procedures usually considered to be cosmetic when medical information is not submitted.

By clarifying the requirements relating to the cosmetic surgery exclusion, the Superintendent is furthering the legislative intent set forth in Article 49 of the Insurance Law and Article 49 of the Public Health Law, which require health plans to conduct utilization reviews to determine if services are medically necessary, and then provide external appeal rights if services are denied. The amendment of Regulation 62, and the addition of new Regulation 183, is necessary to establish uniformity among health plans and ensure that cosmetic surgery denials are given the appropriate review.

3. Needs and Benefits: The Insurance Law and corresponding regulations require most insurers to provide coverage for surgical services. 11 NYCRR 52.16(c)(5) permits plans to exclude coverage for cosmetic surgery but provides an exception to the cosmetic surgery exclusion for

reconstructive surgery. However, the reconstructive surgery exception is not the only type of surgery that would not be cosmetic. The amendment to Regulation 62 and the new Regulation 183 clarify that whenever surgery is a covered benefit, a determination that the surgery is cosmetic is a medical necessity determination subject to the utilization review and external appeal requirements of Article 49 of the Insurance Law or Public Health Law. This amendment to Regulation 62 and the new Regulation 183 codifies existing Department policy that cosmetic denials generally are medical necessity denials subject to Article 49 of the Insurance Law. Health plans should currently be following the standard that this amendment and new regulation establish.

To address the concerns of health plans that certain procedures usually considered cosmetic would be subject to the utilization review and external review requirements when medical information is not submitted, Part 56 further provides that a request for coverage of surgery, other than a request for pre-authorization, that is solely identified by a code on a designated list, and is submitted without medical information, may be denied by a health plan without subjecting the request to Title I and Title II of Article 49 of the Insurance Law and Public Health Law. However, if a request for surgery identified by a code on the designated list is submitted with medical information, or as a preauthorization request, then the Article 49 utilization review process must be followed to adjudicate the claim. In addition, if the automatic denial process is used for the designated codes, the denial must explain that the insured may request a medical necessity review and submit medical information, in which case the plan must review as a utilization review appeal and provide external appeal rights.

The requirements established in these regulations, and the list of procedures set forth in Table 1 of the new Regulation 183, are the result of a collaborative effort among the New York Health Plan Association, the New York State Conference of Blue Cross and Blue Shield Plans, the New York State Department of Health and the New York State Insurance Department. Interested parties agreed that it is in the best interest of both health plans and consumers for there to be uniformity among the plans when making coverage decisions, and these regulations are intended to establish such uniformity. Representatives of insurers and HMOs also expressed concern about the cost of a clinical peer review when services usually considered to be cosmetic are reviewed retrospectively and medical information has not been submitted. The list of procedures in Regulation 183 that may be denied without such review addresses this concern, while still ensuring that consumer utilization review and external appeal rights are not compromised. Striving to minimize the costs of health insurance and protecting the interests of consumers who purchase health insurance are important functions of the Superintendent. These regulations accomplish both aims, and ensure that there is uniformity among health plans when making coverage determinations.

4. Costs: The regulations apply only to insurers and HMOs issuing insurance policies that exclude cosmetic surgery. Any costs imposed on regulated parties as a result of the regulations will be minimal, as they involve only clarification of existing optional insurance policy provisions. Actual costs to insurers and HMOs will be limited to the time that product compliance personnel will spend in implementing any accompanying changes to their claims procedure or making any filings.

The regulations may indirectly affect health care providers, since the regulations clarify that medical information must be submitted by providers or their patients for certain health care procedures usually considered to be cosmetic. However, current law permits insurers and HMOs to request medical information in order to make a claim determination.

The costs to the Insurance Department will be limited to the time spent by existing staff to review products submitted by insurers for compliance.

There should be no costs associated with these regulations to state or local government.

5. Local Government Mandates: The regulations impose no new programs, services, duties or responsibilities on any county, city, town, village, school district or fire district.

6. Paperwork: The regulations do not impose any additional paperwork requirements on insurers or HMOs. Insurers and HMOs are currently required by law to make form and utilization review report filings with the Department. HMOs and insurers are also currently permitted to request medical information from providers and consumers and therefore it is unlikely that any greater burden would be imposed on providers or consumers.

The regulations may indirectly affect health care providers since they clarify that medical information must be submitted by providers or their patients for certain health care procedures usually considered to be cos-

metic. However, current law permits insurers and HMOs to request medical information in order to make a claim determination.

7. Duplication: The regulations do not duplicate standards of either the federal or other state governments. The regulations set standards applicable to health insurance coverage for New York State.

8. Alternatives: The regulations were developed through meetings with interested parties. Alternatives such as precluding plans from denying procedures when medical information is not submitted, or including an expanded list of procedures, were both discussed, but the Insurance Department and Health Department determined that listing procedures in the regulation is the most appropriate and effective means to meet the needs of health plans and protect consumers. The Department also considered whether the requirements established by these regulations could be established through guidelines, and determined that regulations would be needed to integrate the new requirements with existing requirements and ensure uniformity and consistency in application.

9. Federal Standards: The U.S. Department of Labor Claims Payment Regulation, 29 C.F.R. 2560.503 issued pursuant to the Employee Retirement Income Security Act (ERISA) creates federal standards for the treatment of medical necessity denials and the processing of such claims. However, the federal regulation does not include standards for surgical services. Therefore, these regulatory actions do not effect, modify, or duplicate any existing federal standards.

10. Compliance Schedule: Regulated parties should be able comply with the regulations immediately. Insurers and HMOs have been made aware of the requirements in the regulations through meetings and Department correspondence. In addition, the Insurance Department has always instructed insurers and HMOs that they must treat cosmetic surgery denials as medical necessity denials. The regulations merely clarify this instruction and provide an option for claims processing when medical information is not submitted.

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

1. Effect of the rule: These regulations will affect all health maintenance organizations (HMOs) and insurers licensed to do business in New York State. Based upon information provided by these companies in annual statements filed with the Insurance Department, HMOs and insurers licensed to do business in New York do not fall within the definition of small business found in Section 102(8) of the State Administrative Procedures Act because none of them are both independently owned and have under 100 employees. These regulations may indirectly affect health care providers since the regulations clarify that medical information must be submitted by providers or their patients for certain health care procedures usually considered to be cosmetic. These regulations do not apply to or affect local governments.

2. Compliance requirements: These regulations will not impose any reporting, recordkeeping, or other compliance requirements on small businesses or local governments. Health care providers and consumers requesting coverage of certain procedures usually considered to be cosmetic, other than for requests involving preauthorization, will need to submit medical information, if not previously submitted. However, current law permits insurers and HMOs to request information from providers and consumers in order to make coverage determinations.

3. Professional services: Small businesses or local governments will not need professional services to comply with the regulations.

4. Compliance costs: These regulations will not impose any compliance costs upon small businesses or local governments. The Insurance Law and Public Health Law currently permit health plans to request medical information from providers and their patients in order to make coverage determinations.

5. Economic and technological feasibility: Small businesses or local governments will not incur an economic or technological impact as a result of the regulations.

6. Minimizing adverse impact: These regulations apply to the insurance market throughout New York State. The same requirements will apply uniformly, and do not impose any adverse or disparate impact on HMOs, insurers, health care providers or consumers.

7. Small business and local government participation: These regulations are directed at HMOs and insurers 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 Act. Notice of the proposal was previously published in the Insurance Department's Regulatory Agenda. This notice was intended to provide small businesses with the opportunity to participate in the rule making process, but no input was received. Interested parties were also consulted through direct meetings during the development of the proposed regulations.

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

1. Types and Estimated Number of Rural Areas: Insurance companies and health maintenance organizations (HMOs) to which these regulations apply do business in every county in this state, including rural areas as defined under State Administrative Procedure Act Section 102(13). Some of the home offices of these companies lie within rural areas. These regulations may also indirectly affect health care providers, including providers located in rural areas; since the regulations clarify that medical information must be submitted by providers or their patients for certain health care procedures usually considered to be cosmetic.

2. Reporting, Recordkeeping and other Compliance Requirements; and Professional Services: Insurance companies and HMOs may have to modify their claim processing procedures and/or make new filings to the Insurance Department to conform to the regulations. No professional services will be necessary to comply with the proposed rule. Health care providers and consumers requesting coverage of certain procedures usually considered to be cosmetic, other than for requests involving preauthorization, will need to submit medical information, if not previously submitted. However, current law permits insurers and HMOs to request information from providers and consumers in order to make coverage determinations.

3. Costs: The costs to regulated parties as a result of the regulations will be limited to the costs associated with the time that product compliance personnel will spend in implementing any modified claims procedures, or making any necessary filings.

4. Minimizing Adverse Impact: These regulations apply uniformly to entities that do business in both rural and nonrural areas of New York State. These regulations do not impose any additional burden on persons located in rural areas and the Insurance Department does not believe that the regulations will have an adverse impact on rural areas.

5. Rural Area Participation: Notice of the regulations was published in the Insurance Department's Regulatory Agenda. Although there was no specific effort to obtain rural area input during the development of the regulations, interested parties, including health plan representatives, were consulted through direct meetings during the development of the regulations.

#### **Consolidated Job Impact Statement**

This proposed addition of a new Part 56 and the Thirty-fifth Amendment to Part 52 of 11 NYCRR will not adversely impact job or employment opportunities in New York. It will have no impact as it merely involves a slight modification to existing health insurance policy provisions and the associated claims processing procedures.

## **EMERGENCY RULE MAKING**

### **Minimum Standards for the Form, Content and Sale of Health Insurance**

**I.D. No.** INS-20-07-00004-E

**Filing No.** 451

**Filing date:** April 27, 2007

**Effective date:** April 27, 2007

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

**Action taken:** Amendment of section 52.16(c)(5) of Regulation 62 of Title 11 NYCRR.

**Statutory authority:** Insurance Law, art. 49, sections 201, 301, 1109, 3201, 3216, 3217, 3221, 4235, 4303, 4304, 4305 and 4802

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

**Specific reasons underlying the finding of necessity:** Insurance Law and regulations require certain health insurance policies to provide coverage for surgical services. 11 NYCRR 52.16(c)(5) permits insurers to exclude coverage for surgery that is considered to be cosmetic. Articles 49 of the Insurance Law and Public Health Law, enacted after Section 52.16, provide for internal and external appeal when services are denied as not medically necessary.

It is the Insurance Department's position that whenever surgery is a covered benefit under a policy, a determination that the surgery is cosmetic is a medical necessity determination subject to the utilization review and external review requirements of Title I and Title II of Article 49 of the Insurance Law or Public Health Law. It has come to the Department's attention that insurers and health maintenance organizations (HMOs) have been inconsistent as to what they consider to be medically necessary

surgery or cosmetic surgery and some insureds have not been provided with the right to utilization review and external appeal for denials of surgical services. If the appropriate appeal rights are not given, an insured may be unable to obtain medically necessary health care services, adversely affecting the health of the insured.

To establish uniformity, ensure that consumers are protected, and address concerns of health plans, a new part 56 is added to 11 NYCRR and the cosmetic surgery exclusion in Part 52.16(c)(5) is amended. These two regulations clarify that denials for the reason that services are considered cosmetic are subject to the utilization review and external appeal requirements of Article 49 of the Insurance Law or Public Health Law. Part 56 further provides that a request for coverage of surgery, other than a request for pre-authorization, that is solely identified by a code on a designated list, and is submitted without medical information, may be denied by a health plan without subjecting the request to Title I and Title II of Article 49 of the Insurance Law or Public Health Law if certain conditions are met.

The requirements established in these regulations are the result of a collaborative effort among the New York Health Plan Association, the New York State Conference of Blue Cross and Blue Shield Plans, the New York State Department of Health and the New York State Insurance Department. Health plans are aware of the requirements in these regulations and have advised the Insurance Department that they would like to begin implementation through revised subscriber contracts. The Insurance Department has already received and approved subscriber contracts from health plans that include the process outlined in Part 56 and the amended Part 52. Promulgating Part 56 and the amended Part 52 on an emergency basis will ensure that all subscriber contracts that are being filed and approved are consistent with regulatory requirements and will enable health plans to make all contract changes in one filing.

Moreover, these amendments will ensure that all health plans are following the same requirements and that access to utilization review and external appeal by insureds will not be dependent on the particular health insurance policy the insured may have. These amendments will further ensure that insureds will be able to obtain medically necessary surgical services so that the health of insureds is not compromised.

For the reasons stated above, the immediate adoption of this regulation is necessary for the preservation of the general welfare. The regulation must be kept in effect on an emergency basis pending GORR approval to go forward with formal adoption of the regulation.

**Subject:** Minimum standards for the form, content and sale of health insurance.

**Purpose:** To clarify when plans may exclude coverage for cosmetic surgery.

**Text of emergency rule:** Paragraph (5) of subdivision (c) of Section 52.16 of Part 52 of Title 11 of the Official Compilation of Codes, Rules and Regulations is amended to read as follows:

(5) cosmetic surgery, except that cosmetic surgery shall not include reconstructive surgery when such service is incidental to or follows surgery resulting from trauma, infection or other diseases of the involved part, and reconstructive surgery because of congenital disease or anomaly of a covered dependent child which has resulted in a functional defect. *However, if the policy provides hospital, surgical or medical expense coverage, including a policy issued by a health maintenance organization, then coverage and determinations with respect to cosmetic surgery must be provided pursuant to Part 56 of this Title (Regulation 183);*

**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 July 25, 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) 480-2285, e-mail: amais@ins.state.ny.us

#### **Regulatory Impact Statement**

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of emergency rule making, I.D. No. INS-20-07-00003-E, Issue of May 16, 2007.

#### **Regulatory Flexibility Analysis**

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of emergency rule making, I.D. No. INS-20-07-00003-E, Issue of May 16, 2007.

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

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was

previously printed under a notice of emergency rule making, I.D. No. INS-20-07-00003-E, Issue of May 16, 2007.

#### **Job Impact Statement**

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of emergency rule making, I.D. No. INS-20-07-00003-E, Issue of May 16, 2007.

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## Office of Mental Health

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### EMERGENCY RULE MAKING

#### **Personalized Recovery-Oriented Services**

**I.D. No.** OMH-20-07-00012-E

**Filing No.** 456

**Filing date:** May 1, 2007

**Effective date:** May 1, 2007

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

**Action taken:** Repeal of Part 512 and addition of new Part 512 to Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 7.09(b), 31.04(a), 41.05, 43.02(a), (b) and (c); and Social Services Law, sections 364(3) and 364-a(1)

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

**Specific reasons underlying the finding of necessity:** In order to continue to provide essential services to individuals now served by Personalized Recovery-Oriented Services Programs (PROS) and to prevent a loss of services to potential recipients as new PROS programs are approved, it is necessary to adopt this regulation on an emergency basis.

**Subject:** Program and fiscal requirements for personalized recovery-oriented services.

**Purpose:** To establish revised standards for personalized recovery-oriented services.

**Substance of emergency rule:** This rule will repeal the current Part 512 which established a new licensed program category for Personalized Recovery-Oriented Services (PROS) programs. It will adopt a new Part 512 which has significant clarifications and expanded guidance. The revisions are noted in this summary.

#### OVERVIEW OF CURRENT STANDARDS

The purpose of PROS programs is to assist individuals to recover from the disabling effects of mental illness through the coordinated delivery of a customized array of rehabilitation, treatment and support services. Such services are available both in traditional program settings and in off-site locations where such individuals live, learn, work or socialize. Providers are expected to create a therapeutic environment which fosters awareness, hopefulness and motivation for recovery, and which supports a harm reduction philosophy.

Depending upon program configuration and licensure category, PROS programs are required to include the following four components:

1) Community Rehabilitation and Support (CRS): designed to engage and assist individuals in managing their illness and in restoring those skills and supports necessary to live in the community.

2) Intensive Rehabilitation (IR): designed to intensively assist individuals in attaining specific life roles such as those related to competitive employment, independent housing and school. The IR component may also be used to provide targeted interventions to reduce the risk of hospitalization or relapse, loss of housing or involvement with the criminal justice system, and to help individuals manage their symptoms.

3) Ongoing Rehabilitation and Support (ORS): designed to assist individuals in managing symptoms and overcoming functional impairments as they integrate into a competitive workplace. ORS interventions focus on supporting individuals in maintaining competitive integrated employment. Such services are provided off-site.

4) Clinical Treatment: designed to help stabilize, ameliorate and control an individual's symptoms of mental illness. Clinical Treatment inter-

ventions are expected to be highly integrated into the support and rehabilitation focus of the PROS program. The frequency and intensity of Clinical Treatment services must be commensurate with the needs of the target population.

There are 3 license categories for PROS programs: Comprehensive PROS with clinical treatment (provides all 4 components), Comprehensive PROS without clinical treatment (provides CRS, IR and ORS components), and limited license PROS (provides IR and ORS components only).

All PROS providers, regardless of licensure category, are required to offer individualized recovery planning services and pre-admission screening services. Furthermore, depending on the licensure category, providers are required to offer a specified array of services that are delineated in Part 512. Any additional services may be offered if they are clinically appropriate and approved in advance by OMH. Persons eligible for admission to a PROS program must: be 18 years of age or older; have a designated mental illness diagnosis; have a functional disability due to the severity and duration of mental illness; and have been recommended for admission by a licensed practitioner of the healing arts. Such recommendation may be made by a member of the PROS staff, or through a referral from another provider.

A PROS provider is required to continuously employ an adequate number and appropriate mix of clinical staff consistent with the objectives of the program and the number of individuals served. Providers must maintain an adequate and appropriate number of professional staff relative to the size of the clinical staff. In Comprehensive PROS programs, at least one of the members of the provider's professional staff must be a licensed practitioner of the healing arts, and must be employed on a full-time basis. IR services must be provided by, or under the direct supervision of, professional staff. The regulation provides that if a PROS provider has recipient employees, such employees must adhere to the same requirements as other PROS staff, and must receive specified training regarding confidentiality requirements.

An Individualized Recovery Planning process must be carried out by, or under the direct supervision of, a member of the professional staff, and must be in collaboration with the individual and any persons the individual has identified for participation. The regulation sets out the contents and the time frames for development of the Individualized Recovery Plan (IRP).

The regulation provides standards and requirements that must be met in order for providers to receive Medicaid reimbursement. The reimbursement is a monthly case payment based on the services provided to a PROS participant or collateral in each of the PROS components and the total amount of program participation for the individual during the month. The rate of payment will be a monthly fee determined by the Commissioner and approved by the Division of the Budget. Fee schedules, based on defined Upstate and Downstate geographic area, are included in the regulation.

Part 512 also addresses requirements relating to the content of the case record, co-enrollment in PROS and other mental health programs, quality improvement, organization and administration, governing body, recipient rights, and physical space and premises.

#### REVISIONS REGARDING REIMBURSEMENT METHODOLOGY

To ensure that the PROS reimbursement standards more clearly support the programmatic intent of the PROS model, and more clearly articulate the billing expectations, the Office of Mental Health (OMH), in collaboration with the Department of Health, has revised the PROS reimbursement methodology. While the concept of a monthly tiered case payment is unchanged, the building blocks of the methodology are now based on program "units."

PROS units are determined by a combination of program participation (measured in time) and service frequency (measured in number), and are accumulated during the course of each day that the individual participates in the PROS program. The units are then aggregated to a monthly total to determine the level of the PROS monthly base rate that can be billed each month. These program units support the billing concept of a "modified threshold visit."

- Program participation is defined as the length of allowable time that recipients or collaterals participate in the PROS program, both on-site and off-site.

- Scheduled meal periods or planned recreational activities that are not specifically designated as medically necessary are excluded from the calculation of program participation.

- Time spent in the provision of services with collaterals, other than a period of the program day that is simultaneously being credited to the recipient, may be included in the calculation of program participation.

- An individual must have at least 15 minutes of continuous program participation within a program day to accumulate any units.

- Program participation is measured and accumulated in 15 minute increments. Increments of less than 15 minutes must be rounded down to the nearest quarter hour to determine the program participation for the day.

- Service frequency is defined as the number of medically necessary services delivered to a recipient, or his or her collateral, during the course of a program day.

- A minimum of one service must be delivered during the course of a program day to accumulate any units.

- Services provided in a group format must be at least 30 minutes in duration.

- Services provided in an individual modality must be at least 15 minutes in duration.

- Medically necessary PROS services include:

- Crisis intervention services;

- Pre-admission screening services;

- Services provided in accordance with the screening and admission note; and

- Services provided in accordance with the IRP.

- PROS units are calculated in accordance with the following rules:

- PROS units are accumulated in .25 increments.

- The maximum number of PROS units per individual per day is five.

- The formula for accumulating PROS units during a program day is as follows:

- If one medically necessary PROS service is delivered, the number of PROS units is equal to the duration of program participation, rounded down to the nearest quarter hour, or two units, whichever is less.

- If two medically necessary PROS services are delivered, the number of PROS units is equal to the duration of program participation, rounded down to the nearest quarter hour, or four units, whichever is less.

- If three or more medically necessary PROS services are delivered, the number of PROS units is equal to the duration of program participation, rounded down to the nearest quarter hour, or five units, whichever is less.

- A minimum of two PROS units must be accrued for an individual during a calendar month in order to bill the monthly base rate.

- Under the revised methodology, providers will continue to bill on a monthly case payment basis.

- To determine the monthly base rate, the daily PROS units accumulated during the calendar month are aggregated and translated into one of the five payment levels. While the current rate codes and billing process will continue to be utilized, new PROS rates are effective for the 2006-07 State fiscal year. The 2005-06 rate adjustment for OMH licensed clinics has been applied to the PROS Clinical Treatment rate.

#### REVISIONS REGARDING DOCUMENTATION

The PROS documentation standards have been revised in order to clarify the recordkeeping requirements for documenting medical necessity, as well as to support the revised reimbursement methodology.

Within a PROS program, evidence of medical necessity is supported through a combination of screening and assessments, the IRP, and periodic progress notes. In an effort to strengthen the evidence of medical necessity within the IRP, consistent with the principles of person-centered planning, the related requirements have been modified to clarify the programmatic intent. To that end, there is a more explicit requirement for an identified connection between an individual's recovery goals, the barriers to the achievement of those goals that are due to the individual's mental illness, and the recommended course of action. Furthermore, there is a more precise requirement related to justifying the need for services that are more expensive or intensive than those in the CRS component (*i.e.*, IR, ORS or Clinical Treatment services). Finally, there are specific and detailed requirements for the documentation of service delivery used as the basis for the monthly bill.

#### REVISIONS REGARDING GROUP SIZE

In many instances, PROS services will be provided in a group format. While the PROS program model did not contemplate groups of excessive size, the existing regulations did not explicitly address this issue. To ensure that group services are delivered in a clinically optimal manner, the PROS standards are being revised to limit the size of groups. Each CRS or Clinical Treatment group will generally be limited to 12 participants (recipients and/or collaterals) and each IR group will generally be limited to 8 participants (recipients and/or collaterals) with specified exceptions. From a program operations perspective, the size of the groups (consistent with the above limitations) cannot be exceeded on a "regular and routine" basis.

This standard will be monitored and addressed through OMH's certification process.

From a fiscal perspective, reimbursement on behalf of participating group members will be subject to certain limits (assuming that all services are medically necessary).

#### REVISIONS REGARDING STAFFING

As the result of feedback from a variety of stakeholders, two components of the existing PROS staffing requirements are being revised. One of the modifications relates to the use of psychiatric nurse practitioners in lieu of a portion of the psychiatrist coverage; the second revision relates to the transition of newly licensed providers to full compliance with the professional staffing requirements.

#### REVISIONS REGARDING REGISTRATION SYSTEM

Following the original promulgation of the PROS regulations, OMH developed and implemented a PROS registration system. The intent of this system is to establish a process whereby PROS providers and other service providers can be informed, at the earliest possible date, of potential co-enrollment situations that are not otherwise authorized. Therefore, the use of the registration system is intended to prevent duplicative Medicaid billing, and thus reduce the need for post-payment adjustments. The PROS regulations have been revised to accommodate the concept of registration.

#### REVISIONS REGARDING TRANSITION

With the Commissioner's permission, providers operating pursuant to a PROS operating certificate on or before November 1, 2006, may, subject to certain conditions, continue to operate pursuant to the requirements of Part 512 in effect prior to that date.

**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 July 29, 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

#### 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 (OMH) 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 rendition of services for persons with mental illness.

Section 41.05 of the Mental Hygiene Law provides that a local governmental unit shall direct and administer a local comprehensive planning process for its geographic area in which all providers of service shall participate and cooperate through the development of integrated systems of care and treatment for people with mental illness.

Subdivision (a) of Section 43.02 of the Mental Hygiene Law provides that payments under the medical assistance program for services approved by the Office of Mental Health shall be at rates certified by the Commissioner of Mental Health and approved by the Director of the Budget. Subdivision (b) of Section 43.02 of the Mental Hygiene Law gives the Commissioner authority to request from operators of facilities licensed by the OMH such financial, statistical and program information as the Commissioner may determine to be necessary. Subdivision (c) of Section 43.02 of the Mental Hygiene Law gives the Commissioner of Mental Health authority to adopt rules and regulations relating to methodologies used in establishment of schedules of rates for services.

Sections 364(3) and 364-a(1) of the Social Services Law give OMH responsibility for establishing and maintaining standards for medical care and services in facilities under its jurisdiction, in accordance with cooperative arrangements with the Department of Health.

2. Legislative Objectives: Articles 7, 31 and 43 of the Mental Hygiene Law reflect the Commissioner's authority to establish regulations regarding mental health programs and establish rates of payments for services under the Medical Assistance program. Sections 364 and 364-a of the Social Services Law reflect the role of the Office of Mental Health regarding Medicaid reimbursed programs.

3. Needs and Benefits: The Personalized Recovery-Oriented Services (PROS) initiative creates a framework to assist individuals and providers in improving both the quality of care and outcomes for people with serious mental illness in New York State.

In 2005, OMH, with input from local government, consumers, family members and provider organizations, developed a new Medicaid license: PROS. This license takes advantage of the flexibility offered through the

Rehabilitation Option of the Federal Medicaid Program. The license gives local government and providers the ability to integrate multiple programs into a comprehensive rehabilitation service. Providers may combine club-houses, intensive psychiatric rehabilitation treatment (IPRT) programs and other rehabilitation program categories, reducing fragmentation and increasing continuity of care and accountability for achieving recovery goals. Also, there is the option to incorporate Continuing Day Treatment (CDT) programs and clinical treatment into a PROS license. These two program categories are currently licensed separately under mental health regulations.

The PROS license gives service providers the ability to support consumers as they progress with their recovery. The purpose of PROS programs is to assist individuals in recovering from the disabling effects of mental illness through the coordinated delivery of a customized array of rehabilitation, treatment and support services. Such services are expected to be available both in traditional program settings and in off-site locations where such individuals live, learn, work or socialize. Providers must create a therapeutic environment which fosters awareness, hopefulness and motivation for recovery, and which supports a harm reduction philosophy.

The PROS program structure combines under one license basic rehabilitation services; time limited, goal focused intensive rehabilitation, which a consumer can access at various points in the recovery process; ongoing mental health supports to individuals who have secured employment; and an optional clinical treatment component, which allows treatment services to be fully integrated into rehabilitation planning and service provision. All these components are coordinated toward a person's recovery using an Individualized Recovery Plan (IRP).

The PROS license is used to advance the adoption on the front lines of care of several scientifically proven practices which have produced superior outcomes for individuals with severe and persistent psychiatric conditions. These include wellness self-management (also referred to as illness management and recovery), family psycho-education, ongoing rehabilitation and support related to the evidence based practice of supported employment, integrated treatment for co-occurring mental illness and substance abuse, and evidence-based medication practices. By using the comprehensive nature of the PROS license and the IRP, these practices will be able to be provided in combination, offering the potential to amplify recovery outcomes.

Providers collect outcome data in the areas of psychiatric hospitalization, emergency room use, contact with the criminal justice system, consumer satisfaction, employment, education and housing stability. These data are used to help determine program effectiveness and each provider will be asked to develop an ongoing quality improvement process using their outcome data.

The design of PROS addresses many of the care delivery system problems. Access to the range of services needed to facilitate recovery will be increased due to the comprehensive nature of the license. The use of an IRP promotes consumer and provider collaboration toward recovery and fosters integration of rehabilitation, support and treatment, thereby reducing fragmentation. The flexibility of the license stimulates creative development of recovery-oriented services. Consumers are allowed to choose services from more than one PROS provider, so consumer choice is preserved. The design encourages a provider to work with a consumer throughout the recovery process, enhancing accountability for outcomes. By collecting outcome data and using it to help improve individual outcomes and program effectiveness, a data-based continuous quality improvement process is introduced. The various aspects of the PROS license, when viewed as a whole, support and encourage a recovery-focused culture and service delivery system.

To ensure that the PROS reimbursement standards more clearly support the programmatic intent of the PROS model, and more clearly articulate the billing expectations, OMH, in collaboration with the Department of Health, has revised the PROS reimbursement methodology. While the current concept of a monthly tiered case payment is unchanged, the building blocks of the methodology are now based on program "units."

PROS units are determined by a combination of program participation (measured in time) and service frequency (measured in number), and are accumulated during the course of each day that the individual participates in the PROS program. The units are then aggregated to a monthly total to determine the level of the PROS monthly base rate that can be billed each month. These program units support the billing concept of a "modified threshold visit." The revised methodology, using units, provides for a more accurate and effective approach to billing.

Under the revised methodology, providers will continue to bill on a monthly case payment basis. To determine the monthly base rate, the daily

PROS units accumulated during the calendar month are aggregated and translated into one of the five payment levels. While the current rate codes and billing process will continue to be utilized, new PROS rates are effective for the 2006-07 and 2007-08 State fiscal years. The 2005-06 rate adjustment for OMH licensed clinics has been applied to the PROS Clinical Treatment rate.

The PROS documentation standards have been revised in order to clarify the recordkeeping requirements for documenting medical necessity, as well as to support the revised reimbursement methodology. Within a PROS program, evidence of medical necessity is supported through a combination of screening and assessments, the IRP, and periodic progress notes. In an effort to strengthen the evidence of medical necessity within the IRP, consistent with the principle of person-centered planning, the related requirements have been modified to clarify the programmatic intent. To that end, there will be a more explicit requirement for an identified connection between an individual's recovery goals, the barriers to the achievement of those goals that are due to the individual's mental illness, and the recommended course of action. Furthermore, there will be a more precise requirement related to justifying the need for services that are more expensive or intensive. Finally, there are specific and detailed requirements for documentation of service delivery used as the basis for the monthly bill.

In many instances, PROS services offered will be provided in a group format. While the PROS program model did not contemplate groups of excessive size, the previous regulation did not explicitly address this issue. To ensure that group services are delivered in a clinically optimal manner, the PROS standards have been revised to limit the size of certain groups. From a program operations perspective, the size of the groups cannot be exceeded on a "regular and routine" basis. This standard will be monitored and addressed through OMH's certification process. From a fiscal perspective, reimbursement on behalf of participating group members will be subject to certain limits (assuming that all services are medically necessary).

As the result of feedback from a variety of stakeholders, two components of the existing PROS staffing requirements have been revised. One of the modifications relates to the use of psychiatric nurse practitioners in lieu of a portion of the psychiatrist coverage; the second revision relates to the transition of newly licensed providers to full compliance with the professional staffing requirements.

Following the original promulgation of the PROS regulations, OMH developed and implemented a PROS registration system. The intent of this system is to establish a process whereby PROS providers and other service providers can be informed, at the earliest possible date, of potential co-enrollment situations that are not otherwise authorized. The use of the registration system is intended to prevent duplicative Medicaid billing, and thus reduce the need for post-payment adjustments. The PROS regulations have been revised to accommodate the concept of registration. The revised PROS regulation will support the growth of the PROS program as it develops to its full potential. Note: The Commissioner may permit providers operating pursuant to a PROS operating certificate on or before November 1, 2006, to continue to operate pursuant to the requirements of Part 512 in effect prior to November 1, 2006. Such permission shall be granted only if such providers shall have submitted and the Commissioner shall have approved a transition plan setting forth a timetable for complying with the requirements of this Part.

#### 4. Costs:

a. Any additional costs to existing efficiently and economically run programs that are converting to PROS will be fully funded through the PROS Medicaid fee and/or startup funding provided by the Office of Mental Health.

b. Sufficient funding has been included in the current enacted budget to enable economically and efficiently run programs to convert to PROS. Approximately 350 providers have programs that are eligible for conversion to PROS. Existing resources associated with these programs include approximately \$251 million in gross program funding, of which \$139 million is State funding, \$14 million is local funding and \$97 million is Federal funding. After conversion to PROS, gross program funding is estimated to be \$283 million of which State resources are \$129 million, local resources are \$14 million and Federal resources are \$140 million. The implementation of PROS is estimated to result in no increase in local funding.

5. Local Government Mandates: The regulation will not mandate any additional imposition of duties or responsibilities upon county, city, town, village, school or fire districts. The regulation will provide for optimal county involvement in the process of evaluating the quality and appropri-

ateness of PROS programs. Counties may choose to participate in this process with the Office of Mental Health, but it is not required.

6. Paperwork: This rule making will require programs that participate to complete the paperwork which is necessary to receive medical assistance payments and will not result in a substantial change in paperwork requirements.

7. Duplication: The regulatory amendment does not duplicate existing State or federal requirements.

8. Alternatives: The only alternative considered was to continue to use the current program and licensing standards without revision. This alternative was rejected because of the need for further clarification of the current standards and additional regulatory guidance to ensure compliance with programmatic intent and federal requirements for Medicaid reimbursement.

9. Federal Standards: The regulatory amendment does not exceed any minimum standards of the federal government for the same or similar subject areas.

10. Compliance Schedule: The regulatory amendment will be effective May 1, 2007.

#### **Regulatory Flexibility Analysis**

A Regulatory Flexibility Analysis is not submitted with this notice because this new rule will not impose an adverse economic impact on small businesses or local governments. This rule, which repeals Part 512, the current regulation authorizing the Personalized Recovery-Oriented Services (PROS) program, and adds a new Part 512, will revise certain PROS program standards including those relating to the process of obtaining reimbursement, reimbursement rates, establishing group size, staffing and registration.

The providers who will be subject to this rule will be organizations that now hold or in the future apply to establish a PROS program. The majority of these provider organizations are not-for-profit corporations and county governments who currently operate outpatient programs funded and licensed by the Office of Mental Health and/or provide mental health services under contract with local governments and/or OMH and are supported by state and/or local funding.

The existing programs and services that have transitioned or will transition into PROS include Intensive Psychiatric Rehabilitation Treatment and Continuing Day Treatment, currently licensed by the Office of Mental Health (OMH). They also include services previously or currently funded by OMH, but not licensed, such as Psychosocial Clubs, On-Site Rehabilitation, Ongoing Integrated Employment, Enclave in Industry, Affirmative Business, Client Worker and Supported Education.

The licensed programs are currently required to be established through a process that is subject to Part 551 of 14 NYCRR and must comply, on an ongoing basis, with the appropriate program and fiscal regulations as contained in Title 14, including standards for receiving Medicaid reimbursement. The unlicensed programs are established and provide services under contracts with OMH and/or the local governmental unit (the county or the City of New York, depending on location) and are subject to contractual program and fiscal requirements. The requirements are, in part, specific to the funding streams involved, which include: Local Assistance Regular, Community Support Services, Reinvestment, Ongoing Integrated Employment, Psychiatric Rehabilitation, Flexible Funding and Medicaid. While many of the fiscal contractual requirements are the same, there are certain fiscal requirements specific to certain funding streams. Most funding passes from the State to local governments and then to providers and is subject to both State and local government contract requirements.

The PROS program, as revised, will continue to promote comprehensive and coordinated services, foster continuity, and result in more effective program organization and service delivery. It will reduce program-related paper work involved with transfers; for example, an Intensive Psychiatric Rehabilitation Treatment Program must currently discharge an individual when that person achieves the stated goal even if the person needs ongoing support to maintain that goal. That individual's ongoing needs may then require transfer to another program in order to obtain necessary clinical services. The PROS program provides for integration of programs and services, and it will serve to reduce the paperwork required in such a situation, as what were formerly separate programs and services will now be service components under a single PROS license.

The revised PROS regulation continues to provide for a case payment approach to reimbursement which simplifies the Medicaid billing process. The multiple program and service components that formerly had to comply with separate contract requirements for each program funding stream and/or Medicaid fee-for-service with a more complex billing process will, under the revised PROS regulation, come together into a single program

and be funded by a comprehensive per client case payment, billed on a monthly basis. For a number of service providers, billing Medicaid, as opposed to contract funding, may be a new experience. In recognition of this, OMH has and will continue to provide start-up funding for Medicaid billing development costs for providers transitioning to a PROS license in Phase I of implementation. Such start-up funds will be provided in accordance with need and availability of appropriations. Model record-keeping forms will also be developed by OMH and made available to all providers, for use at their discretion. The case payment rate has been enhanced under the revised regulation to a level sufficient to fund the costs of providing the PROS services, including the costs of documenting compliance and billing for services.

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

A Rural Area Flexibility Analysis is not submitted with this notice because the amended rule will not impose any adverse economic impact on rural areas. Rural and non-rural programs will benefit from the integration of now separate programs and services and the revisions will not have a unique or negative impact on Personalized Recovery-Oriented Services (PROS) programs in rural areas.

#### **Job Impact Statement**

A Job Impact Statement is not submitted with this notice because it will have no negative impact on jobs and employment opportunities. It is expected that employment opportunities for individuals receiving services from a new Personalized Recovery-Oriented Services (PROS) provider will increase when compared to the current fragmented service system and that the revised PROS regulation will not significantly differ from the current regulation in terms of impact on jobs and employment opportunities.

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

#### **Use of Space**

**I.D. No.** OMH-20-07-00011-P

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

**Proposed action:** This is a consensus rule making to repeal Part 561 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 7.09 and 31.04

**Subject:** Use of space.

**Purpose:** To repeal an obsolete rule.

**Text of proposed rule:** Pursuant to the authority granted to the Commissioner of Mental Health in Section 7.09(b) of the Mental Hygiene Law, Title 14 of the Official Compilation of Codes, Rules and Regulations of the State of New York is hereby amended as follows:

Part 561 is repealed.

**Text of proposed 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

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

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

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

No person is likely to object to this rule making because it merely repeals regulatory provisions that have been superseded by statute and is otherwise non-controversial.

14 NYCRR Part 561 was promulgated on August 24, 1982 pursuant to a directive from the Director, NYS Division of Budget (DOB), as set forth in Budget Bulletin B-1072, dated May 27 1982. This budget bulletin required the establishment of regulatory standards regarding the use of space in Office of Mental Health (OMH) facilities by other entities. Budget Bulletin B-1072 was replaced in 1984 by Budget Policy and Reporting Manual B-200, which continued the requirement that state agencies promulgate regulations to establish certain standards for the use of space in state facilities by non-state entities. However, in accordance with Budget Bulletin A-1001, issued in 1998, B-200 was discontinued and deleted from the Budget Policy and Reporting Manual. There is no longer a requirement by DOB regarding 14 NYCRR Part 561.

Chapter 723 of the Laws of 1993, "The Community Reinvestment Act," established the Interagency Council on Mental Hygiene Property Utilization (Interagency Council) to act as a clearinghouse for all agency surplus property transactions. The Interagency Council develops and/or

approves guidelines regarding real property transactions and leases related to OMH facility campuses. It is comprised of representatives of OMH, DOB, Office of General Services (OGS), Office of Alcoholism and Substance Abuse Services (OASAS), Office of Mental Retardation and Developmental Disabilities (OMRDD), the Dormitory Authority of the State of New York (DASNY) and the Empire State Development Corporation (ESDC).

On August 3, 1997, OMH issued "Operating Guidelines for DMH Leases Permits, and Conveyances" which, were approved by the Interagency Council. These guidelines were intended to provide a formal process for all permits and leases for the use of space on facility grounds that helps ensure that such use is consistent with other State agency initiatives and the overall plan for alternate use of surplus State property *i.e.*, the same subject matter previously governed by 14 NYCRR Part 561. It is noted in these guidelines that leases are not authorized unless they are approved by the Interagency Council. The guidelines make no reference to and are not consistent with standards set forth in 14 NYCRR Part 561.

OMH finds that repeal of Part 561 is preferable to the alternative of amending it to conform to the current guidelines which are consistent with the requirements of the Interagency Council. A regulation is not necessary, as the standards govern an internal management practice of the agency which does not directly or significantly affect the rights of, or procedures or practices available to, the public, and are thus exempt from the requirement of the State Administrative Procedure Act (SAPA) in accordance with § 102(b)(i) of SAPA. Proposed repeal of Part 561 was shared with the involved State agencies, including OASAS and OMRDD, and they had no objection to such repeal.

#### **Job Impact Statement**

Because the purpose of this amendment is to repeal regulatory provisions no longer applicable to any person, it is apparent that it will not have any impact on jobs and employment activities.

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## **Department of Motor Vehicles**

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### **EMERGENCY RULE MAKING**

#### **Drinking Driver Program**

**I.D. No.** MTV-20-07-00010-E

**Filing No.** 454

**Filing date:** April 30, 2007

**Effective date:** April 30, 2007

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

**Action taken:** Amendment of Parts 134 and 136 of Title 15 NYCRR.

**Statutory authority:** Vehicle and Traffic Law, sections 215(a), 510(6)(a), 1192(10)(a) and (d), 1193(2)(c)(1), 1196(4) and (7)(a)

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

**Specific reasons underlying the finding of necessity:** Precludes multiple DWI offenders from obtaining a conditional license and from being prematurely re-licensed under certain circumstances.

**Subject:** Drinking Driver Program and conditional license eligibility and re-licensure requirements.

**Purpose:** To set forth the Drinking Driver Program and conditional license eligibility criteria for multiple DWI offenders and establishes re-licensure requirements for such offenders.

**Text of emergency rule:** Section 134.2 is amended to read as follows:

134.2 Persons eligible for program. Any person who is convicted of a violation of any subdivision of section 1192 of the Vehicle and Traffic Law, or is found to have been operating a motor vehicle after having consumed alcohol in violation of section 1192-a of this article, or of an alcohol or drug related traffic offense in another state, shall be eligible for enrollment in an alcohol and drug rehabilitation program unless: such person has participated in a program established pursuant to article 31 of the Vehicle and Traffic Law within the five years immediately preceding the date of commission of the alcohol or drug-related offense or such person has been convicted of a violation of any subdivision of section 1192

of such law [other than a violation committed prior to November 1, 1988] during the five years immediately preceding commission of an alcohol or drug-related offense; with respect to persons convicted of a violation of section 1192 of the Vehicle and Traffic Law, is prohibited from enrolling in a program by the judge who imposes sentence upon the conviction; or the commissioner is prohibited from issuing such new license to a person because of two convictions of a violation of section 1192 of the Vehicle and Traffic Law where physical injury, as defined in section 10.00 of the Penal Law, has resulted in both instances. *Notwithstanding the provisions of this section, a person shall be eligible for enrollment in the alcohol and drug rehabilitation program if such person is sentenced pursuant to the plea bargaining provisions set forth in Vehicle and Traffic Law section 1192(10)(a)(ii) and 1192(10)(d).*

Paragraph (8) of subdivision (a) of section 134.7 is amended to read as follows:

(8) The person has been penalized under section 1193(1)(d)(1) of the Vehicle and Traffic Law for any violation of subdivision 2, 2-a, 3, [or] 4, or 4-a of [such] section 1192 of such law.

Subdivision (a) of section 134.7 is amended by adding a new paragraph (13) to read as follows:

(13) *The person, during the five years preceding the commission of the alcohol or drug-related offense or a finding of a violation of section 1192-a of the Vehicle and Traffic Law, participated in the alcohol and drug rehabilitation program or has been convicted of a violation of any subdivision of section 1192 of such law.*

Subdivision (b) of section 134.10 is amended to read as follows:

(b) Results of satisfactory completion of a rehabilitation program. Upon satisfactory completion of a program, any unexpired suspension or revocation which was issued as a result of the conviction for which the person was eligible for enrollment in the program may be terminated by the commissioner unless the termination is prohibited under section 1193 of the Vehicle and Traffic Law or this Subchapter or if the termination is based upon enrollment in the program pursuant to the plea bargaining provisions of Vehicle and Traffic Law section 1192(10)(a)(ii) and 1192(10)(d), if such person would not otherwise be eligible for enrollment in the program pursuant to section 1196(4) of such law.

Section 134.11 is amended to read as follows:

134.11 Issuance of unconditional driver's license. Satisfactory completion of a rehabilitation program or expiration of the term of suspension, whichever occurs first, will initiate the necessary action to provide for the termination of the suspension or revocation which was the basis for entry into the rehabilitation program. Upon a determination of satisfactory completion of the rehabilitation program or the term of suspension, and unless otherwise determined by the commissioner, as provided for in subdivision (b) of section 134.10 of this Part, a notice of termination of the suspension or revocation and an unconditional license will be issued. However, no such license will be issued until all civil penalties due the department are paid or if there are any outstanding suspensions, revocations, or bars against such license until such suspensions, revocations, or bars are satisfactorily disposed of by the applicant. Any conditional license which is still valid will be terminated concurrently with the return of the unconditional driver's license and must be returned to the department. A conditional license shall not be renewed more than one year after the issuance of the conditional license if a revocation is issued for a chemical test refusal and the holder of the conditional license has not paid the civil penalty required by section 1194 of the Vehicle and Traffic Law.

Subdivision (a) of Section 136.6 is amended to read as follows:

(a) There shall be assigned to each safety factor a negative unit as follows:

Safety Factor	Assigned Negative Units	
	Over one year to three years of application	Within one year of application
(1) for each reportable accident of record with a finding by the referee of gross negligence in the operation of a motor vehicle in a manner showing a reckless disregard for the life and property of others.	-5	-8

(2) for each reportable accident of record with conviction involvement or with a finding by the referee of a violation of the Vehicle and Traffic Law	-3	-4
(3) for the first and second speeding conviction of record*	-3	-4
(4) for the third and subsequent speeding conviction*	-5	-8
(5) for reckless driving	-5	-8
(6) for each conviction of record for leaving the scene of a personal injury accident of record	-8	-11
(7) for each alcohol related offense of record as follows:		
(i) conviction for violation of sub-division (1) of section 1192 of the Vehicle and Traffic Law:		
1st offense	-5	-8
2nd offense	-8	-11
3rd offense	-11	-14
(ii) conviction for violation of subdivision (2), (2-a), (3), [or] (4), or (4-a) of section 1192 of the Vehicle and Traffic Law:		
1st offense	-8	-11
2nd or subsequent offense	-11	-14
(iii) chemical test refusal	-6	-11
(8) for each conviction of homicide, criminally negligent homicide, or assault arising out of the operation of a motor vehicle	-11	-14
(9) (i) for each incident of driving during a period of alcohol-related license suspension or revocation	-10	-12
(ii) for each other incident of driving during a period of license suspension or revocation	-8	-10
(10) for each conviction or finding by the Commissioner's referee of a violation of section 392 of the Vehicle and Traffic Law	-3	-4
(11) for each other conviction of record for a moving violation	-2	-3

\*For each speeding violation of 25 miles per hour or more over the posted speed limit, add one point.

Paragraph (2) of subdivision (d) of Section 136.6 is amended to read as follows:

(2) Where a first conviction of any subdivision [(2)] of section 1192 of the Vehicle and Traffic Law and a finding of a chemical test refusal arise out of the same incident, only one of these two safety factors having equal weight is considered in a review of the total record because these safety factors are not independent of each other.

Section 136.9 is amended to read as follows:

136.9 Effect of completion of the alcohol and drug rehabilitation program. The successful completion of the article 21 alcohol and drug rehabilitation program, where no intervening safety factors occurred between the date such person entered the program and the date the application for a license is made and with no subsequent incidents of operating a motor vehicle while under the influence of alcoholic beverages or drugs, shall be considered evidence of rehabilitative effort satisfactory for the purposes of this Part. *Provided, however, if enrollment in the program based upon the plea bargaining provisions of Vehicle and Traffic Law section*

1192(10)(a)(ii) and 1192(10)(d), and if such person would not otherwise have been eligible for enrollment in the program pursuant to section 1196(4) of such law, then completion of the program, may not, in the commissioner's discretion, be deemed evidence of rehabilitative effort.

**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. MTV-17-07-00006-P, Issue of April 25, 2007. The emergency rule will expire July 28, 2007.

**Text of emergency 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

**Regulatory Impact Statement**

1. Statutory authority: Section 215(a) of the Vehicle and Traffic Law authorizes the Commissioner to enact regulations to control the exercise of the powers of the Department of Motor Vehicles. Section 510(6)(a) of such law provides that where a license revocation is mandatory, no new license shall be issued except in the discretion of the Commissioner. Section 1193(2)(c)(1) of such law provides that where a license is revoked pursuant to an alcohol-related conviction, no new license shall be issued after the expiration of the minimum revocation period, except in the discretion of the Commissioner. Section 1192(10)(a) and (d) of such law relate to plea bargaining provisions in driving while intoxicated prosecutions and the requirement to attend the Drinking Driver Program. Section 1196(4) of such law relates to eligibility to enroll in the Drinking Driver Program. Section 1196(5) of such law provides that completion of the Drinking Driver Program may, in the discretion of the Commissioner, serve to terminate the suspension or revocation arising out of the alcohol-related conviction. Section 1196(7)(a) of such law relates to conditional license eligibility for those persons convicted of alcohol-related offenses.

2. Legislative objectives: This proposal is consistent with legislative objectives that grant the Commissioner of Motor Vehicles broad discretion in establishing criteria for the restoration of driver's licenses and the relicensing of individuals whose licenses have been suspended or revoked for alcohol-related offenses. It is also in accord with legislative objectives that afford the Commissioner discretion in determining eligibility for a conditional license, a limited use license issued to persons convicted of alcohol-related offenses. Currently, a person convicted of alcohol-related offenses may enroll in the Drinking Driver Program (DDP), as set forth in section 1196 of the Vehicle and Traffic Law, if such person has not, within the preceding five years, been convicted of an alcohol related offense or participated in the DDP. Under Chapter 732 of the Laws of 2006, section 1192(10) of such law is amended to provide that under certain plea bargaining provisions involving alcohol-related offenses, the court must require the defendant to enroll in the DDP even if such person is not otherwise eligible. Under current law, when a person successfully completes DDP, the suspension or revocation arising out of the alcohol conviction is terminated. Under this proposal, DDP completion would not serve to terminate the suspension or revocation for individuals who are not otherwise DDP eligible. This accords with the Legislature's intent, and DMV's current policy, that multiple alcohol offenders must show proof of rehabilitation in order to have their licenses restored.

3. Needs and benefits: These regulations are necessary to put the public on notice that multiple alcohol-related offenders who are not otherwise eligible for the DDP, pursuant to Vehicle and Traffic Law section 1196(4), shall not have their licenses restored upon completion of DDP, if enrollment for DDP is mandated by a court pursuant to the plea bargaining provision in Vehicle and Traffic Law section 1192(10). Currently, a person convicted of alcohol-related offenses may enroll in the Drinking Driver Program (DDP), as set forth in section 1196 of the Vehicle and Traffic Law, if such person has not, within the preceding five years, been convicted of an alcohol related offense or participated in the DDP. Under Chapter 732 of the Laws of 2006, section 1192(10) of such law is amended to provide that under certain plea bargaining provisions involving alcohol-related offenses, the court must require the defendant to enroll in the DDP even if such person is not otherwise eligible under section 1196(4). Under current law, when a person successfully completes DDP, the suspension or revocation arising out of the alcohol conviction is terminated. Under this proposal, DDP completion would not serve to terminate the suspension or revocation for individuals who are not otherwise DDP eligible. In addition, under this proposal, and consistent with current law, a person not eligible for the DDP would not be eligible for a conditional license.

This regulation is important because it provides, in accordance with current DMV policies and reapplication procedures, as set forth in Parts

134 and 136, that a recidivist DWI offender who is not eligible for the DDP must show proof of rehabilitation from an approved treatment provider prior to re-licensure. It would be contrary to public safety if a multiple DWI offender who completed DDP twice within five years is permitted to be re-licensed without having been evaluated by a treatment provider with expertise in alcohol counseling. In addition, under Part 136, applicants for re-licensure are denied a license if they have 25 or more negative units accumulated within a specified time period. Negative units are assigned for various violations of the Vehicle and Traffic Law. This amendment adds the two new alcohol offenses, Vehicle and Traffic Law 1192(2-a) and (4-a), to the offenses that trigger negative units. Thus, these amendments are necessary to protect the public from drivers who pose a significant high-way risk.

4. Costs: There are no costs to the public, local government or to this agency. The Department already has staff and procedures in place to process multiple offenders applying for re-licensure.

Source: DMV's Driver Improvement Bureau.

5. Local government mandates: This proposal does not impose any mandates upon local governments.

6. Paperwork: This proposal does not impose any additional paperwork requirements on the Department.

7. Duplication: This proposal does not duplicate, overlap or conflict with any relevant rule or legal requirement of the State and federal governments.

8. Alternatives: No significant alternatives were considered. 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: Immediate with adoption of this rule.

**Regulatory Flexibility Analysis**

A RFA is not attached because this rule will not have a disproportionate impact on small businesses or local governments, nor will it impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on small businesses or local governments.

**Rural Area Flexibility Analysis**

A Rural Area Flexibility Analysis is not submitted with this proposal because it will have no adverse or disproportionate impact on the rural areas of the State.

**Job Impact Statement**

A Job Impact Statement is not submitted with this statement because it will not have an adverse impact on job creation or development in New York State.

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## Public Service Commission

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### NOTICE OF ADOPTION

**Approval of New Types of Gas Meters and Accessories**

**I.D. No.** PSC-44-06-00020-A

**Filing date:** April 25, 2007

**Effective date:** April 25, 2007

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

**Action taken:** The commission, on April 18, 2007, approved an application by New York State Gas and Electric for the use of the Orion integral transmitter, manufactured by Badger Meter Incorporated.

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

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

**Purpose:** To permit gas utilities in New York State to use Badger Meter Incorporated, Orion integral transmitters.

**Substance of final rule:** The Commission adopted an order approving a petition by New York State Electric and Gas Corporation for the use of the Orion Integral Transmitter, manufactured by Badger Meter Incorporated, to be used for gas revenue billing applications for residential and commercial installations in New York State.

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

**Text of rule may be obtained from:** Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-

1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (06-G-1077SA2)

**NOTICE OF ADOPTION**

**Investment and Outreach Program by Rochester Gas and Electric Corporation**

**I.D. No.** PSC-01-07-00020-A

**Filing date:** April 25, 2007

**Effective date:** April 25, 2007

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

**Action taken:** The commission, on April 18, 2007, adopted an order allowing Rochester Gas and Electric Corporation (RG&E) to add an Investment and Outreach Program to its portfolio of electric economic development programs.

**Statutory authority:** Public Service Law, sections 5(1)(b), 65(1)-(3), 66(1), (3), (5), (10) and (12-b)

**Subject:** Addition of an Investment and Outreach Program to RG&E's economic development programs.

**Purpose:** To approve the addition of an Investment and Outreach Program to RG&E's economic development programs.

**Substance of final rule:** The Public Service Commission adopted an order authorizing Rochester Gas and Electric Corporation (RG&E) to add an Investment and Outreach program to the portfolio of electric economic development programs, subject to the terms and conditions of the order.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (02-E-0198SA10)

**NOTICE OF ADOPTION**

**Elimination of the Annual Limit on Non-Rate Incentives by Rochester Gas and Electric Corporation**

**I.D. No.** PSC-04-07-00009-A

**Filing date:** April 25, 2007

**Effective date:** April 25, 2007

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

**Action taken:** The commission, on April 18, 2007, adopted an order allowing Rochester Gas and Electric Corporation (RG&E) to allocate funds from its existing \$13 million annual electric economic development budget to electric non-rate economic development programs.

**Statutory authority:** Public Service Law, sections 5(1), 65(1)-(3), 66(1), (3), (5), (10) and (12-b)

**Subject:** Elimination of the annual limit on non-rate incentives under RG&E's economic development programs.

**Purpose:** To approve the elimination of the annual limit on non-rate incentives under RG&E's economic development programs.

**Substance of final rule:** The Public Service Commission adopted an order allowing Rochester Gas and Electric Corporation to allocate funds from its existing \$13 million annual electric economic development budget to electric non-rate economic development programs, subject to the terms and conditions of the order.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (02-E-0198SA11)

**NOTICE OF ADOPTION**

**Transfer of Water Supply Assets and Electronic Tariff Filings by Adrian's Acres West Water Company, Inc., et al.**

**I.D. No.** PSC-04-07-00017-A

**Filing date:** April 27, 2007

**Effective date:** April 27, 2007

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

**Action taken:** The commission, on April 18, 2007, adopted an order approving the transfer of water supply assets of Adrian's Acres West Water Company, Inc. to Upper Porter Mountain Water Association and Lower Porter Mountain Water Association, and the electronic tariff schedules, P.S.C. No. 1 — Water.

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

**Subject:** Transfer of water supply assets and electronic tariff filing.

**Purpose:** To transfer the water supply assets of Adrian's Acres West Water Company, Inc. to Upper Porter Mountain Water Association and Lower Porter Mountain Water Association, and approve electronic tariff schedules, P.S.C. No. 1 — Water for Upper Porter Mountain Water Association and Lower Porter Mountain Water Association.

**Substance of final rule:** The Commission adopted an order approving the Joint Petition to transfer the water supply assets Adrian's Acres West Water Company, Inc. to Upper Porter Mountain Water Association and Lower Porter Mountain Water Association, and the electronic tariff schedule, P.S.C. No. 1 — Water, to become effective May 1, 2007, subject to the terms and conditions set forth in the order.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (06-W-1187SA1)

**PROPOSED RULE MAKING  
HEARING(S) SCHEDULED**

**Major Rate Filing by National Fuel Gas Distribution Corporation**

**I.D. No.** PSC-20-07-00019-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 or modify, in whole or in part, a proposal filed by National Fuel Gas Distribution Corporation to make various changes in the rates, charges, rules and regulations contained in its schedule for gas service, P.S.C. No. 8 — Gas.

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

**Subject:** Major rate filing.

**Purpose:** To increase annual gas revenues by approximately \$52 million or 6.4 percent (increase delivery rates by approximately 19 percent).

**Public hearing(s) will be held at:** 1:00 p.m., July 11, 2007\* at City Hall, 65 Niagara Sq., Rm. 1417, Buffalo, NY; and 6:30 p.m., July 11, 2007\* at

Niagara Falls High School, Amphitheater, 4455 Portage Rd., Niagara Falls, NY.

\*There could be requests to reschedule the hearings. Notification of any subsequent scheduling changes will be available at the DPS Web Site ([www.dps.state.ny.us](http://www.dps.state.ny.us)) under Case 07-G-0141.

**Accessibility:** All public hearings have been scheduled at places reasonably accessible to persons with a mobility impairment.

**Interpreter Service:** Interpreter services will be made available to deaf persons, at no charge, upon written request submitted within reasonable time prior to the scheduled public hearing. The written request must be addressed to the agency representative designated in the paragraph below.

**Substance of proposed rule:** The Commission is considering National Fuel Gas Distribution Corporation's request to increase annual gas revenues by approximately \$52 million or 6.4%. Rates for bundled residential service would increase approximately 7%, transportation service rates would increase on an average of 18% and general service rates would decrease slightly.

**Text of proposed rule may be obtained from:** Elaine Lynch, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 486-2660

**Data, views or argument 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:** Five days after the last scheduled public hearing.

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(07-G-0141SA1)

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

**Interconnection Agreement between Verizon New York Inc. and Fiber Technologies, LLC**

**I.D. No.** PSC-20-07-00014-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Verizon New York Inc. and Fiber Technologies Networks, LLC for approval of an interconnection agreement executed on March 29, 2007.

**Statutory authority:** Public Service Law, section 94(2)

**Subject:** Interconnection of networks for local exchange service and exchange access.

**Purpose:** To review the terms and conditions of the negotiated agreement.

**Substance of proposed rule:** Verizon New York Inc. and Fiber Technologies Networks, LLC have reached a negotiated agreement whereby Verizon New York Inc. and Fiber Technologies Networks, LLC will interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services and Exchange Access to their respective customers. The Agreement establishes obligations, terms and conditions under which the parties will interconnect their networks lasting until May 28, 2009, or as extended.

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

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(07-C-0431SA1)

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

**Interconnection Agreement between Verizon New York Inc. and Spectravoice, Inc.**

**I.D. No.** PSC-20-07-00015-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Verizon New York Inc. and Spectravoice, Inc. for approval of an interconnection agreement executed on March 22, 2007.

**Statutory authority:** Public Service Law, section 94(2)

**Subject:** Interconnection of networks for local exchange service and exchange access.

**Purpose:** To review the terms and conditions of the negotiated agreement.

**Substance of proposed rule:** Verizon New York Inc. and Spectravoice, Inc. have reached a negotiated agreement whereby Verizon New York Inc. and Spectravoice, Inc. will interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services and Exchange Access to their respective customers. The Agreement establishes obligations, terms and conditions under which the parties will interconnect their networks lasting until March 21, 2009, or as extended.

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

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(07-C-0434SA1)

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

**Tariff Revisions and Making Rates Permanent by New York State Electric & Gas Corporation**

**I.D. No.** PSC-20-07-00016-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 or modify, in whole or in part, a petition by New York State Electric & Gas Corporation (NYSEG) seeking rehearing of the commission's order directing tariff revisions and making rates permanent, issued in this proceeding on Feb. 16, 2007.

**Statutory authority:** Public Service Law, sections 2(3), (12), (13), 22, 65(1), 66(4) and (12)

**Subject:** Petition filed by NYSEG for rehearing of the commission's order in Case 05-E-1222, issued on Feb. 16, 2007.

**Purpose:** To determine whether to approve or reject or modify, in whole or in part, a petition filed by NYSEG for rehearing of the commission's order in Case 05-E-1222, issued on Feb. 16, 2007.

**Substance of proposed rule:** The Commission is considering whether to approve or reject or modify, in whole or in part, a petition by New York State Electric & Gas Corporation (NYSEG) seeking rehearing of the Commission's order directing tariff revisions and making rates permanent, issued in this proceeding on February 16, 2007.

**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-E-1222SA8)

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

**Mini Rate Filing by the Village of Greene**

**I.D. No.** PSC-20-07-00017-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by the Village of Greene to make various changes in the rates, charges, rules and regulations contained in its schedule for electric service, P.S.C. No. 1 — Electricity, to become effective Oct. 1, 2007.

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

**Subject:** Mini rate filing.

**Purpose:** To increase annual electric revenues by approximately \$162,205 or 9.7 percent.

**Substance of proposed rule:** The Commission is considering the Village of Greene's (the Village) request to increase its annual electric revenues by approximately \$162,205 or 9.7%. The Village's proposal includes an increase to the customer charge from \$2.00 per month to \$7.00 per month for S.C. No. 1 - Residential and from \$3.00 to \$10.00 per month for S.C. No. 2 - General Service Non-Demand Metered. The Village proposed to charge space heating customers for usage over 2200 kWh a rate of 7.0 cents per kWh as part of an Electric Heat Energy Conservation Provision that would apply to S.C. Nos. 1 and 2. The Village also proposes to increase S.C. No. 5 - Large General Service revenues by 19.4%. The proposed filing has an effective date of October 1, 2007. The Commission may approve, reject or modify, in whole or in part, the Village of Greene's request.

**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-E-0486SA1)

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

**Carrying Costs by St. Lawrence Gas Company, Inc.**

**I.D. No.** PSC-20-07-00018-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 whether to approve or reject, in whole or in part or modify a request by St. Lawrence Gas Company, Inc. (St. Lawrence) to include carrying costs among various incremental expenses allowed to be deferred until rates are set in the next rate case.

**Statutory authority:** Public Service Law, sections 4(1) and 66(1), (4), and (12)

**Subject:** A request by St. Lawrence to include carrying costs among various incremental expenses allowed to be deferred until rates are set in the next rate case.

**Purpose:** To consider a request by St. Lawrence to include carrying costs among various incremental expenses allowed to be deferred until rates are set in the next rate case.

**Substance of proposed rule:** By Petition filed April 26, 2007, St. Lawrence Gas Company, Inc. (the Company) seeks the Public Service Commission's permission to include, as in addition to the previously-allowed deferral amount, carrying costs at the Company's pre-tax rate of return of 10.93% until rates are set in its next rate case.

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

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(06-G-1471SA2)

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## Racing and Wagering Board

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

**Use of the Whip**

**I.D. No.** RWB-20-07-00006-P

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

**Proposed action:** Amendment of section 4117.8 of Title 9 NYCRR.

**Statutory authority:** Racing, Part-Mutuel Wagering and Breeding Law, sections 101 and 301

**Subject:** Ensure public confidence in the driver's urging of the harness racehorse by permitting the conventional and reasonable use of the whip at one-quarter of a mile before the finish of the race instead of the current restriction at one-eighth of one-mile before the finish.

**Purpose:** To ensure the board to preserve the public's confidence in the integrity of the sport, while generating reasonable revenue for the support of government. The proposed rule amendment removes a burdensome restriction on the timing when whipping is authorized—from one-eighth of a mile before the finish to one-quarter of a mile before the finish. Thus, the public is assured that the horse is being urged to the best of its ability by its driver. Judges at the racetracks and fans have advocated this amendment which is a commonly accepted industry standard. Other provisions of this section guard against excessive or brutal use of the whip, including the requirement that mandates that each horse be visually inspected after each race. Often, horses respond to the motion and sound of the whip against the sulky, not necessarily to contact with horseflesh.

**Text of proposed rule:** Section 4117.8(c)(3) is amended to read as follows:

Section 4117.8 Whip, goads and head poles. Drivers shall keep a line in each hand from the start of the race [until the head of the stretch finishing the race] until one-quarter of one mile before the finish of the race.

**Text of proposed 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, (518) 395-5400, e-mail: [gpronti@racing.state.ny.us](mailto:gpronti@racing.state.ny.us)

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

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

**Regulatory Impact Statement**

1. Statutory Authority and Legislative Objectives of Such Authority: The Board is authorized to promulgate these rules pursuant to Racing Pari-Mutuel Wagering and Breeding Law (“RPMWBL”) sections 101 and 301. Under section 101, the Board has general jurisdiction over all horse racing activities and all pari-mutuel thoroughbred racing activities. Section 301 of the RPMWBL authorizes the Board to supervise generally all harness race meetings in New York at which pari-mutuel betting is conducted, and to adopt rules and regulations to carry into effect the provisions of sections 222 through 705 of the RPMWBL. Further, section 301 provides that the board shall prescribe rules and regulations for effectually preventing the use of improper devices to affect the speed of harness horses in races.

2. Legislative Objectives: To enable the New York State Racing and Wagering Board to preserve the integrity of pari-mutuel racing, while generating reasonable revenue for the support of government.

3. Needs and Benefits: The proposed amendment to NYCRR section 4117.8 allows drivers to make use of the whip at one-quarter of a mile from the finish of the race. The existing rule allows whipping from one-eighth of a mile from the finish line. The current rule diminishes the public perception that the driver is doing all he or she can to win the race. Judges at the racetracks in the state, as well as fans, have expressed concern that the current rule is too restrictive and does not allow enough time to urge the horse in the race. In harness racing, the motion of the whip and the noise it makes when it hits the sulky have an impact on the horse’s performance. If the whip makes contact with horseflesh, it can only be done without resulting visible injury. The board strengthened its oversight of the use of the whip in 1998 when part 4117.8 was originally adopted, specifying that the whip can only be used in a conventional manner; that the use of the whip is confined to an area above and between the sulky shafts, to include the sulky shafts and the outside wheel discs; and, that brutal, excessive, unnecessary or indiscriminate use of the whip, is prohibited. There is a mandatory visual inspection of each horse following each race for evidence of unconventional use of the whip under the supervision of the judges. In thoroughbred racing, the whip is allowed at any time during the race. In several other harness racing jurisdictions, there are no rules regarding the timing of the use of the whip during the race.

Costs:

(a) Costs to regulated parties for the implementation of and continuing compliance with the rule: None.

(b) Costs to the agency, the state and local governments for the implementation and continuation of the rule: None.

(c) The information, including the source(s) of such information and the methodology upon which the cost analysis is based: See (d) below.

(d) Where an agency finds that it cannot provide a statement of costs, a statement setting forth the agency’s best estimate, which shall indicate the information and methodology upon which the estimate is based and the reason(s) why a complete cost statement cannot be provided. There will be no cost to the agency.

5. Local Government Mandates: None. See above.

6. Paperwork: None.

7. Duplication: None.

8. Alternatives:

This alternative was the only one presented to the board by the judges at the harness racetracks and advocated by the fans. The board could remove any restriction on the use of the whip during the race, but determined that this recommendation reasonably maximized the potential performance of the horse in a race, and still barred excessive use of the whip.

9. Federal Standards: None.

10. Compliance Schedule: Once adopted, the rule can be implemented immediately.

**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 it merely specifies the distance before the finish of a race when a whip can be used by the driver to urge the harness horse; at one-quarter of a mile before the finish instead of at one-eighth of a mile before the finish. These proposed 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 requirements on small businesses in rural or urban areas nor on employment opportunities. The rule simply ensures the confidence of the betting

public that the horse is being urged by reasonable and conventional methods, and therefore assists to protect jobs and the robust horse racing and breeding economy in New York State.

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

**Wagering While on Duty**

**I.D. No.** RWB-20-07-00007-P

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

**Proposed action:** Amendment of sections 4122.10 and 4005.4 of Title 9 NYCRR.

**Statutory authority:** Racing, Part-Mutuel Wagering and Breeding Law, sections 101 and 301

**Subject:** Pari-mutuel corporation employees prohibited from making wagers while on duty.

**Purpose:** To prohibit employees who are employed in the pari-mutuel department of any corporation or association licensed to conduct harness racing or thoroughbred racing in the State of New York from betting on duty. The rule is intended to avoid the actual or apparent misconduct of a pari-mutuel employee given his or her unique position in the pari-mutuel wagering system.

**Text of proposed rule:** Section 4005.4 of 9E NYCRR is amended to read as follows:

4005.4. Pari-mutuel employees forbidden to bet.

No employee of the pari-mutuel department of any licensed association shall[, during the period of his said employment, bet upon the outcome of any race conducted by any such licensed association,] *be permitted to bet during those periods of any day on which such person is actually working in such capacity.*

Section 4122.10 of 9E NYCRR is amended to read as follows:

4122.10 Method of wagering

The method of selling pari-mutuel tickets shall be approved by the Harness Racing Commission and the State Tax Commission. No employee of a licensed track assigned to or working in the pari-mutuel department shall accept a wager from any person except through the track’s pari-mutuel windows and in the regular course of business. *No employee of the pari-mutuel department of any licensed corporation or association shall be permitted to bet during those periods of any day which such person is actually working in such capacity.*

**Text of proposed 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, (518) 395-5400, e-mail: info@racing.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**

(a) STATUTORY AUTHORITY: Racing, Pari-Mutuel Wagering and Breeding Law, sections 101 and 301. Section 101 of the Racing, Pari-Mutuel Wagering and Breeding Law vests the Board with general jurisdiction over all horse racing and all pari-mutuel wagering activities in New York State. Section 301 grants the Board the authority to supervise generally all harness race meetings in New York State at which pari-mutuel betting is conducted and the authority to adopt rules accordingly.

(b) LEGISLATIVE OBJECTIVES: This proposed amendment advances the legislative objective of regulating the conduct of pari-mutuel racing 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 rule is needed to prevent the apparent or actual improprieties that occur when an employee of the pari-mutuel division of a harness or thoroughbred racing track. While wagering on track races by employees of the pari-mutuel division of a thoroughbred racing track is currently prohibited by 9E NYCRR 4005.4, this amendment would expand that rule to prohibit such employees from wagering on simulcast races. Both the thoroughbred rule and the harness rule will be consistent with each other.

The pari-mutuel division is responsible for accepting wagers, managing cash, paying holders of winning pari-mutuel tickets, and generally interacting with the public at a race track’s betting windows.

A pari-mutuel window teller occupies a unique position of trust in the eyes of the public. In addition to the obvious fact that a pari-mutuel teller is responsible for handling tens of thousands of dollars and day and entering complex wagers into a computer, the window teller is often seen by the public as a racing insider. Whether real or perceived, the public sees the pari-mutuel teller as someone who may have access to exclusive wagering information regarding horses or betting patterns in a any given race. If the pari-mutuel employee is allowed to place wagers while on duty, it may appear that the teller is exploiting his position for personal gain, thereby eroding public confidence in pari-mutuel wagering in general.

The prohibition against wagering by window tellers is also intended to prohibit a practice known as "10 percenting." Certain individuals are disqualified from pari-mutuel wagering due to the fact that they may be persons with a criminal history or association. In order to evade detection, these excluded persons find willing pari-mutuel tellers who covertly handle their wagers in return for a 10 percent fee. While it may appear that the teller is processing a wager for himself, he is at best circumventing legitimate rules designed to exclude criminal elements, and at worst aiding and abetting criminal enterprises. This rule will compliment Board Rule 4122.10, which states that "No employee of a licensed track assigned to or working in the pari-mutuel department shall accept a wager from any person except through the track's pari-mutuel window and in the regular course of business."

Monticello Raceway has already adopted its own policy of prohibiting raceway employees from betting at the track.

(d) COSTS: There are no projected costs to regulated persons or state and local governments associated with the adoption of this rule. As is apparent from the nature of this rule, there are no costs imposed on track associations, and the rule will prohibit certain types of expenditures by harness track employees and therefore no costs are imposed.

(e) PAPERWORK: There will be no new paperwork created by this prohibition.

(f) LOCAL GOVERNMENT MANDATES: Since the New York State Racing Wagering Board is solely responsible for the regulations of pari-mutuel wagering activities in the State of New York, there is no program, service, duty or responsibility imposed by the rule upon any county, city, town, village, school district, fire district or other special district.

(g) DUPLICATION: There are no relevant rules or legal requirements of the state and federal governments that duplicate, overlap or conflict with the amendment of Board Rule.

(h) ALTERNATIVE APPROACHES: The other alternative would be to allow certain track employees to place bets while in duty. This would be counterproductive to the goals stated above.

(i) FEDERAL STANDARDS: There are no federal standards for pari-mutuel wagering on harness races in New York State.

(j) COMPLIANCE SCHEDULE: The rule would be effective immediately upon publication of the Notice of Adoption in the *State Register*.

#### **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 addresses the wagering activities of harness and thoroughbred track employees. It does not diminish their substantive job duties or their opportunity to earn a living. The rule prohibits an employee of the pari-mutuel wagering division of a harness or thoroughbred racetrack from wagering on races while in duty. The rule does not prohibit them from wagering altogether. The employees can still wager when off-duty or at other pari-mutuel wagering venues. Consequently, as is apparent from the nature of rule, the rule neither affect small business, local governments, job nor rural areas. Prohibiting wagering activities of part-mutuel wagering employees does not impact upon a small business pursuant to such definition in the State Administrative Procedure Act § 102(8). Nor does it affect employment. The proposal will not impose an adverse economic impact on reporting, recordkeeping or other compliance requirements 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.

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

#### **Single-Service Use and Disposal of Syringes and Needles**

**I.D. No.** RWB-20-07-00008-P

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

**Proposed action:** Addition of sections 4120.16 and 4043.11 to Title 9 NYCRR.

**Statutory authority:** Racing, Pari-Mutuel Wagering and Breeding Law, sections 101 and 301

**Subject:** Single-service use and disposal of syringes and needles used in the administration of equine medication at race tracks.

**Purpose:** To prevent the inadvertent administration of a prohibited or harmful drug to a horse, which may affect the health or performance of a race horse. The purpose of the rule is also to prevent the contamination of the horse's blood, which could result in a positive drug test and the subsequent disqualification and penalty for a drug positive.

**Text of proposed rule:** New section 4120.16 is added to read:

*4120.16 Use and disposal of hypodermic syringes and needles.*

*To ensure drug testing accuracy, all hypodermic syringes and needles may be used only once by a track or practicing veterinarian. The collection, security and disposal of the used syringes and needles are the responsibility of a track or practicing veterinarian.*

New Section 4043.11 is added to read:

*4043.11 Use and disposal of hypodermic syringes and needles.*

*To ensure drug testing accuracy, all hypodermic syringes and needles may be used only once by a track or practicing veterinarian. The collection, security and disposal of the used syringes and needles are the responsibility of a track or practicing veterinarian.*

**Text of proposed rule and any required statements and analyses may be obtained from:** Gail Pronti, Secretary to the Board, Racing and Wagering Board, One Broadway Center, Schenectady, NY 12305, (518) 395-5400, e-mail: info@racing.state.ny.us

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

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

#### **Regulatory Impact Statement**

1. Statutory authority: Racing, Pari-Mutuel Wagering and Breeding Law, sections 101 and 301. Under Section 101, the Board has general jurisdiction over all horse racing activities and all pari-mutuel thoroughbred racing activities. Section 301 authorizes the Board to prescribe rules and regulations preventing the use of improper devices, the administration of drugs or stimulants or other improper acts for the purpose of affecting the speed of harness horses in races in which they are about to participate.

2. Legislative objectives: To enable the Board to assure the public's confidence and preserve the integrity of racing at pari-mutuel betting tracks by regulating the use of drugs and medications in race horses so that their natural racing ability is not compromised or enhanced by such use.

3. Needs and benefits: This rule amendment is necessary to prevent the contamination of medications administered to a horse via syringe. If a syringe is used to administer two different types of medications at different times, the residue from the first medication may contaminate the second or any subsequent medication. This rule would require single-service syringes for all races horses. The rule is necessary to prevent inadvertent administration of a prohibited or harmful drug to a horse, which may affect the health or performance of a race horse. The rule is also necessary to prevent the contamination of the horse's blood, which could result in a positive drug test and the subsequent disqualification and penalty for a drug positive. The public benefit would be to ensure that horses have received a unadulterated dosage of the proper medication, and their performance has not been helped or hindered by residual contamination of a previous medication contained in a syringe.

4. Costs:

(a) Costs to regulated parties for the implementation of and continuing compliance with the rule: The cost of a 12-cc single-service syringe and needle is approximately 30 cents maximum. A 12-cc single-service syringe costs between 15 and 20 cents. A single-service needle costs between 5 and 10 cents. Syringes are typically used for on-premises administration of furosemide while the horse is at the track. The total cost of using a single-service syringe, assuming a nine-horse field and a 10 race card, would be \$27 per day. According to Dr. John Fairburn, a veterinarian at Monticello Raceway, the alternative would be autoclaving syringes for repeat use. While it's not possible to determine the exact daily cost of autoclaving based upon the amount of time needed for each autoclaving procedure, type of syringe to be cleaned, and the type of medication to be purged from the syringe, Dr. Fairburn said that autoclaving is more expensive and time-consuming than using single service syringes.

(b) Costs to the agency, the state and local governments for the implementation and continuation of the rule: None.

(c) The information, including the source(s) of such information and the methodology upon which the cost analysis is based: Dr. John Fairburn, Board veterinarian, Monticello Raceway.

(d) The Board cannot provide an exact estimate of costs for the reasons listed above. The Board's estimated cost per day for implementing this rule would be \$27 per day at each track, based upon the information cited above.

5. Local government mandates: None. Local governments do not regulate horse racing in the State of New York.

6. Paperwork: None. Veterinarians would use the existing paperwork requirements for the administration of equine medication.

7. Duplication: None. The New York State Racing and Wagering Board is the only entity whose duty is to regulate horse racing in the State of New York, and there are no other controlling rules or regulations.

8. Alternatives: The only alternative is to allow autoclaving of previously used syringes. Autoclaving employs high temperature to sanitize medical equipment. This wouldn't be cost effective when compared with single-service syringes, as cited above. In addition, the Board would need to ensure that all autoclaving has adequately purged residual medications to achieve the purpose of this rule, which the Board is not equipped to do. It's more practical to require single-service syringes than to inspect the thoroughness of an autoclaved syringe.

9. Federal standards: None.

10. Compliance schedule: Once adopted, the rule can be implemented immediately upon publication in the *State Register*.

***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 it places a requirement for the single use of hypodermic syringes and disposal thereof by track or practicing veterinarians treating racehorses. These proposed amendments do not impact upon State Administrative Procedure Act section 102(8), nor do they affect employment. It will not impose an adverse economic impact on reporting, recordkeeping or other compliance requirements on small businesses in rural or urban areas nor on employment opportunities. The proposals help to prevent contamination of blood and urine samples of racehorses. By removing possible pathways of contamination, the integrity of the state's drug testing program is improved. Thus, these recommendations assist to protect jobs and the robust horse racing and breeding economy in New York State.