

RULE MAKING ACTIVITIES

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

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

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

Department of Agriculture and Markets

NOTICE OF ADOPTION

State Aid to Soil and Water Conservation Districts

I.D. No. AAM-29-07-00018-A

Filing No. 1036

Filing date: Oct. 2, 2007

Effective date: Oct. 17, 2007

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

Action taken: Amendment of Part 363 of Title 1 NYCRR; and repeal of Part 4400 of Title 21 NYCRR.

Statutory authority: Soil and Water Conservation Districts Law, sections 4 and 11-a

Subject: Procedures to provide State aid to soil and water conservation districts.

Purpose: To provide a mechanism for the distribution of financial assistance, within available funds, to soil and water conservation districts.

Text or summary was published in the notice of proposed rule making, I.D. No. AAM-29-07-00018-P, Issue of July 18, 2007.

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

Text of rule and any required statements and analyses may be obtained from: Ronald Kaplewicz, Executive Director, Soil and Water Conservation Committee, Department of Agriculture and Markets, 10B Airline Dr., Albany, NY 12235, (518) 457-3738

Assessment of Public Comment

Public Comments were received from the Fulton County Soil & Water Conservation District and the New York Farm Bureau.

The Fulton County Soil and Water Conservation District Board of Directors (Fulton County S&WCD Board), in comments dated July 19, 2007, questioned the need for more regulations and additional paperwork, and recommended that the additional funds be distributed to all of the soil and water conservation districts equally. The Board further noted that its district needs more employees and that the proposed regulations do not allow the hiring of additional personnel.

The Department and State Soil and Water Conservation Committee (State Committee) appreciate the Fulton County S&WCD Board's comments. Soil and Water Conservation Districts Law (SWCDL) § 11-a(1)(c) directs that the additional funds be distributed on a competitive basis pursuant to performance standards to be developed by the Department and the State Committee. The statute does not authorize the distribution of the funds equally to all districts as suggested by the Board. Pursuant to SWCDL § 11-a(1)(c) these funds (within amounts available) shall be provided to soil and water districts for the purposes of carrying out projects for the conservation of the soil and water resources of the State, and for the improvement of water quality, control and prevention of soil erosion and the prevention of floodwater and sediment damages, among other purposes. The proposed amendments to 1 NYCRR Part 363 and the repeal of part 4400 of Title 21 NYCRR are consistent with SWCDL § 11-a(1)(c). The additional paperwork to apply for financial assistance will be minimal and can be completed using existing staff.

In a letter dated September 4, 2007, the New York Farm Bureau (Farm Bureau) expressed support for the proposed regulation. Farm Bureau indicates it is a strong supporter of the increased funding for soil and water conservation districts. Farm Bureau encourages the State Committee, in establishing annual priorities for the aid distribution, to focus funds on district efforts implementing voluntary, incentive-based environmental improvement programs on farms. The Department and the State Committee appreciate the Farm Bureau's support for and input in the drafting of the proposed regulations. The proposed regulations, 1 NYCRR Part 363 and the repeal of part 4400 of Title 21 NYCRR, are consistent with SWCDL § 11-a(1)(c). SWCDL § 11-a(1)(c) provides that the additional funds shall be distributed to soil and water conservation districts on a competitive basis based upon performance standards to be established by the Commissioner and the State Committee. SWCDL § 11-a(1)(c) lists four performance standards and describes the types of projects and activities for which the funds may be used. The proposed regulations establish a mechanism whereby the State Committee, within amounts available, annually allocates the funds to the four performance standard categories. The Department and State Committee will take the Farm Bureau's suggestion under advisement as it considers the annual allocation of funds. The proposed regulations provide that the funds shall annually be allocated to the four performance standard categories, distributed to the districts based upon performance within those categories and the funds are to be utilized for projects and activities as described in SWCDL § 11-a(1)(c).

Office of Children and Family Services

EMERGENCY RULE MAKING

Market Rates for Subsidized Child Care

I.D. No. CFS-42-07-00006-E

Filing No. 1031

Filing date: Oct. 1, 2007

Effective date: Oct. 1, 2007

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

Action taken: Amendment of section 415.9 of Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20(3)(d), 34(3)(f), 410 and 410-x(4)

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

Specific reasons underlying the finding of necessity: The adoption of these regulations on an emergency basis is necessary for the preservation of the health, safety and welfare of children in need of subsidized child care services in this State. Section 410-x(4) of the Social Services Law requires that the market rates be sufficient to ensure equal access to eligible children to comparable day care available to children whose parents are not eligible to receive a subsidy. The current market rates were initially issued in October, 2005 and reflect rate data collected in 2005. Accordingly, the current rates are artificially low. The adjustments to the market rates are needed to address the escalating costs of providing child care services.

Continuing to maintain the existing rates could result in subsidized families losing their child care arrangements or being unable to find appropriate child care. As a result, such families could be forced to place their children in child care settings that are inappropriate or unsafe for their children, leave their children unsupervised, or leave their jobs or training programs. If they choose the latter option, the families may remain on public assistance for longer periods of time or return to public assistance. This would directly counter the overriding purpose of welfare reform to encourage families on public assistance to move into employment or training programs. Thus, the increases in the market rates are necessary to maintain and preserve the gains achieved for poor families under welfare reform. As a result of these regulations, public assistance recipients and other low income families will not have to decide between losing their employment income and placing their children in child care that is unsafe or inappropriate.

Delaying the adoption of these regulations would be contrary to the public interest because it could result in children from public assistance or other low income families receiving unhealthy or unsafe child care, or in persons leaving jobs or training programs and returning to public assistance, to the detriment of the public welfare system. Further, the Federal Administration for Children and Families has indicated that the New York State Child Care and Development Fund Plan cannot be approved unless child care market rates have been adjusted, based upon a market rate survey, effective October 1, 2007. Unless new market rates become effective on that date, the State's ability to use over \$650 million in Federal funds under CCDF and to transfer funds into CCDF for child care subsidies will be jeopardized. Therefore, it is necessary to adopt these regulations on an emergency basis.

Subject: Market rates for subsidized child care.

Purpose: To update the market rates social services districts can pay for subsidized child care.

Text of emergency rule: Section 415.9(j) is amended to read as follows and a new rate schedule is added to read as follows:

(1) Effective October 1, [2005] 2007, following are the local market rates for each social services district set forth by the type of provider, the age of the child and the amount of time the child care services are provided per week.

(2) The market rates are established in five groupings of social services districts. Except for districts noted as an exception in the market rate schedule, the rates established for a group apply to all districts in the designated group. The district groupings are as follows:

Group A: Nassau, Putnam, Rockland, Suffolk, Westchester
Group B: Columbia, Erie, Monroe, Onondaga, Ontario, Rensselaer, Saratoga, Schenectady, Tompkins, Warren

Group C: Allegany, Broome, Cattaraugus, Cayuga, Chautauqua, Chemung, Chenango, Clinton, Cortland, Delaware, Essex, Franklin, Fulton, Genesee, Greene, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Montgomery, Niagara, Oneida, Orleans, Oswego, Otsego, Schoharie, Schuyler, Seneca, St. Lawrence, Steuben, Sullivan, Tioga, Washington, Wayne, Wyoming, Yates

Group D: Albany, Dutchess, Orange, Ulster

Group E: Bronx, Kings, New York, Queens, Richmond

GROUP A COUNTIES:

Nassau, Putnam, Rockland, Suffolk, and Westchester DAY CARE CENTER

AGE OF CHILD

	<i>Under 1½</i>	<i>1½-2</i>	<i>3-5</i>	<i>6-12</i>
<i>WEEKLY</i>	\$314	\$280	\$250	\$262
<i>Exceptions:</i>				
<i>Westchester</i>	\$378	\$331	\$27	--
<i>DAILY</i>	\$70	\$62	\$55	\$54
<i>Exceptions:</i>				
<i>Nassau</i>	\$75	\$77	--	--
<i>Suffolk</i>	\$80	\$70	--	--
<i>Westchester</i>	\$75	\$70	\$58	--
<i>PART-DAY</i>	\$47	\$41	\$37	\$36
<i>Exceptions:</i>				
<i>Nassau</i>	\$50	\$51	--	--
<i>Suffolk</i>	\$53	\$47		
<i>Westchester</i>	\$50	\$47	\$39	--
<i>HOURLY</i>	\$8.88	\$9.48	\$8.81	\$9.17

REGISTERED FAMILY DAY CARE

AGE OF CHILD

	<i>Under 1½</i>	<i>1½-2</i>	<i>3-5</i>	<i>6-12</i>
<i>WEEKLY</i>	\$250	\$250	\$250	\$250
<i>Exceptions:</i>				
<i>Putnam</i>	\$300	\$275	\$278	--
<i>Suffolk</i>	\$260	\$263	--	--
<i>Westchester</i>	\$300	--	\$331	--
<i>DAILY</i>	\$56	\$56	\$55	\$50
<i>PART-DAY</i>	\$37	\$37	\$37	\$33
<i>HOURLY</i>	\$8.00	\$8.89	\$7.75	\$8.00

GROUP FAMILY DAY CARE

AGE OF CHILD

	<i>Under 1½</i>	<i>1½-2</i>	<i>3-5</i>	<i>6-12</i>
<i>WEEKLY</i>	\$260	\$255	\$250	\$250
<i>Exceptions:</i>				
<i>Rockland</i>	--	--	\$261	--
<i>Westchester</i>	\$275	\$275	\$266	\$276
<i>DAILY</i>	\$58	\$56	\$55	\$56
<i>Exceptions:</i>				
<i>Westchester</i>	--	\$60	\$60	\$60
<i>PART-DAY</i>	\$39	\$37	\$37	\$37
<i>Exceptions:</i>				
<i>Westchester</i>	--	\$40	\$40	\$40
<i>HOURLY</i>	\$8.00	\$8.00	\$8.00	\$8.00

SCHOOL AGE CHILD CARE

AGE OF CHILD

	<i>Under 1½</i>	<i>1½-2</i>	<i>3-5</i>	<i>6-12</i>
<i>WEEKLY</i>	\$0	\$0	\$0	\$262
<i>DAILY</i>	\$0	\$0	\$0	\$54
<i>PART-DAY</i>	\$0	\$0	\$0	\$36
<i>HOURLY</i>	\$0	\$0	\$0	\$9.17

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE STANDARD RATE

AGE OF CHILD

	<i>Under 1½</i>	<i>1½-2</i>	<i>3-5</i>	<i>6-12</i>
<i>WEEKLY</i>	\$163	\$163	\$163	\$163
<i>DAILY</i>	\$36	\$36	\$36	\$33
<i>PART-DAY</i>	\$24	\$24	\$24	\$22
<i>HOURLY</i>	\$5.20	\$5.78	\$5.04	\$5.20

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE ENHANCED RATE

AGE OF CHILD

	Under 1 ¹ / ₂	1 ¹ / ₂ -2	3-5	6-12
WEEKLY	\$188	\$188	\$188	\$188
DAILY	\$42	\$42	\$41	\$38
PART-DAY	\$28	\$28	\$27	\$25
HOURLY	\$6.00	\$6.67	\$5.81	\$6.00

GROUP B COUNTIES:

Columbia, Erie, Monroe, Onondaga, Ontario, Rensselaer, Saratoga, Schenectady, Tompkins and Warren

DAY CARE CENTER

AGE OF CHILD

	Under 1 ¹ / ₂	1 ¹ / ₂ -2	3-5	6-12
WEEKLY	\$210	\$200	\$183	\$177
Exceptions:				
Saratoga	--	\$211	\$196	--
DAILY	\$50	\$48	\$43	\$38
Exceptions:				
Erie	--	--	\$44	--
Monroe	\$55	\$52	\$48	--
PART-DAY	\$33	\$32	\$29	\$25
Exceptions:				
Monroe	\$37	\$35	\$32	--
HOURLY	\$7.74	\$7.78	\$6.89	\$7.74

REGISTERED FAMILY DAY CARE

AGE OF CHILD

	Under 1 ¹ / ₂	1 ¹ / ₂ -2	3-5	6-12
WEEKLY	\$150	\$150	\$145	\$136
Exceptions:				
Erie	--	\$161	--	--
Ontario	\$164	\$169	--	--
Saratoga	\$169	\$165	\$160	\$143
Schenectady	\$170	\$160	\$150	\$150
DAILY	\$34	\$35	\$31	\$31
Exceptions:				
Columbia	\$35	--	--	--
Erie	\$38	\$38	\$34	\$34
Saratoga	\$35	--	--	\$33
Warren	--	--	--	\$33
PART-DAY	\$23	\$23	\$21	\$21
Exceptions:				
Erie	\$25	\$25	\$23	\$23
Saratoga	--	--	--	\$22
Warren	--	--	--	\$22
HOURLY	\$5.00	\$5.17	\$5.00	\$4.45

GROUP FAMILY DAY CARE

AGE OF CHILD

	Under 1 ¹ / ₂	1 ¹ / ₂ -2	3-5	6-12
WEEKLY	\$170	\$165	\$160	\$160
Exceptions:				
Erie	--	\$175	\$165	--
Schenectady	\$195	\$188	\$186	--
DAILY	\$38	\$35	\$35	\$33
Exceptions:				
Erie	--	--	--	\$34
PART-DAY	\$25	\$23	\$23	\$22
Exceptions:				
Erie	--	--	--	\$23
HOURLY	\$5.00	\$5.14	\$5.14	\$5.00

SCHOOL AGE CHILD CARE

AGE OF CHILD

	Under 1 ¹ / ₂	1 ¹ / ₂ -2	3-5	6-12
WEEKLY	\$0	\$0	\$0	\$177
DAILY	\$0	\$0	\$0	\$38
PART-DAY	\$0	\$0	\$0	\$25
HOURLY	\$0	\$0	\$0	\$7.74

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE STANDARD RATE

AGE OF CHILD

	Under 1 ¹ / ₂	1 ¹ / ₂ -2	3-5	6-12
WEEKLY	\$98	\$98	\$94	\$88
DAILY	\$22	\$23	\$20	\$20
PART-DAY	\$15	\$15	\$13	\$13
HOURLY	\$3.25	\$3.36	\$3.25	\$2.89

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE ENHANCED RATE

AGE OF CHILD

	Under 1 ¹ / ₂	1 ¹ / ₂ -2	3-5	6-12
WEEKLY	\$113	\$113	\$109	\$102
DAILY	\$26	\$26	\$23	\$23
PART-DAY	\$17	\$17	\$15	\$15
HOURLY	\$3.75	\$3.88	\$3.75	\$3.34

GROUP C COUNTIES:

Allegany, Broome, Cattaraugus, Cayuga, Chautauqua, Chemung, Chenango, Clinton, Cortland, Delaware, Essex, Franklin, Fulton, Genesee, Greene, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Montgomery, Niagara, Oneida, Orleans, Oswego, Otsego, Schoharie, Schuyler, Seneca, St. Lawrence, Steuben, Sullivan, Tioga, Washington, Wayne, Wyoming, and Yates

DAY CARE CENTER

AGE OF CHILD

	Under 1 ¹ / ₂	1 ¹ / ₂ -2	3-5	6-12
WEEKLY	\$171	\$165	\$155	\$136
Exceptions:				
Niagara	--	--	--	\$138
DAILY	\$40	\$37	\$34	\$31
Exceptions:				
Broome	--	\$40	\$38	--
PART-DAY	\$27	\$25	\$23	\$21
Exceptions:				
Broome	--	\$27	\$25	--
HOURLY	\$5.44	\$5.06	\$5.25	\$5.23

REGISTERED FAMILY DAY CARE

AGE OF CHILD

	Under 1 ¹ / ₂	1 ¹ / ₂ -2	3-5	6-12
WEEKLY	\$135	\$130	\$125	\$125
Exceptions:				
Clinton	--	--	--	\$135
Oneida	--	--	\$130	--
DAILY	\$31	\$31	\$30	\$30
Exceptions:				
Clinton	--	--	--	\$34
Sullivan	--	--	--	\$31
PART-DAY	\$21	\$21	\$20	\$20
Exceptions:				
Clinton	--	--	--	\$23
Sullivan	--	--	--	\$21
HOURLY	\$3.18	\$3.00	\$3.00	\$3.00

GROUP FAMILY DAY CARE

AGE OF CHILD

	Under 1 ¹ / ₂	1 ¹ / ₂ -2	3-5	6-12
WEEKLY	\$140	\$130	\$126	\$125
Exceptions:				
Oneida	\$150	\$150	\$135	--
Steuben	--	--	\$135	\$138
Washington	--	--	\$145	\$130

DAILY	\$34	\$33	\$31	\$30
PART-DAY	\$23	\$22	\$21	\$20
HOURLY	\$4.00	\$4.00	\$4.00	\$4.00

SCHOOL AGE CHILD CARE

	AGE OF CHILD			
	Under 1½	1½ -2	3-5	6-12
WEEKLY	\$0	\$0	\$0	\$136
Exceptions:				
Niagara	--	--	--	\$138
DAILY	\$0	\$0	\$0	\$31
PART-DAY	\$0	\$0	\$0	\$21
HOURLY	\$0	\$0	\$0	\$5.23

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE STANDARD RATE

	AGE OF CHILD			
	Under 1½	1½ -2	3-5	6-12
WEEKLY	\$88	\$85	\$81	\$81
DAILY	\$20	\$20	\$20	\$20
PART-DAY	\$13	\$13	\$13	\$13
HOURLY	\$2.07	\$1.95	\$1.95	\$1.95

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE ENHANCED RATE

	AGE OF CHILD			
	Under 1½	1½ -2	3-5	6-12
WEEKLY	\$101	\$98	\$94	\$94
DAILY	\$23	\$23	\$23	\$23
PART-DAY	\$15	\$15	\$15	\$15
HOURLY	\$2.39	\$2.25	\$2.25	\$2.25

GROUP D COUNTIES:

Albany, Dutchess, Orange, and Ulster

DAY CARE CENTER

	AGE OF CHILD			
	Under 1½	1½ -2	3-5	6-12
WEEKLY	\$227	\$210	\$195	\$185
Exceptions:				
Dutchess	\$250	\$225	\$197	\$223
Orange	--	\$220	--	--
DAILY	\$51	\$47	\$44	\$44
Exceptions:				
Albany	--	\$50	\$45	--
PART-DAY	\$34	\$31	\$29	\$29
Exceptions:				
Albany	--	\$33	\$30	--
HOURLY	\$7.75	\$7.46	\$7.24	\$7.34

REGISTERED FAMILY DAY CARE

	AGE OF CHILD			
	Under 1½	1½ -2	3-5	6-12
WEEKLY	\$191	\$185	\$175	\$175
Exceptions:				
Dutchess	--	--	--	\$180
Orange	\$200	\$200	\$200	\$200
DAILY	\$44	\$41	\$38	\$38
Exceptions:				
Dutchess	--	\$45	\$44	\$45
Orange	--	--	\$40	\$44
PART-DAY	\$29	\$27	\$25	\$25
Exceptions:				
Dutchess	--	\$30	\$29	\$30
Orange	--	--	\$27	\$29
HOURLY	\$7.00	\$6.00	\$6.00	\$6.10

GROUP FAMILY DAY CARE

	AGE OF CHILD			
	Under 1½	1½ -2	3-5	6-12
WEEKLY	\$200	\$194	\$180	\$178
Exceptions:				
Orange	\$225	--	--	\$189
DAILY	\$45	\$45	\$43	\$40
Exceptions:				
Orange	\$54	--	\$45	\$44
PART-DAY	\$30	\$30	\$29	\$27
Exceptions:				
Orange	\$36	--	\$30	\$29
HOURLY	\$7.50	\$7.00	\$7.00	\$7.00

SCHOOL AGE CHILD CARE

	AGE OF CHILD			
	Under 1½	1½ -2	3-5	6-12
WEEKLY	\$0	\$0	\$0	\$185
Exceptions:				
Dutchess	--	--	--	\$223
DAILY	\$0	\$0	\$0	\$44
PART-DAY	\$0	\$0	\$0	\$29
HOURLY	\$0	\$0	\$0	\$7.34

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE STANDARD RATE

	AGE OF CHILD			
	Under 1½	1½ -2	3-5	6-12
WEEKLY	\$124	\$120	\$114	\$114
DAILY	\$29	\$27	\$25	\$25
PART-DAY	\$19	\$18	\$17	\$17
HOURLY	\$4.55	\$3.90	\$3.90	\$3.98

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE ENHANCED RATE

	AGE OF CHILD			
	Under 1½	1½ -2	3-5	6-12
WEEKLY	\$143	\$139	\$131	\$131
DAILY	\$33	\$31	\$29	\$29
PART-DAY	\$22	\$21	\$19	\$19
HOURLY	\$5.25	\$4.50	\$4.50	\$4.59

GROUP E COUNTIES:

Bronx, Kings, New York, Queens, and Richmond

DAY CARE CENTER

	AGE OF CHILD			
	Under 1½	1½ -2	3-5	6-12
WEEKLY	\$370	\$255	\$224	\$185
DAILY	\$67	\$67	\$50	\$50
PART-DAY	\$45	\$45	\$33	\$33
HOURLY	\$17.64	\$17.00	\$16.21	\$12.18

REGISTERED FAMILY DAY CARE

	AGE OF CHILD			
	Under 1½	1½ -2	3-5	6-12
WEEKLY	\$160	\$150	\$150	\$141
DAILY	\$36	\$39	\$35	\$31
PART-DAY	\$24	\$26	\$23	\$21
HOURLY	\$16.00	\$11.11	\$13.20	\$13.06

GROUP FAMILY DAY CARE

	AGE OF CHILD			
--	--------------	--	--	--

	Under 1½	1½ -2	3-5	6-12
WEEKLY	\$175	\$175	\$160	\$150
DAILY	\$38	\$38	\$36	\$35
PART-DAY	\$25	\$25	\$24	\$23
HOURLY	\$16.41	\$15.17	\$11.73	\$17.14

SCHOOL AGE CHILD CARE

AGE OF CHILD

	Under 1½	1½ -2	3-5	6-12
WEEKLY	\$0	\$0	\$0	\$185
DAILY	\$0	\$0	\$0	\$50
PART-DAY	\$0	\$0	\$0	\$33
HOURLY	\$0	\$0	\$0	\$12.18

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE STANDARD RATE

AGE OF CHILD

	Under 1½	1½ -2	3-5	6-12
WEEKLY	\$104	\$98	\$98	\$92
DAILY	\$23	\$25	\$23	\$20
PART-DAY	\$15	\$17	\$15	\$13
HOURLY	\$10.40	\$7.22	\$8.58	\$8.49

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE ENHANCED RATE

AGE OF CHILD

	Under 1½	1½ -2	3-5	6-12
WEEKLY	\$120	\$113	\$113	\$106
DAILY	\$27	\$29	\$26	\$23
PART-DAY	\$18	\$19	\$17	\$15
HOURLY	\$12.00	\$8.33	\$9.90	\$9.80

SPECIAL NEEDS CHILD CARE

The rate of payment for child care services provided to a child determined to have special needs is the actual cost of care up to the statewide limit of the highest weekly, daily, part-day or hourly market rate for child care services in the State, as applicable, based on the amount of time the child care services are provided per week regardless of the type of child care provider used or the age of the child.

The highest full time market rate in the State is:

Weekly	\$ 378
Daily	\$ 80
Part-Day	\$ 53
Hourly	\$ 17.64

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire December 29, 2007.

Text of emergency rule and any required statements and analyses may be obtained from: Public Information Office, Office of Children and Family Services, 52 Washington St., Rensselaer, NY 12144, (518) 473-7793

Regulatory Impact Statement

1. Statutory authority:

Section 20(3)(d) of the Social Services Law (SSL) authorizes the Commissioner of the Office of Children and Family Services (Office) to establish rules, regulations and policies to carry out the Office's powers and duties under the SSL.

Section 34(3)(f) of SSL authorizes the Commissioner to establish regulations for the administration of public assistance and care within the State.

Section 410 of the SSL authorizes a social services official of a county, city or town to provide day care for children at public expense and authorizes the Office to establish criteria for when such day care is to be provided.

Section 410-x(4) of the SSL requires the Office to establish, in regulation, the applicable market-related payment rates that will establish the ceilings for State and federal reimbursement for payments made under the New York Child Care Block Grant. The amount to be paid or allowed for child care assistance funded under the Block Grant and under Title XX shall be the actual cost of care but no more than the applicable rate established in regulations. Payment rates must be sufficient to ensure equal access for eligible children to comparable child care assistance in the substate area that are provided to children whose parents are not eligible to receive assistance under any federal or State programs. Payment rates must take into account the variations in the costs of providing child care in different settings and to children of different age groups, and the additional cost of providing child care for children with special needs.

Federal statute, section 658E(c)(4)(A) of the Social Security Act, and federal regulation, 45 CFR 98.43(a), also require that the State establish payment rates for federally-funded child care subsidies that are sufficient to ensure such equal access for eligible children. Additionally, federal regulation 45 CFR 98.43(b)(2) requires that payment rates be based on a local market survey conducted no earlier than two years prior to the effective date of the currently approved State plan for the Child Care and Development Fund. The current State Plan in effect covers the period October 1, 2005 through September 30, 2007. The proposed State Plan for the period October 1, 2007 through September 30, 2009 has been submitted to the federal government for approval. The market rates that are being replaced were effective October 1, 2005 and were based on a survey conducted in 2005.

2. Legislative objectives:

The legislative intent is to have child care subsidy payment rates that reflect market conditions and that are adequate to enable subsidized families to access child care services comparable to other families not in receipt of a child care subsidy.

3. Needs and benefits:

The regulations are needed to adjust existing rates that were established based on a survey conducted in 2005. Since then, child care providers have experienced increased costs in operating their businesses. These costs are reflected in the higher rates that they are charging as compared to the existing rates. The rates need to be updated to reflect the increased rates in order to continue to provide subsidized families with equal access to child care comparable to that received by unsubsidized families as required by federal and State laws.

The methodology used by the Office to establish the payment rates for the regulations meets the federal and State statutory requirements for conducting a local survey of child care providers. Prior to conducting the market rate survey, a letter was mailed to all licensed and registered providers to inform them that they might be among the sample of providers who would be asked to participate in the market rate survey. The Office contracted with a market research firm to conduct the telephone survey in English and Spanish and had resources available to assist providers in other languages. The sample was drawn so that it encompassed the full range of providers within all geographic areas.

The payment rates were established based on over 4,800 completed telephone market rate surveys from licensed and registered providers throughout the State. Providers were asked for the rates they charge for full-time and part-time care, if applicable, based on the age of the child.

These rates were analyzed to determine the 75th percentile. The federal Administration of Children and Families has indicated in the preamble to the final rule for the Child Care and Development Fund that it regards the 75th percentile of the actual cost of care as sufficient to provide subsidized parents with equal access to child care providers. The rates that resulted were then clustered into five distinct groupings of social services districts based on rate similarities. Within each group, rates are differentiated by type of provider (i.e. day care center, school-age child care, family day care, group family day care and legally-exempt family child care and in-home child care), age of child (i.e. under 1 ½, 1 ½-2, 3-5, 6-12), and amount of time in care (i.e., weekly, daily, part-day, and hourly). This data was compiled and analyzed by Suzanne Zafonte Sennett, Director within the Office's Bureau of Early Childhood Services.

The standard market rates for legally-exempt family child care and in-home child care were established based on a 65 percent differential applied to the group market rates established for family day care. The enhanced market rate for legally exempt family and in-home child care were established based on a 75 percent differential applied to the group market rates established for family day care to reflect an incentive to legally exempt providers to pursue a minimum of 10 hours of approved training. This

differential reflects the higher costs associated with meeting the higher regulatory standards to become a registered family day care provider.

Revising the existing rates will help subsidized families to avoid losing their child care arrangements or being unable to find appropriate child care. This will help prevent such families from being forced to place their children in child care settings that are inappropriate or unsafe or to leave their children unsupervised. Avoiding such results is important because it can be detrimental to a child's development to experience disruption in care or to receive substandard or no care at all. The updated rates also will help subsidized families avoid having to choose whether to use their limited income to supplement the cost of child care services or to meet their basic living costs.

4. Costs:

Under section 410-v(2) of the SSL, the State is responsible for reimbursing social services districts for 75 percent of the costs of providing subsidized child care services to public assistance recipients; and, districts are responsible for the other 25 percent of such costs. In addition, the State is responsible for reimbursing districts for 100 percent of the costs of providing child care services to other eligible low-income families. The State reimbursement for these child care services is made from the State and/or federal funds allocated to the State Child Care Block Grant, and is limited on an annual basis to each district's State Child Care Block Grant allocation for that year.

Under the State Budget for SFY 2007-08, social services districts received their allocations of \$713,220,629 in federal and State funds under the New York State Child Care Block Grant. While this allocation is the primary resource available, social services districts have the option to transfer a portion of their Flexible Fund for Family Services allocations to the New York State Child Care Block Grant to use for the child care subsidy program.

5. Local government mandates:

Social services districts will be required to make payments for subsidized child care services based on the actual cost of care up to the new market rates. Districts will need to review cases to determine whether the payments reflect the actual cost of care up to applicable market rates.

6. Paperwork:

Social services districts will need to process any required payment adjustments after conducting the necessary case reviews.

7. Duplication:

The new requirements do not duplicate any existing State or federal requirements.

8. Alternatives:

The adjustments in rates set forth in the regulations are necessary to implement the federal and State statutory and regulatory mandates.

9. Federal standards:

The regulations are consistent with applicable federal regulations. 45 CFR 98.43(a) and (b)(2) and (3) require that the State establish payment rates that are sufficient to ensure equal access to comparable care received by unsubsidized families, based on a survey of providers and consistent with the parental choice provisions in 45 CFR 98.30.

10. Compliance schedule:

These provisions must be implemented effective on October 1, 2007.

Regulatory Flexibility Analysis

1. Effect on small businesses and local governments:

The adjustments to the child care market rates will affect the 58 social services districts. There is a potential effect on over 20,000 licensed and registered child care providers and an estimated 70,000 informal providers that may provide child care services to families receiving a child care subsidy.

2. Compliance requirements:

Social services districts will be required to make payments for subsidized child care services based on the actual cost of care up to the new market rates. Districts will need to review cases to determine whether the payments reflect the actual cost of care up to the new market rates. Payment adjustments will have to be made, as needed.

3. Professional services:

Neither social services districts nor child care providers should have to hire additional professional staff in order to implement these regulations.

4. Compliance costs:

Under section 410-v(2) of the Social Services Law, the State is responsible for reimbursing social services districts for 75 percent of the costs of providing subsidized child care services to public assistance recipients; districts are responsible for the other 25 percent of such costs. In addition, the State is responsible for reimbursing districts for 100 percent of the costs of providing child care services to other eligible low-income fami-

lies. The State reimbursement for these child care services is made from the State and/or federal funds allocated to the State Child Care Block Grant, and is limited on an annual basis to each district's State Child Care Block Grant allocation for that year.

Under the State Budget for SFY 2007-08, social services districts received their allocations of \$713,220,629 in federal and State funds under the New York State Child Care Block Grant. While this allocation is the primary resource available, social services districts have the option to transfer a portion of their Flexible Fund for Family Services allocations to the New York State Child Care Block Grant to use for the child care subsidy program.

5. Economic and technological feasibility:

The child care providers and social services districts affected by the regulations have the economic and technological ability to comply with the regulations.

6. Minimizing adverse impact:

Federal regulation 45 CFR 98.43(b)(2) requires that payment rates be based on a local market survey conducted no earlier than two years prior to the effective date of the currently approved State plan for the Child Care and Development Fund. The market rates were developed in accordance with federal guidelines for conducting a survey of child care providers. The Office took a representative sample of over 4,800 licensed and registered child care providers throughout the State. The rates were analyzed to establish the market rates at the 75th percentile of the amounts charged in accordance with guidelines issued in the Child Care and Development Fund Final Rule. The market rates are clustered into five distinct groupings of counties based on similarities in rates among the counties in each group. As a result, the rates established for counties are based on the actual costs of care within the counties.

Social services districts will benefit from the increases in the rates. The increases will enable districts to provide temporary assistance recipients and low-income families receiving subsidized child care services with access comparable to those families not receiving a child care subsidy. This will assist these districts to enable more temporary assistance and low-income families to work, thereby reducing the number of families in need of public assistance. It also should assist the districts in meeting their federal participation rates for Temporary Assistance (TA) recipients because there should be a reduction in the number of TA recipients who are excused from work activities due to a lack of child care.

Child care providers also will benefit from the increases in the market rates. The adjustments to the market rates will help address the escalating costs incurred by child care providers in operating their businesses. These providers will also be in a better position to serve low-income families who previously may not have had access to their programs due to their rates.

7. Small business and local government participation:

In accordance with federal regulatory requirements, OCFS conducted a telephone survey of a sample of regulated providers. Prior to conducting the telephone survey, a letter was sent to all regulated child care providers to inform them that they might be included among the sample of providers called to participate in the market rate survey. A copy of the questions was also sent so that providers could prepare responses. A market research firm conducted the telephone survey in English and in Spanish, as needed, and had the resources available to assist providers in other languages, if needed. Rate data was collected from over 4,800 providers and that information formed the basis for the updated market rates.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

The regulations will affect the 44 social services districts located in rural areas of the State and the child care providers located in those districts.

2. Reporting, recordkeeping, and other compliance requirements and professional services:

The regulations will not result in any new reporting or recordkeeping requirements for social services districts.

Social services districts will be required to make payments for subsidized child care services based on the actual cost of care up to the new market rates. Districts will need to review cases to determine if the payments reflect the actual cost of care up to the new market rates. Neither social services districts nor child care providers should have to hire additional professional staff in order to implement these regulations.

3. Costs:

Under section 410-v(2) of the Social Services Law, the State is responsible for reimbursing social services districts for 75 percent of the costs of providing subsidized child care services to public assistance recipients; districts are responsible for the other 25 percent of such costs. In addition,

the State is responsible for reimbursing districts for 100 percent of the costs of providing child care services to other eligible low-income families. The State reimbursement for these child care services is made from the State and/or federal funds allocated to the State Child Care Block Grant, and is limited on an annual basis to each district's State Child Care Block Grant allocation for that year.

Under the State Budget for SFY 2007-08, social services districts received their allocations of \$713,220,629 in federal and State funds under the New York State Child Care Block Grant. While this allocation is the primary resource available, social services districts have the option to transfer a portion of their Flexible Fund for Family Services allocations to the New York State Child Care Block Grant to use for the child care subsidy program.

4. Minimizing adverse impact:

The market rates were developed in accordance with federal guidelines for conducting a survey of child care providers. The Office took a representative sample of over 4,800 completed surveys from licensed and registered child care providers throughout the State. The rates were analyzed to establish market rates at the 75th percentile of the amounts charged. The market rates are clustered into five distinct groupings of counties based on similarities in rates among the counties in each group. As a result, the rates established for rural counties are based on the actual costs of care within the counties.

Social services districts in rural areas will benefit from the increases in the rates. The increases will enable districts to provide temporary assistance recipients and low-income families receiving subsidized child care services with access to additional child care providers. This will assist these districts to enable more temporary assistance and low-income families to work, thereby reducing the number of families in need of temporary assistance. It also should assist the districts in meeting their federal participation rates for Temporary Assistance (TA) recipients because there should be a reduction in the number of TA recipients who are excused from work activities due to a lack of child care.

Child care providers in rural areas also will benefit from the increases in the market rates. The adjustments to the market rates will help address the escalating costs incurred by child care providers in operating their businesses. These providers will also be in a better position to serve low-income families who previously may not have had access to their programs due to their rates.

5. Rural area participation:

Federal regulation 45 CFR 98.43(b)(2) requires that payment rates be based on a local market survey conducted no earlier than two years prior to the effective date of the currently approved State plan for the Child Care and Development Fund. In accordance with the federal regulatory requirements, OCFS conducted a telephone survey of a sample of regulated providers. The sample drawn was representative of the regions across the State and, therefore, providers located in rural areas were appropriately represented in the survey. Prior to conducting the telephone survey, a letter was sent to all regulated child care providers to inform them that they might be included among the sample of providers called to participate in the market rate survey. A copy of the questions was also sent so that providers could prepare responses. A market research firm conducted the telephone survey in English and in Spanish, as needed, and had resources available to assist providers in other languages, if needed. Rate data was collected from over 4,800 providers and that information formed the basis for the updated market rates.

Job Impact Statement

Section 201-a of the State Administrative Procedures Act requires a job impact statement to be filed if proposed regulations will have an adverse impact on jobs and employment opportunities in the State.

These regulations will have a positive impact on jobs or employment opportunities as the increased rates will allow child care providers to hire additional staff or improve the compensation they pay existing staff. Individuals who may have been discouraged from starting up new child care programs in low-income communities because the existing rates would not have been sufficient to support their operational costs may be encouraged by the new rates to establish such programs. In addition, by making child care more available and affordable for low-income working families, the regulations will improve the ability of employers to attract and retain employees and the ability of low-income workers to obtain and maintain jobs.

Education Department

EMERGENCY RULE MAKING

Contracts for Excellence

I.D. No. EDU-20-07-00005-E

Filing No. 1020

Filing date: Sept. 26, 2007

Effective date: Sept. 29, 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.

The proposed amendment was adopted at the April 23-24, 2007 Regents meeting as an emergency measure, effective April 27, 2007, 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. A Notice of Emergency Adoption and Proposed Rule Making was published in the *State Register* on May 16, 2007.

At their June 25-26, 2007 meeting, the Regents substantially revised the proposed rule, and adopted the revised rule by emergency action, effective July 26, 2007. A Notice of Emergency Adoption and Revised Rule Making was published in the August 8, 2007 *State Register*.

At their July 25, 2007 meeting, the Board of Regents further revised the proposed rule in response to public comment and adopted the revised rule as an emergency action, effective July 31, 2007. A Notice of Emergency Adoption and Revised Rule Making was published in the August 15, 2007 *State Register*.

Pursuant to the State Administrative Procedure Act section 202(4-a), the revised rule cannot be adopted by regular (non-emergency) action until at least 30 days after publication of the revised rule in the *State Register*. Since the Board of Regents meets at fixed intervals, and there is no meeting scheduled for August 2007 and the September Regents meeting is scheduled for September 10-11, 2007, the earliest the proposed amendment can be adopted by regular action, after expiration of the 30-day public comment period for a revised rule making, is the October 22-23, 2007 Regents meeting. However, the July emergency adoption will expire on September 28, 2007, 60 days after its filing with the Department of State on July 31, 2007. A lapse in the rule's effectiveness would disrupt imple-

mentation of the contract for excellence program under Education Law section 211-d. A fourth emergency adoption is therefore necessary for the preservation of the general welfare to ensure that the emergency rule adopted at the April Regents meeting, and revised at the June and July Regents meetings, remains continuously in effect until the effective date of its adoption as a permanent rule.

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 rule: The Board of Regents has readopted, by emergency action effective September 29, 2007, the emergency rule adopted at the July 25, 2007 Regents meeting that added a new section 100.13 and amended section 170.12 of the Commissioner's Regulations. The rule is necessary to implement Education Law section 211-d 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 emergency rule.

Section 100.13(a) defines: (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 for determining whether a school district is required to prepare a contract for excellence. A contract shall be prepared by each district: (1) that has at least one school currently identified under section 100.2(p) 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 NYC school district, a contract shall be prepared for the city school district and each community district meeting the above criteria.

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

(1) describe how the contract amount shall be used to support new programs and new activities or expand 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 (LEP) students and students who are English language learners (ELL); (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 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 NYC school district, 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 NYC school district and include continuous class size reduction for low performing and overcrowded schools beginning in the 2007-2008 school year and thereafter and 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, 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 prescribed by the Commissioner after consideration of the recommendation of an expert panel appointed to review class size research.

The Commissioner shall approve each contract meeting the provisions of section 100.13(c) and certify, for each contract, that the expenditure of additional aid or grant amounts is in accordance with Education Law section 211-d(2). Approval shall be given to contracts demonstrating to the Commissioner's satisfaction that the allowable programs selected:

(i) predominately benefit students with the greatest educational needs, including but not limited to: (a) LEP and ELL students; (b) students in poverty; and (c) students with disabilities;

(ii) predominately benefit students in schools identified as requiring academic progress, or in need of improvement, or in corrective action, or restructuring and address the most serious academic problems in those schools; and

(iii) are based on practices supported by research or other comparable evidence in order to facilitate student attainment of State learning standards.

Section 100.13(d) establishes the allowable programs and activities, including experimental programs. Section 100.13(d)(1) establishes general requirements, including that such programs and activities: (1) predominately benefit students with the greatest educational needs including, but not limited to: LEP and ELL students; students in poverty; and students with disabilities; (2) predominately benefit students in schools identified as requiring academic progress, in need of improvement, in corrective action, or restructuring and address the most serious academic problems in those schools; (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 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 NYC school district 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) establishes requirements for class size reduction, including special provisions for NYC. NYC 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 the expert panel appointed by the Commissioner. Districts outside of NYC 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 measurable progress towards meeting the target levels recommended by the expert panel. The rule also mandates NYC give priority 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 NYC, 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 an appropriately certified, or highly qualified teacher where required under section 120.6, 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 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 may 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 districts 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 the 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 NYC's development of the contracts are included.

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

Section 100.13(g) establishes requirements for the public reporting by 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, for schools required to prepare a contract for excellence pursuant to Education Law section 211-d, the annual audit for the year such contract is in effect shall 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 only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of emergency/proposed rule making, I.D. No. EDU-20-07-00005-EP, Issue of May 16, 2007. The emergency rule will expire November 24, 2007.

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

Regulatory Impact Statement

STATUTORY AUTHORITY:

Education Law section 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, recordkeeping 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.

SMALL BUSINESS AND 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.

Assessment of Public Comment

The agency received no public comment.

EMERGENCY RULE MAKING

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

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

Filing No. 1021

Filing date: Sept. 26, 2007

Effective date: Sept. 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 145-2.15 to Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided), 215 (not subdivided) and 661(4); and L. 2007, ch. 57, part E-1, sections 1 and 2
Finding of necessity for emergency rule: Preservation of general welfare.

Specific reasons underlying the finding of necessity: The proposed rule is necessary to implement paragraphs (d) and (e) of subdivision (4) of Section 661 of the Education Law, as added by Chapter 57 of the Laws of 2007, to identify certain ability-to-benefit tests and the passing scores for such tests that the Board of Regents approves as an alternative to a certificate of graduation from a school providing secondary education or its recognized equivalent, for purposes of eligibility for general awards and academic performance awards prescribed under Section 661 of the Education Law. The proposed rule also establishes the criteria the Commissioner will utilize to determine if an approved ability-to-benefit test has been independently administered.

A Notice of Proposed Rule Making was published in the *State Register* on June 27, 2007. At their June 25-26, 2007 meeting, the Regents substantially revised the proposed rule, and adopted the revised rule as an emergency measure, effective July 1, 2007, in order to permit eligible students who do not hold a diploma from a high school located in the United States, or its recognized equivalent to apply for State student financial aid in a timely manner for the 2007-2008 academic year. A Notice of Emergency Adoption and Revised Rule Making was published in the July 18, 2007 *State Register*.

Subsequently, further revisions were made to the proposed rule in response to public comment and a second Notice of Revised Rule Making was published in the *State Register* on September 5, 2007. Pursuant to the State Administrative Procedure Act section 202(4-a), the revised rule cannot be adopted by regular (non-emergency) action until at least 30 days after publication of the revised rule in the *State Register*. Since the Board of Regents meets at fixed intervals, the earliest the proposed rule can be adopted by regular action, after expiration of the 30-day public comment period for a revised rule making, is the October 22-23, 2007 Regents meeting. However, the June emergency action will expire on September 26, 2007, 90 days after its filing with the Department of State on June 29, 2007. A lapse in the rule's effectiveness would disrupt implementation of the Section 661 of the Education Law, as amended by Chapter 57 of the Laws of 2007; thereby prohibiting eligible students who do not hold a diploma from a high school located in the United States, or its recognized

equivalent to apply for State student financial aid in a timely manner for the 2007-2008 academic year.

A second emergency adoption is therefore necessary for the preservation of the general welfare to adopt revisions to the rule in response to public comment and to otherwise ensure that the emergency rule adopted at the June Regents meeting, and revised at the September Regents meeting, remains continuously in effect until the effective date of its adoption as a permanent rule.

It is anticipated that the proposed rule will be presented for adoption as a permanent rule at the October meeting of the Board of Regents, which is the first scheduled meeting after expiration of the 30-day public comment period prescribed by the State Administrative Procedure Act.

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

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

Substance of emergency rule:

The Board of Regents has added section 145-2.15 to the Regulations of the Commissioner of Education, relating to the administration of ability-to-benefit tests for eligibility for awards, as an emergency action effective September 27, 2007. The following is a summary of the emergency rule.

Subdivision (a) of section 145-2 sets forth the applicability of this section, i.e., the identification of certain ability-to-benefit tests approved by the Board of Regents and the passing scores for such tests and the criteria the commissioner shall utilize when determining whether an approved ability-to-benefit test is independently administered.

Subdivision (b) of section 145-2.15 defines the following terms: assessment center; federally approved ability-to-benefit test; school providing secondary education from a state within the United States; and Secretary.

Paragraph (1) of Subdivision (c) of section 145-2.15 provides that for students first receiving aid in the 2007-2008 academic year and each academic year thereafter, students shall have a certificate of graduation from a recognized school providing secondary education from a state within the United States, or the recognized equivalent of such certificate, or receive a passing score on a federally approved ability-to-benefit test identified by the Board of Regents as satisfying the eligibility requirements of this section that has been independently administered and evaluated.

Paragraph (2) of subdivision (c) of section 145-2.15 requires the department to publish a list of ability-to-benefit tests that the Board of Regents has identified as satisfactory in determining eligibility to receive an award. The identification of such tests shall be without term unless the department determines that a test is no longer satisfactory in determining eligibility for awards or the Secretary discontinues federal recognition of such test.

Subdivision (d) of section 145-2.15 provides that an eligible institution shall submit for approval by the Board of Regents, the passing score it proposes to utilize on any ability-to-benefit test approved by the Board of Regents, in a form prescribed by the commissioner. This subdivision states that the score shall not be lower than the score set by the Secretary and the eligible institution shall submit an explanation of its reasons for selecting such passing score. Approval of such score shall be without term unless the department determines that the passing score is no longer satisfactory in determining eligibility for awards or the institution seeks to change such passing score or no longer offers the approved ability-to-benefit test. This subdivision also sets forth the factors that the Commissioner must consider when determining whether to approve an institution's proposed score or scores, including: (1) the level of curricula the institution offers; (2) the admission criteria and procedures the institution utilizes to evaluate the capacity of a student to undertake a course of study and the capacity of the institution to provide instructional and other support services to ensure that the student can complete the course of study; (3) evidence that the admission criteria and procedures that the institution utilizes are effective in admitting only persons who have the capacity to undertake a course of study and the institution provides proper instructional and support services; (4) the adequacy of the academic support services the institution provides; and (5) evidence that the institution evaluates the success of its academic and other support services in providing instructional and other support services that the student needs to complete the program.

Subdivision (e) of section 145-2.15 requires an institution to independently administer ability-to-benefit tests approved by the Board of Regents.

Paragraph (1) of subdivision (e) of section 145-2.15 provides that an ability-to-benefit test is independently administered if the test is administered at an assessment center that is not located and/or affiliated with the institution for which the student is seeking enrollment and the test administrator is an employee of such center.

Paragraph (2) of subdivision (e) of section 145-2.15 provides that an ability-to-benefit test is independently administered if the test is administered at a degree-granting institution that confers two-year or four-year degrees or an institution that qualifies as an eligible public vocational institution and the chief executive officer of such institution certifies annually, in a form prescribed by the commissioner, that: (1) the test is administered by a unit of the institution that is responsible for other forms of testing or for a provision of academic support services, or both, and such unit does not report to officers responsible for admissions or the administration of student financial aid for such institution; (2) the test is administered in an environment that is separate, secure, closed and continuously monitored during testing; (3) students are required to provide written verification of identity, such as a photo identification, and to sign in prior to taking the test and students are prohibited from bringing into the test area any materials prohibited by the test publisher and are required to leave the test area immediately upon completion of the test; (4) the test is proctored by professional employees who have been trained in test administration and federal guidelines regarding the administration of ability-to-benefit tests and who are not employed through the admissions, student financial aid, or registrar's offices of the institution; (5) the scoring of such test is overseen by institutional employees who are not employed through the admissions, student financial aid, or registrar's offices and such scores are verified by more than one employee; (6) all tests, test results, and test databases, if any, are kept in locked and secured containers; (7) the test administrator has no prior financial or ownership interest in the institution, its affiliates, or its parent corporation, other than the interest obtained through its agreement to administer the test; (8) the test administrator is not a current or former member of the board of directors, a current or former employee or a consultant to a member of the board of directors or a chief executive officer; (9) the test administrator is not a current or former student of the institution and (10) the test administrator is not scoring the test. The annual certification shall include the following information relating to the previous academic year: the number of students examined, the number of re-tests administered, the scores on all ability-to-benefit tests for each student examined, the number of students achieving passing scores on such tests, the number of students tested that are enrolling in such institution and the success of tested students in terms of retention and graduation.

Paragraph (3) of subdivision (e) of section 145-2.15 states that the department will consider an ability-to-benefit test to be independently administered if the test is administered at an eligible institution that does not have degree-conferring authority and the test is given by a test administrator who: (1) has no current or prior financial or ownership interest in the institution, its affiliates, or its parent corporation, other than the interest obtained through its agreement to administer the test, and has no controlling interest in any other educational institution; (2) is not a current or former employee of or consultant to the institution, its affiliates, or its parent corporation, a person in control of another institution, or a member of the family of any of these individuals; (3) is not a current or former member of the board of directors, a current or former employee of or a consultant to a member of the board of directors, chief executive officer, chief financial officer of the institution or its parent corporation or at any other institution, or a member of the family of any of the above individuals; and (4) is not a current or former student of the institution; (5) is certified by the test publisher to give and score the publisher's test; (6) administers the test in accordance with instructions provided by the test publisher and in a manner that insures the integrity and security of the test; (7) makes the test available only to a test-taker, and then only during a regularly scheduled test; (8) secures the test against disclosure or release; (9) submits the completed test to the test publisher within two business days after test administration in accordance with the test publisher's instructions; and (10) upon request, gives the commissioner guaranty agency, accrediting agency, and law enforcement agencies access to test records or other documents related to an examination, audit, investigation, or program review of the institution or test publisher.

Paragraph (4) of subdivision (e) of section 145-2.15 provides that the commissioner will not consider a test to be independently administered if an institution: (1) compromises test security or testing procedures; (2) pays

a test administrator a bonus, commission, or other incentive based upon the test scores or pass rates of its students who take the test; or (3) otherwise interferes with the test administrator's independence or test administration.

Paragraph (5) of subdivision (e) of section 145-2.15 requires any institution administering an ability-to-benefit test to maintain a record for each student who sat for an ability-to-benefit test, including the name of the test taken by the student, the date of the test and the student's scores on such tests.

Paragraph (6) of subdivision (e) provides that, upon request, each eligible institution must provide the commissioner with access to test records or other documents related to an audit, investigation or program review of the institution.

Paragraph (7) of subdivision (e) states that if the commissioner finds that an institution has violated the certification procedures or the ability-to-benefit test procedures under this section, the commissioner shall have the authority to require an eligible institution to employ an assessment center independent of such institution.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of proposed rule making, I.D. No. EDU-26-07-00010-P, Issue of June 27, 2007. The emergency rule will expire November 24, 2007.

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

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

Education Law section 215 provides that the Regents, or the Commissioner, or their representatives, may visit, examine into and inspect, any institution in the University of the State of New York and any school or institution under the educational supervision of the State, and may require, as often as desired, duly verified reports giving such information and in such form as they shall prescribe.

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

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

2. LEGISLATIVE OBJECTIVES:

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

3. NEEDS AND BENEFITS:

Education Law section 661 prescribes eligibility requirements and procedures governing awards under the State student financial aid programs established in Education Law Articles 13 and 14. Education Law section 661(4)(d) and (e) establish new requirements for students who do not hold diplomas from high schools located within the U.S., or its recognized equivalent, seeking State financial aid for the first time in the 2007-2008 academic year.

Currently, under the federal Higher Education Act, students seeking to qualify for Pell grants or other federal Title IV aid who do not have a high school diploma or its recognized equivalent must demonstrate the ability to benefit from the education or training provided by achieving a score set by

the Secretary of the U.S. Department of Education (“Secretary”) on a test approved by the Secretary.

Prior to the 2007-2008 academic year, a student applying for State student financial aid who did not have a diploma from a U.S. high school, or its recognized equivalent, was required to achieve a passing score set by the Secretary, on an ability-to-benefit test approved by the Secretary. Education Law section 661(4)(e) modifies this requirement. Students seeking State aid for the first time in the 2007-2008 academic year, without a high school diploma or the recognized equivalent of such, must achieve a passing score on an ability-to-benefit test approved by the Regents and the test must be independently administered as defined by the Commissioner.

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

Each eligible institution must submit for Regents approval, the passing score it proposes to utilize on any approved ability-to-benefit test, which passing score may not be lower than the federally approved score for such test. For the 2007-2008 academic year fall semester, eligible institutions may utilize any passing score that is not lower than the federally approved score. For subsequent academic terms, in determining whether to approve an institution’s proposed passing score, the regulation requires the Regents to consider certain specified factors. Once approved, an institution’s passing score(s) will remain approved unless the institution proposes to change such score(s) or the Regents determine that such passing score is no longer satisfactory in determining eligibility for awards under Education Law section 661.

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

4. COSTS:

(a) Costs to State government. The regulation will not impose any additional costs on State government beyond those resulting from the enactment of Chapter 57 of the Laws of 2007.

(b) Costs to local government. The regulation will result in minimal costs beyond those resulting from enactment of Chapter 57 of the Laws of 2007.

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

To administer an ability-to-benefit test on campus, each eligible degree-granting institution would be required to submit to the Department an annual certification by their chief executive officer that its administration of these tests meets the regulation’s requirements. The majority of the regulation’s requirements for the independent administration of such tests duplicate requirements set forth in the federal Higher Education Act and its

corresponding federal regulations. Therefore, eligible degree-granting institutions should already be administering ability-to-benefit tests in a similar manner and any additional costs imposed should be minimal.

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

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

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

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

5. LOCAL GOVERNMENT MANDATES:

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

6. PAPERWORK:

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

To administer an ability-to-benefit test on campus, each eligible degree-granting institution would be required to have its chief executive officer annually certify to the Department that its administration of the tests meets the regulation’s requirements.

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

7. DUPLICATION:

The regulation is necessary to implement Education Law section 661(4)(e). The criteria the Department will utilize in reviewing applications by eligible institutions to set passing scores on acceptable ability-to-benefit tests are already required of those institutions in the standards for the registration of undergraduate and graduate curricula set forth in Commissioner’s Regulations Part 52. The definition for assessment center is similar to the federal definition set forth in 34 CFR section 668.142 and the criteria set forth in the proposed amendment for independent administration builds upon the federal requirements set forth in 34 CFR section 668-151.

8. ALTERNATIVES:

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

9. FEDERAL STANDARDS:

The regulation builds on federal standards for the administration of federal student financial aid programs established under Title IV of the Higher Education Act and its corresponding regulations. Specifically, the definition for assessment center is similar to the federal definition in 34 CFR section 668.142 and the criteria set forth in the regulation for independent administration builds upon the federal requirements in 34 CFR section 668-151.

10. COMPLIANCE SCHEDULE:

The regulation would be effective on its stated effective date.

Regulatory Flexibility Analysis

1. EFFECT OF RULE:

(a) Small Businesses:

To implement Education Law section 661, as added by Chapter 57 of the Laws of 2007, the regulation establishes procedures for the identification of federally approved ability-to-benefit tests and passing scores the Regents will deem approved as an alternative for students applying for State financial aid, and requirements for the independent administration of such tests. The Department estimates 21 of the eligible 42 proprietary colleges in the State are small businesses with 100 or fewer employees.

(b) Local Governments:

The State Education Department estimates that at least 21 community colleges may be affected by the regulation.

2. COMPLIANCE REQUIREMENTS:

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

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

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

The regulation also establishes factors the Department will consider to determine if an ability-to-benefit is independently administered and evaluated. For the fall semester of the 2007-2008 academic year, the test will be deemed independently administered if its administration meets the criteria set forth in federal regulations. For subsequent academic terms, the regulation provides an ability-to-benefit test is independently administered if the

test is administered by an assessment center not located at, or affiliated with, the institution at which the student is seeking enrollment and the test administrator is an employee of such center. If the ability-to-benefit test is administered at an eligible degree-granting institution, the chief executive officer of such institution shall provide an annual certification to the Department that it independently administers such tests according to the factors delineated in the regulation. If the ability-to-benefit test is administered by an eligible institution that does not grant degrees, the ability-to-benefit test must be administered pursuant to the criteria set forth in the federal regulations. If the Department finds that an institution has violated the certification procedure or the federal ability-to-benefit procedures, it may require the institution to use an assessment center external to the institution.

3. PROFESSIONAL SERVICES:

(a) Small Businesses:

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

(b) Local Governments:

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

4. COMPLIANCE COSTS:

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

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

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

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

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

(a) Small Businesses:

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

(b) Local Governments:

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

6. MINIMIZING ADVERSE IMPACT:

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

which sets forth the procedures for identification of federally approved ability-to-benefit tests and the passing scores for such tests, and the requirements for the independent administration of such tests must be uniformly applied to all such institutions.

7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION:

Before drafting the regulation, the Department convened a working group comprised of persons knowledgeable about student financial aid and academic affairs, from all four sectors of higher education, including the Vice Chancellor for Community Colleges and other staff of the State University of New York System Administration and comparable staff of The City University of New York central administration, proprietary colleges that are classified as small businesses, as well as the president of the association of proprietary colleges, many of which are classified as small businesses. The comments they provided were taken into consideration when drafting the proposed amendment.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

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

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

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

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

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

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

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

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

3. COSTS:

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

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

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

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

4. MINIMIZING ADVERSE IMPACT:

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

5. RURAL AREA PARTICIPATION:

Before drafting the proposed regulation, the State Education Department convened a work group comprised of persons knowledgeable about student financial aid and academic affairs from all four sectors of higher education. The group included representatives of eligible institutions located in rural areas, as well as of the Association of Proprietary Colleges, the Commission on Independent Colleges and Universities, and the State University of New York system administration, many of whose institutions or campuses are located in rural areas. The comments they provided were taken into consideration when drafting the proposed regulation.

Job Impact Statement

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

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

State Board of Elections

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Operation and Maintenance of Voting Machines and Systems**I.D. No.** SBE-42-07-00003-P

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

Proposed action: Repeal of Parts 6210 and 6211 and section 6209.11; and addition of new Part 6210 to Title 9 NYCRR.

Statutory authority: Election Law, sections 3-100, 7-20 and 7-206

Subject: Operation and maintenance of voting machines and systems.

Purpose: To ensure uniform maintenance on voting equipment statewide, which provides for reliability of the systems used in elections in New York State.

Substance of proposed rule (Full text is posted at the following State website: www.elections.state.ny.us): These regulations prescribe procedures for ongoing testing and maintenance of voting systems and equipment, to assure continued functionality.

They also provide the definition of what constitutes a vote on both paper-based and DRE systems.

And finally, these regulations provide detailed procedures for conducting the mandatory audit of voting systems after each election, and sets the discrepancy thresholds for escalated audits, up to and including the audit of an entire election.

Text of proposed rule and any required statements and analyses may be obtained from: Todd D. Valentine, Board of Elections, 40 Steuben St., Albany, NY 12207, (518) 474-6367, e-mail: tvalentine@elections.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: New York State Election Law § 3-100 and § 3-102 creates the State Board of Elections and grants commissioners “the power and duty to issue instructions and promulgate rules and regulations relating to the administration of the election process”. Also, Election Law § 7-201 sets forth the guidelines for the examination of voting machines and systems, which requires the State Board of Elections to “cause machines to be examined and a report of the examination to be made such report shall state an opinion as to whether the kind of machine or system to be examined can safely and properly be used by voters and local boards of elections, under conditions prescribed [above] and the requirements of the

federal Help America Vote Act”. In addition, under § 7-206(1) “the State Board of Elections shall test every voting machine of a type approved to ensure that each such machine functions properly before such machines may be used in any election in this state”. Finally, § 9-211 is a new Election Law, which establishes the audit of voter verifiable audit records. It requires that “within seven days after every primary or village election a bipartisan committee shall manually audit the voter verifiable audit records from three percent of voting machines or systems. . .”

In accordance with New York State Election Laws and Title 9 of the Official Compilation of Codes, Rules and Regulations of the State of New York, Subtitle V, the State Board of Elections is seeking to repeal § 6210, Absentee Voting Counting Equipment and § 6211, Operational Absentee Counting System Utilizing Electronically Tabulated Punchcard Ballots, and to adopt § 6210(1)-(18), which combines § 6210 and § 6211, in order to establish routine maintenance and testing of voting systems and operational procedures.

Legislative objectives: In 2000, the federal government enacted the Help America Vote Act (HAVA). As per HAVA requirements, New York State is mandated to replace current mechanical lever machines with either Direct Recording Electronic Voting Systems (DRE’s) or Precinct Based Optical Scan Voting Systems (Op Scans), when such machines are certified. The legislative objective in adopting § 6210 is to comply with HAVA mandates.

As a result of HAVA implementation, many NYS Election Laws were revised in 2005. In doing so, the State Board was required to update a series of regulations in accordance with the new Election Laws.

In an effort to further streamline current regulations, the State Board is seeking to combine three regulations, parts of which have become outdated and obsolete under the new laws. The regulations included, § 6209, which governed Electronic Voting Systems and Auxiliary Equipment; § 6210, which governed Absentee Voting Counting Equipment and § 6211, which governed the Operation of Absentee Counting Systems Utilizing Electronically Tabulated Punch Card Ballots.

By combining the three above referenced regulations and enacting § 6210(1)-(18) the State Board will establish the routine maintenance and testing of voting systems and operational procedures in accordance with Election Laws § 3-100 § 7-201 § 7-206 and § 9-211.

The result of combining three separate regulations has produced these proposed regulations, parts of which are described below.

The regulation begins by describing Pre-Qualification Testing, which is “a test prescribed by the State Board, conducted immediately prior to the voting systems’ use in an election in which a predetermined set of votes are cast which will ensure that all voting positions for each ballot style are tested”. It then describes the Routine Maintenance and Testing of Voting Systems, which directs that “complete testing of all voting systems shall be conducted before the use of the system in any election and at such other times of the year as prescribed by these regulations”.

The regulation states “County Boards which adopt procedures pursuant to section 9-126(3) of the Election Law shall file such procedures with the State Board of Elections”. This rule also governs Demonstration Models and Voting System Operations.

The next section of the regulation directs county boards to provide sufficient and appropriate staff for the successful use of voting systems. It continues by discussing the production and use of machine ballots and directing county boards to prepare a test deck to be used to verify voting system will accurately cast and count votes within each individual ballot style.

The regulation further describes Vote Tabulation, governs Ballot Accounting, and describes Voting System Security.

The regulation goes on to describe Procedures, which direct county boards to adopt written procedures to further implement provisions of the Election Law for use in New York elections. These procedures include ballot security, ballot distribution and counting, as well as the challenge process and systems evaluation.

Next, the rule provides for uniform, non-discriminatory standards for establishing what constitutes a vote and what shall be counted as a vote for all categories of voting systems and voting procedures in New York. It concludes with establishing Standards for Determining Valid Votes on Direct Recording Electronic (DRE) Equipment and Standards for Determining Valid Votes on Optical Scan Voting Systems and/or Paper Ballots, providing Ballot Examples for Counting Paper Ballots, establishing Standards for Determining Valid Votes on Lever Type Voting Machines, and instructing county boards how to conduct a Three Percent (3%) Audit.

Needs and benefits: As a result of HAVA implementation, New York State is required to replace old mechanical lever machines with new

electronic machines. When the mechanical machines are replaced by new technologically advanced machines § 6209, which governed Electronic Voting Systems and Auxiliary Equipment; § 6210, which governed Absentee Voting Counting Equipment and § 6211, which governed the Operation of Absentee Counting Systems Utilizing Electronically Tabulated Punch Card Ballots will be considered obsolete. A new regulation must be created in order to sustain the new technology presented by the new forms of machines.

The new voting machines will require maintenance that is not contemplated in the current regulations. Accordingly, the new regulation will define the necessary maintenance requirements for the new voting machines to assure that they will function properly. By enacting § 6210.1 through 18, the State Board will establish routine maintenance and testing of new voting systems and create operational procedures that will also ensure that uniform standards prevail for all elections. As a result, the State Board will be in statutory compliance with HAVA mandates and will have updated regulations in accordance with the 2005 Election Laws. In addition to being statutorily in compliance, the new regulation will promote accuracy in election outcomes and benefit all voters in elections throughout New York State.

Costs: Since no machine has yet been certified it is currently impossible to provide exact costs of this proposed regulation. It is, however, safe to conclude that costs may vary based on the voting equipment chosen by the county.

On going maintenance of equipment owned by the county boards of elections is a standard business procedure accomplished by county board employees with such maintenance as part of their job description. Costs to counties will depend upon the salaries of the employees responsible for such maintenance, as well as additional overtime hours that accrue because of the maintenance testing. For example: one type of machine requires a battery pack in order to operate effectively. This would undoubtedly be an additional cost to counties and may continue per election throughout the life of the machine. In addition, because the system that is ultimately certified will be a form of electronic versus the old mechanical lever machines, the frequency of maintenance will probably be greater than the maintenance that is required for lever machines. Lastly, it may require a custodian with greater technological knowledge. This may require additional training or persons with an advanced technological skill level. As a result, machine costs overall will be escalated.

Local government mandates: This regulation focuses on local government and does mandate several specific obligations on local county boards of elections that were mentioned in the Legislative Objectives section.

Paperwork: Local county boards are required to maintain all election equipment and must keep maintenance logs for each machine.

Duplication: The subject regulation does not duplicate other existing Federal or State voting requirements.

Alternatives: As a result of the 2005 changes to the NYS Election Law, many regulations became obsolete. In updating their regulations, the State Board originally sought to combine three regulations into one: § 6209, Electronic Voting Systems and Auxiliary Equipment; § 6210, Absentee Voting Counting Equipment and § 6211, Operation of Absentee Counting Systems Utilizing Electronically Tabulated Punch Card Ballots thus creating one regulation, § 6209. At the time, the effort to combine such regulations received numerous public comments during the adoption period for § 6209. Many Government advocacy agencies and concerned citizens voiced their opinions regarding the changes.

Some examples include:

New Yorkers for Verified Voting 6209.2A(4) "Provide a battery power source" [There is no] period of time over which the system must continue to run on a battery.

6209.2B (3) "Provision needs to be more general, requiring support for dual switch input devices, such as sip and puff switches, foot pedal switches and jelly switches".

6209.3J "paragraph is too vague and does not specify which entity will perform the functional tests nor does it state who determines whether the special purpose data processing equipment has successfully performed in elections use".

6209.8A "This will allow counties to continue to use their systems after certification has been withdrawn. The voting system should not be allowed to be used until it has been recertified".

Testimony of Dan Jacoby

Disagrees with section 6209.2(A)(5), which states "The system shall contain software required to perform a diagnostic test of system status, and the means of simulating the random selection of candidates and casting of ballots in quantities sufficient to demonstrate that the system is fully

operational and that all positions are operable". He state that "a simulated test will not uncover flaws in a voting system, whether it be a DRE or and OpSCAN".

"With OpSCAN, a simulated test will not detect real world situations like if a voter fills in an oval incompletely or if they extend outside of the ovals".

"With a DRE, a simulated test will not detect if there are faulty touch-pad buttons or desensitized portions of a touch-screen".

Testimony of Margaret Yonco-Haines

"Rules and regulations don't protect the integrity of the votes cast".

"Draft rules don't address major security concerns that were raised in GAO report: these flaws include system controls, access controls, physical hardware controls, and weak security management practices employed by voting machine vendors". "source code and certification process must be open to the public".

Testimony of Vicky Perry, Dutchess County Board of Elections

"Standards for the verification of intent by the voter are absent".

"These regulations will further privatization of voting. They will give vendors inordinate power over the voter".

After the initial comment period, there was only agreement to adopt the § 6209 version if the Board removed everything after § 6209.10. As a result, the second half of the regulations became the starting point for the proposed § 6210 regulations with two new incorporated areas. These areas include the Definition of a Vote (6210.13 through 6210.17) and the new Audit provision (6210.18), as required by Election Law § 9-211. The newly formulated version of § 6210, Routine Maintenance and Testing of Voting Systems and Operational Procedures, was the best alternative because it reflects many comments suggested under the 6209 comment period and it provides for the new requirements of voting systems other than lever voting machines or punch card absentee ballot counters.

Federal standards: There are no Federal standards for maintenance of voting machines.

Compliance schedule: The Regulation will be effective on the date it is adopted.

Regulatory Flexibility Analysis

Effect of the rule

This rule applies solely to local governments and does not apply to small businesses. All 58 county boards of elections will have to comply with this rule.

Compliance requirements

In 2000, the federal government enacted the Help America Vote Act (HAVA). As per HAVA requirements, New York State is mandated to replace current mechanical lever machines with either Direct Recording Electronic Voting Systems (DRE's) or Precinct Based Optical Scan Voting Systems (Op Scans), when such machines are certified. The legislative objective in adopting § 6210 is to comply with HAVA mandates.

The new voting machines will require maintenance that is not contemplated in the current regulations. Accordingly, the new regulation will define the necessary maintenance requirements for the new voting machines to assure that they will function properly.

Professional services

Once machines are certified, as per Election Law § 7-204, all contracts shall "require the vendor to guarantee in writing to keep machines and systems in good working order for at least five (5) years without additional costs. . ."

Also, depending on the machine(s) that are certified, some professional services in the field of technology may be needed in addition to Board of Elections staff.

Costs

Since no machine has yet been certified it is currently impossible to provide exact costs of this proposed regulation. It is, however, safe to conclude that costs may vary based on the voting equipment chosen by the county.

On going maintenance of equipment owned by the county boards of elections is a standard business procedure accomplished by county board employees with such maintenance as part of their job description. Costs to counties will depend upon the salaries of the employees responsible for such maintenance, as well as additional overtime hours that accrue because of the maintenance testing. For example: one type of machine requires a battery pack in order to operate effectively. This would undoubtedly be an additional cost to counties and may continue per election throughout the life of the machine.

In addition, because the system that is ultimately certified will be a form of electronic versus the old mechanical lever machines, the frequency

of maintenance will probably be greater than the maintenance that is required for lever machines.

Lastly, it may require a custodian with greater technological knowledge. This may require additional training or persons with an advanced technological skill level. As a result, machine costs overall will be escalated.

Economic and technological feasibility

New machines will have to be purchased by counties in order to replace the lever machine. The new machines will be more technologically advanced than lever machines and have computerized components.

Enacting this rule will not obligate local county boards to go beyond the requirements of the law.

Minimizing adverse impacts

The proposed regulation will undoubtedly impose additional costs on county boards in rural areas. However, under HAVA county boards were given federal funding toward the purchase and maintenance of new voting machines. Most of the mandated initial costs will be absorbed by federal funding, but there may be ongoing costs that will need to be absorbed by the counties, including those with rural areas.

Participation

As a result of the 2005 changes to the NYS Election Law, many regulations became obsolete. In updating their regulations, the State Board originally sought to combine three regulations into one: § 6209, Electronic Voting Systems and Auxiliary Equipment; § 6210, Absentee Voting Counting Equipment and § 6211, Operation of Absentee Counting Systems Utilizing Electronically Tabulated Punch Card Ballots thus creating one regulation, § 6209. At the time, the effort to combine such regulations received numerous public comments during the adoption period for § 6209. Many Government advocacy agencies and concerned citizens voiced their opinions regarding the changes such as The League of Women Voters, NYPIRG, Common Cause and New Yorkers for Verified Voting.

In addition, throughout the process, local County Boards' of Elections have been kept apprised of on going efforts by the State Board to revise the maintenance portion of the Election Law. Their opinions and input have consistently been solicited.

Rural Area Flexibility Analysis

Effect of the rule

This rule applies to local county Boards of Elections throughout New York State. It will, therefore, have an impact on every rural area in the state.

Compliance requirements

In 2000, the federal government enacted the Help America Vote Act (HAVA). As per HAVA requirements, New York State is mandated to replace current mechanical lever machines with either Direct Recording Electronic Voting Systems (DRE's) or Precinct Based Optical Scan Voting Systems (Op Scans), when such machines are certified. A new regulation must be created in order to sustain the new technology presented by the new forms of machines. The legislative objective in adopting § 6210 is to comply with HAVA mandates.

The State Board of Elections took into consideration rural areas and concluded that this regulation may impose an adverse impact in rural areas. As a result, because the process will be new to New York State it may require additional, reporting, recordkeeping or other compliance requirements.

Professional services

Once machines are certified, as per Election Law § 7-204, all contracts shall "require the vendor to guarantee in writing to keep machines and systems in good working order for at least five (5) years without additional costs. . ."

Also, depending on the machine(s) that are certified, some professional services in the field of technology may be needed in addition to Board of Elections staff.

Costs

Since no machine has yet been certified it is currently impossible to provide exact costs of this proposed regulation. It is, however, safe to conclude that costs may vary based on the voting equipment chosen by the county.

On going maintenance of equipment owned by the county boards of elections is a standard business procedure accomplished by county board employees with such maintenance as part of their job description.

Costs to counties will depend upon the salaries of the employees responsible for such maintenance, as well as additional overtime hours that accrue because of the maintenance testing. For example: one type of machine requires a battery pack in order to operate effectively.

This would undoubtedly be an additional cost to counties and may continue per election throughout the life of the machine. In addition,

because the system that is ultimately certified will be a form of electronic versus the old mechanical lever machines, the frequency of maintenance will probably be greater than the maintenance that is required for lever machines.

Lastly, it may require a custodian with greater technological knowledge. This may require additional training or persons with an advanced technological skill level. As a result, machine costs overall will be escalated.

Economic and technological feasibility

New machines will have to be purchased by all rural counties in order to replace the lever machine. The new machines will be more technologically advanced than lever machines and have computerized components.

Enacting this rule will not obligate counties in rural areas to go beyond the requirements of the law.

Minimizing adverse impacts

The proposed regulation will undoubtedly impose additional costs on county boards in rural areas. However, under HAVA county boards were given federal funding toward the purchase and maintenance of new voting machines. Most of the mandated initial costs will be absorbed by federal funding, but there may be ongoing costs that will need to be absorbed by the counties, including those with rural areas.

Participation

As a result of the 2005 changes to the NYS Election Law, many regulations became obsolete. In updating their regulations, the State Board originally sought to combine three regulations into one: § 6209, Electronic Voting Systems and Auxiliary Equipment; § 6210, Absentee Voting Counting Equipment and § 6211, Operation of Absentee Counting Systems Utilizing Electronically Tabulated Punch Card Ballots thus creating one regulation, § 6209. At the time, the effort to combine such regulations received numerous public comments during the adoption period for § 6209.

Many Government advocacy agencies and concerned citizens voiced their opinions regarding the proposed regulation such as The League of Women Voters, NYPIRG, Common Cause and New Yorkers for Verified Voting.

In addition, throughout the process, local County Boards' of Elections, including those in rural areas have been kept apprised of on going surveys and outreach by the State Board. Their opinions and input has consistently been solicited.

Job Impact Statement

The State Board of Elections anticipates that there will be no substantial adverse impact on jobs or employment in the State of New York as a result of this regulation. This regulation is being enacted in order to comply with HAVA mandates and to establish Routine Maintenance and Testing of Voting Systems and Operational Procedures. As a result, all Board of Elections staff, including machine custodians, will be trained on new electronic machines that will be replacing mechanical lever machines and their jobs will not be impacted.

Since nothing in the proposed regulation will increase or decrease the number of jobs in New York State, have an impact on any region in New York State, and no adverse impact on jobs in New York State, no further steps were needed to ascertain these facts and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Department of Environmental Conservation

NOTICE OF ADOPTION

Outdoor Recreation and Trail Maintenance Pin and Patch Program

I.D. No. ENV-29-07-00017-A

Filing No. 1033

Filing date: Oct. 2, 2007

Effective date: Oct. 17, 2007

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

Action taken: Addition to Part 198 to Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 3-0301(2)(m) and 11-0329

Subject: Outdoor Recreation and Trail Maintenance Pin and Patch Program.

Purpose: To implement a voluntary outdoor recreation and trail maintenance pin and patch program.

Text or summary was published in the notice of proposed rule making, I.D. No. ENV-29-07-00017-P, Issue of July 18, 2007.

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

Text of rule and any required statements and analyses may be obtained from: McCrea Burnham, Department of Environmental Conservation, 625 Broadway, Albany, NY 12233-4250, (518) 402-9405, e-mail: smburnha@gw.dec.state.ny.us

Assessment of Public Comment

The agency received no public comment.

Assessment of Public Comment

The agency received no public comment.

Office of General Services

NOTICE OF ADOPTION

Discretionary Thresholds in State Procurement

I.D. No. GNS-25-07-00002-A

Filing No. 1029

Filing date: Oct. 1, 2007

Effective date: Oct. 17, 2007

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

Action taken: Amendment of section 250.6 of Title 9 NYCRR.

Statutory authority: State Finance Law, section 163(6), (6-a); and L. 2006, ch. 56 part D, section 4

Subject: Discretionary thresholds in State procurement.

Purpose: To amend the discretionary buying thresholds and remain consistent with section 4 of part D of chapter 56 of the Laws of 2006.

Text or summary was published in the notice of proposed rule making, I.D. No. GNS-25-07-00002-P, Issue of June 20, 2007.

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

Text of rule and any required statements and analyses may be obtained from: Paula Hanlon, Office of General Services, 41st Fl., Corning Tower, Empire State Plaza, Albany, NY 12242, (518) 474-0571, e-mail: paula.hanlon@ogs.state.ny.us

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

General Provisions for Purchasing Services

I.D. No. GNS-28-07-00001-A

Filing No. 1030

Filing date: Oct. 1, 2007

Effective date: Oct. 17, 2007

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

Action taken: Addition of section 250.4(f) to Title 9 NYCRR.

Statutory authority: Executive Law, section 200; State Finance Law, section 163(4); and L. 2006, ch. 11, section 4

Subject: General provisions for purchasing services.

Purpose: To remain consistent with section 4 of chapter 11 of the Laws of 2006, in requiring contractors and subcontractors to submit annual employment reports.

Text or summary was published in the notice of proposed rule making, I.D. No. GNS-28-07-00001-P, Issue of July 11, 2007.

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

Text of rule and any required statements and analyses may be obtained from: Paula Hanlon, Office of General Services, 41st Fl., Corning Tower, Empire State Plaza, Albany, NY 12242, (518) 474-0571, e-mail: paula.hanlon@ogs.state.ny.us

Insurance Department

NOTICE OF ADOPTION

Continuing Care Retirement Communities

I.D. No. INS-33-06-00003-A

Filing No. 1034

Filing date: Oct. 2, 2007

Effective date: Oct. 17, 2007

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

Action taken: Amendment of Part 350 (Regulation 140) of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301 and 1119; and Public Health Law, sections 4604(4)(a), 4607 and 4611

Subject: Continuing care retirement communities authorized pursuant to art. 46 of the Public Health Law.

Purpose: To adopt revised standards pertaining to continuing care retirement communities authorized pursuant to art. 46 of the Public Health Law.

Text or summary was published in the notice of proposed rule making, I.D. No. INS-33-06-00003-P, Issue of August 16, 2006.

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

Revised rule making(s) were previously published in the State Register on August 22, 2007.

Text of 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

Assessment of Public Comment

The original proposed regulation was published in the New York State Register on August 16, 2006 (INS-33-06-00003-P). Comments were received from an industry organization representing, among others, operators of CCRCs. In response to the public comments, the proposal was revised. The revised proposal was published in the *State Register* on August 22, 2007 (INS-33-06-00003-RC), including an assessment of the comments received on the original proposal.

The Department received comments regarding the revised proposal as follows:

COMMENT: While the industry organization did not oppose the revised regulation, it felt that the Department should reconsider its decision not to revise the regulation (based upon comments received on the original proposal) with regard to the requirement for quarterly reporting on the status of liquid assets pursuant to section 350.6(a)(4) and the conditions under which the superintendent would require a new actuarial study pursuant to section 350.9(b).

RESPONSE: The Department considers that the previously published responses to the comments received on both of these issues are adequate and appropriate. Therefore, no modification to the rule was made.

COMMENT: The industry organization has convened a workgroup to make recommendations to the Department concerning investment and reserve requirements for consideration in the next amendment to the regulation.

RESPONSE: The Department looks forward to seeing what recommendations the workgroup develops.

NOTICE OF ADOPTION

Training Allowance Subsidy

I.D. No. INS-32-07-00002-A

Filing No. 1027

Filing date: Oct. 1, 2007

Effective date: Oct. 17, 2007

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

Action taken: Addition of Part 12 (Regulation 50) to Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301 and 4228

Subject: Rules limiting the amount of training allowance subsidy an insurer can pay an agent.

Purpose: To update the limits in Insurance Law, sections 4228(e)(3)(C) through (E) to reflect inflation from the Jan. 1, 1998 effective date of section 4228 to the present.

Text or summary was published in the notice of proposed rule making, I.D. No. INS-32-07-00002-P, Issue of August 8, 2007.

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

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

Assessment of Public Comment

The agency received no public comment.

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

Rules Governing Valuation of Life Insurance Reserves

I.D. No. INS-42-07-00004-P

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

Proposed action: Amendment of Part 98 (Regulation 147) of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 1304, 1308, 4217, 4218, 4240 and 4517

Subject: Rules governing valuation of life insurance reserves.

Purpose: To include provisions from Actuarial Guideline 38.

Text of proposed rule: Subdivisions (i) through (r) of Section 98.3 are hereby relettered (j) through (s) and a new subdivision (i) is added to read as follows:

(i) "Insurer" means a life insurance company, fraternal benefit society or an accredited reinsurer that reinsures life insurance, whether within or outside the state, or writes life insurance outside the state.

A new subdivision (w) is added to Section 98.4 to read as follows:

(w)(1) For the purposes of this section, statistical agent means an entity with proven systems for protecting the confidentiality of individual insured and insurer information; demonstrated resources for, and history of, ongoing electronic communications and data transfer ensuring data integrity with insurers that are the statistical agent's members or subscribers; and a history of and means for aggregation of data and accurate promulgation of the experience modifications in a timely manner.

(2)(i) This subdivision applies to insurers where the sum of the premiums received as specified in (a), (b), (c), and (d) of this paragraph exceed ten million dollars for the previous calendar year:

- (a) Direct individual life insurance premiums,
- (b) Reinsurance assumed life insurance premiums,
- (c) Direct individually solicited group life insurance premiums,

and

(d) Reinsurance assumed individually solicited group life insurance premiums.

(ii) Every insurer subject to this subdivision shall annually file on or before July 1 with the superintendent, or at the direction of the superintendent, with either the National Association of Insurance Commissioners or with a statistical agent designated by the superintendent, a statistical report, in a form specified by the superintendent, showing mortality, expenses, lapses, and such other company experience information as the superintendent may deem necessary or expedient for the administration of the provisions of the Insurance Law or this Part, with respect to individual life insurance policies and individually solicited group life insurance certificates issued on or after January 1, 1990.

Section 98.9(c)(2)(ii)(b) is amended to read as follows:

(b) Regarding the reserve calculation, this example differs from the one in [section 98.9(c)(1)(i)] subparagraph (i) of this paragraph in that there is no specified event that has to occur in order for the insurer to impose a premium increase; however, the insurer must provide an additional benefit to the policyholder if it exercises this right. Thus the insurer does not have an unrestricted right to impose an increase after ten years. If the contract contains provisions that require additional benefits be provided to the policyholder in the event of a premium increase, even if these benefits are lost if not claimed within a stated time frame, then the initial premiums shall be treated as guaranteed for the entire 30 year period. It would be contrary to the conservative nature of statutory accounting to

treat this policy the same as one in which the ability to raise premiums does not require that additional benefits be provided. Therefore, the initial segment for this policy is 30 years.

The opening paragraph of section 98.9(c)(2)(viii) is amended to read as follows:

(viii) When a universal life policy guarantees coverage to remain in force as long as the accumulation of premiums paid satisfies the secondary guarantee requirement, for policies issued on or after January 1, 2003, the steps [outlined] specified in clauses (a) [- (ix)] through (i) of this subparagraph shall be used to calculate the reserves.

Section 98.9(c)(2)(viii)(b) is renumbered to be Section 98.9(c)(2)(viii)(b)(1), to read as follows:

(b)(1) For purposes of applying section 98.7(b)(1) of this Part, the specified premiums are the minimum gross premiums derived in clause (a) of this subparagraph. Consistent with section 98.5 of this Part, items in clauses (c) through (i) of this subparagraph shall be calculated on a segmented basis, using the segments that section 98.5 of this Part defines for the product. Therefore, in clauses (c) through (i) of this subparagraph, the term fully fund the guarantee shall mean fully funding the guarantee to the end of each possible segment. The term remainder of the secondary guarantee period shall mean the remainder of each possible segment. The reserve shall be no less than the greatest reserve determined by applying the methodology of this subparagraph to the end of each possible segment.

A new section 98.9(c)(2)(viii)(b)(2) is added to read as follows:

(2) For policies issued on or after January 1, 2007 and prior to January 1, 2011, for purposes of applying section 98.7(b)(1) of this Part, an insurer may use a lapse rate of no more than two percent per year for the first five years, followed by no more than one percent per year to the policy anniversary specified in the following table based on issue age, and zero percent per year thereafter. If the period of time from the date of policy issuance to the date of the applicable policy anniversary age in the table is less than five years, then an insurer may use a lapse rate of no more than two percent per year for that period of time, and zero percent per year thereafter.

Issue Age	Policy Anniversary after which the lapse rate is zero
0-50	30th policy anniversary
51 - 60	Policy Anniversary age 80
61 - 70	20th policy anniversary
71 - 89	Policy anniversary age 90
90 and over	no lapse

Section 98.9(c)(2)(viii)(e) is amended to read as follows:

(e) Compute the net single premium on the valuation date for the coverage provided by the secondary guarantee for the remainder of the secondary guarantee period, using the applicable valuation table and select factors as prescribed in section 98.4(a) of this Part, or Part 100 of this Title (Regulation 179), if applicable. For purposes of calculating the net single premium for policies issued on or after January 1, 2007 and prior to January 1, 2011, a lapse rate subject to the same criteria as the lapse rate used in applying clause (b) of this subparagraph may be used.

Section 98.9(c)(2)(viii)(h)(2) is amended to read as follows:

(2) Calculate both net premiums using the maximum allowable valuation interest rate and the minimum mortality standards allowable for calculating basic reserves. However, except for policies issued on or after January 1, 2007 through January 1, 2011, if no future premiums are required to support the guarantee period being valued, there is no reduction for surrender charges. If the resulting amount is less than the sum of the basic and deficiency reserve from clause (b) of this subparagraph, then the basic and deficiency reserves to be used for the purposes of section 98.7(b)(1)(vi)(a) of this Part are those calculated in clause (b) of this subparagraph, and no further calculation is required.

A new section 98.9(c)(2)(viii)(j) is added as follows:

(j) With respect to any policy issued pursuant to this subparagraph, on or after January 1, 2007 and prior to January 1, 2011, the insurer shall annually submit an actuarial opinion and memorandum on or before March 1, in form and substance satisfactory to the superintendent, which satisfies the requirements of Part 95 of this Title (Regulation 126). Reserves established in accordance with this subparagraph shall be increased by any additional reserves required by the stand-alone asset adequacy analysis.

Text of proposed 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

Data, views or arguments may be submitted to: Frederick Andersen, Insurance Department, One Commerce Plaza, Albany, NY 12257, (518) 474-7929, e-mail: fanderse@ins.state.ny.us

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

Regulatory Impact Statement

1. Statutory authority:

The Superintendent's authority for the Second Amendment to Regulation No. 147 (11 NYCRR 98) derives from sections 201, 301, 1304, 1308, 4217, 4218, 4240 and 4517 of the Insurance Law.

These sections establish the Superintendent's authority to promulgate regulations governing reserve requirements for life insurers and fraternal benefit societies. Sections 201 and 301 of the Insurance Law authorize the Superintendent to effectuate any power accorded to him by the Insurance Law, and prescribe regulations interpreting the Insurance Law.

Section 1304 of the Insurance Law enables the Superintendent to require any additional reserves as necessary on account of life insurers' policies, certificates and contracts.

Section 1308 of the Insurance Law describes when reinsurance is permitted, and the effect that reinsurance will have on reserves.

Section 4217 requires the Superintendent to annually value, or cause to be valued, the reserve liabilities ("reserves") for all outstanding policies and contracts of every life insurance company doing business in New York. Section 4217(a)(1) specifies that the Superintendent may certify the amount of any such reserves, specifying the mortality table or tables, rate or rates of interest and methods used in the calculation of the reserves. Reserving has not historically included lapse as a factor in calculations because it was not relevant to traditional forms of life insurance contracts, and therefore Section 4217 does not expressly include references to lapses. However, new products have been developed that were not contemplated at the time Section 4217 was written, such that lapses may be relevant in reserve calculations in some cases.

Section 4217(c)(6)(C) provides that reserves according to the commissioners reserve valuation method for life insurance policies providing for a varying amount of insurance or requiring the payment of varying premiums shall be calculated by a method consistent with the principles of section 4217(c)(6).

Section 4217(c)(6)(D) permits the Superintendent to issue, by regulation, guidelines for the application of the reserve valuation provisions for section 4217 to such policies and contracts as the Superintendent deems appropriate.

Section 4217(c)(9) requires that, in the case of any plan of life insurance that provides for future premium determination, the amounts of which are to be determined by the insurance company based on then estimates of future experience, or in the case of any plan of life insurance or annuity that is of such a nature that the minimum reserves cannot be determined by the methods described in section 4217(c)(6) and section 4218, the reserves that are held under the plan must be appropriate in relation to the benefits and the pattern of premiums for that plan, and be computed by a method that is consistent with the principles of sections 4217 and 4218, as determined by the Superintendent.

Section 4218 requires that when the actual premium charged for life insurance under any life insurance policy is less than the modified net premium calculated on the basis of the commissioners reserve valuation method, the minimum reserve required for the policy shall be the greater of either the reserve calculated according to the mortality table, rate of interest, and method actually used for the policy, or the reserve calculated by the commissioners reserve valuation method replacing the modified net premium by the actual premium charged for the policy in each contract year for which the modified net premium exceeds the actual premium.

Section 4240(d)(6) states that the reserve liability for variable contracts shall be established in accordance with actuarial procedures that recognize the variable nature of the benefits provided and any mortality guarantees provided in the contract. Section 4240(d)(7) states that the Superintendent shall have the power to promulgate regulations, as may be appropriate, to carry out the provisions of this section.

Section 4517(b)(2) provides, for fraternal benefit societies, that reserves according to the commissioners reserve valuation method for life insurance certificates providing for a varying amount of benefits, or requiring the payment of varying premiums, shall be calculated by a method consistent with the principles of subsection (b).

2. Legislative objectives:

Maintaining solvency of insurers doing business in New York is a principle focus of the Insurance Law. One way the Insurance Law seeks to ensure solvency is by requiring all insurers and fraternal benefit societies authorized to do business in New York State to hold reserve funds necessary in relation to the obligations made to policyholders. At the same time, insurers and policyholders benefit when the insurer has adequate capital

for company uses such as expansion, product and other forms of business development.

3. Needs and benefits:

The regulation is necessary to help ensure the solvency of life insurers doing business in New York. The original version of Regulation No. 147, which incorporated the National Association of Insurance Commissioners (NAIC) Valuation of Life Insurance Policies model regulation (adopted in 1999), was permanently adopted in 2003. In 2004, the Department and other states became aware that some insurers were creating new products in order to avoid the reserve methodologies described in Regulation No. 147. As a result, the NAIC began developing an Actuarial Guideline in 2004 that addressed the concerns of the Department and other regulators by eliminating any perceived ambiguity in the standards for policies issued July 1, 2005 and later. This revision was adopted by the NAIC in October 2005 and Regulation No. 147 was amended on an emergency basis to reflect the principles of section 4217 of the Insurance Law and the NAIC standards for policies issued July 1, 2005 and later. The amendment was permanently adopted effective January 10, 2007.

In September 2006, the NAIC adopted a new version of Actuarial Guideline 38, which included provisions on lapse decrements and a separate asset adequacy analysis requirement for certain universal life with secondary guarantee policies. This amendment, which includes these provisions, is consistent with the NAIC. Consistent with the NAIC, these provisions will only be in effect for policies issued on or after January 1, 2007 and prior to January 1, 2011.

The lapse provision was intended to lessen what some insurers saw as redundancy in the reserves for these products. The January 1, 2011 sunset was added because the lapse provision is seen by the NAIC as being an interim resolution, with the expectation that other ways to address the reserve issue will be developed by 2011.

The separate asset adequacy analysis is intended to place a floor value on the reserve after inclusion of the lapse provision.

The regulation requires insurers to submit certain data because experience information is necessary in order to help the Department monitor the ongoing adequacy of the reserve established pursuant to this regulation, particularly as the Department considers the implementation of a more principles-based reserve system that puts more emphasis on an insurer's own experience data.

4. Costs:

Administrative costs to most insurers and fraternal benefit societies authorized to do business in New York State will be minimal. Since the majority of the reserve requirements and methodologies included in this regulation have been in effect since the adoption of the first amendment to this regulation in January 2007, most insurers would only need to update their current computer programs to implement the new reserve methodologies for policies with secondary guarantees. An insurer that needs to modify its current system could produce the modifications internally, or if the system was purchased from a consultant, have its consultant produce the modifications. The cost associated with these modifications is estimated to be less than \$5,000. The cost would include the actual modifications, as well as the testing and implementation of the new software. Once the modifications to the system have been developed, no additional costs should be incurred. Note that these are minimum standards, and an insurer need not modify its current computer systems if it continues to maintain higher reserves.

The impact of the additional provisions is estimated to be a ten percent decrease in reserves, but only for certain universal life with secondary guarantee policies issued on or after January 1, 2007 and prior to January 1, 2011. Reserves on policies issued before January 1, 2007 or on or after January 1, 2011 will not be impacted by these provisions.

Costs to the Insurance Department will be minimal, as existing personnel are available to verify that the appropriate reserves are held by insurers for policies affected by the amendment to Regulation No. 147. There are no costs to other government agencies or local governments.

The requirement of a stand-alone asset adequacy analysis should involve minimal costs for insurers and the Department because such analyses are already required under Sections 95.3(c) and 95.6 of 11 NYCRR 95 (Regulation 126) in view of the interest-sensitive nature of the applicable business.

The cost of submitting data for a company that already voluntarily supplies data as part of the Society of Actuaries data call is expected to be less than \$10,000. For a company that does not currently contribute to industry studies, the cost is expected to be up to \$50,000. The regulation, however, provides an exemption from submitting data for those insurers that do not meet the premium criteria specified in the regulation.

5. Local government mandates:

The regulation imposes no new programs, services, duties or responsibilities on any county, city, town, village, school district, fire district or other special district.

6. Paperwork:

The regulation imposes reporting requirements related to the actuarial opinion and memorandum required for insurers using the new reserve standards for universal life with secondary guarantee insurance policies. Additionally, the regulation requires that certain insurers provide data for mortality, expenses, lapses, and other company specific experience in a statistical report for life insurance policies and individually solicited group life insurance certificates issued on or after January 1, 1990.

7. Duplication:

The regulation does not duplicate any existing law or regulation.

8. Alternatives:

One alternative was to not include provisions of Actuarial Guideline 38 added in the version adopted by the NAIC in September 2006. These provisions consisted of lapse decrements and a separate asset adequacy analysis requirement when valuing certain universal life with secondary guarantee policies. In order to be consistent with the NAIC, the Department included these provisions in this amendment to Regulation No. 147.

The Department also considered requiring all insurers that issue life insurance or individually solicited group life insurance to provide data in the form of a statistical report. However, the amendment includes an exemption for insurers where the premiums are lower than the criteria specified in the regulation.

9. Federal standards:

There are no federal standards in this subject area.

10. Compliance schedule:

This amendment to the regulation applies to financial statements filed on or after December 31, 2007. Since asset adequacy analysis was already required for applicable blocks of business under Part 95 (Regulation 126), the requirement of a stand-alone asset adequacy analysis should not prevent insurers from having ample time to achieve full compliance. Additionally, the statistical report required for insurers meeting the criteria specified in the regulation is due annually on July 1, which gives insurers ample time to prepare the required report.

Regulatory Flexibility Analysis

1. Small businesses:

The Insurance Department finds that this rule will not impose any adverse economic impact on small businesses and will not impose any reporting, recordkeeping or other compliance requirements on small businesses. The basis for this finding is that this rule is directed at all insurers and fraternal benefit societies authorized to do business in New York State, none of which fall within the definition of "small business" as found in section 102(8) of the State Administrative Procedure Act. The Insurance Department has reviewed filed Reports on Examination and Annual Statements of authorized insurers and fraternal benefit societies, and believes that none of them fall within the definition of "small business", because there are none that are both independently owned and have under one hundred employees.

2. Local governments:

The regulation does not impose any impacts, including any adverse impacts, or reporting, recordkeeping, or other compliance requirements on any local governments.

Rural Area Flexibility Analysis

1. Types and estimated number of rural areas:

Insurers and fraternal benefit societies covered by the regulation do business in every county in this state, including rural areas as defined under SAPA 102(10).

2. Reporting, recordkeeping and other compliance requirements; and professional services:

The amendment to this regulation discusses the submission of data by insurers that exceed the premium criteria specified in the regulation for individual life insurance policies and individually solicited group life insurance certificates issued on or after January 1, 1990. It establishes reserve requirements for certain types of life insurance, including universal life insurance with secondary guarantees. The amendment also requires that a stand-alone asset adequacy analysis be performed for certain universal life insurance with secondary guarantee policies.

3. Costs:

Administrative costs to most insurers and fraternal benefit societies authorized to do business in New York State will be minimal. Since the majority of the reserve requirements and methodologies included in this regulation have been in effect since the adoption of the first amendment to

this regulation in January of 2007, most insurers would only need to update their current computer programs to implement the new reserve methodologies for policies with secondary guarantees. An insurer that needs to modify its current system could produce the modifications internally, or if the system was purchased from a consultant, have its consultant produce the modifications. The cost associated with these modifications is estimated to be less than \$5,000. The cost would include the actual modifications, as well as the testing and implementation of the new software. Once the modifications to the system have been developed, no additional costs should be incurred due to those requirements. Note that these are minimum standards, and an insurer need not modify its current computer systems if it continues to maintain higher reserves.

The impact of the additional provisions is estimated to be a ten percent decrease in reserves, only for certain universal life with secondary guarantee policies issued on or after January 1, 2007 and prior to January 1, 2011. Reserves on policies issued before January 1, 2007 or on or after January 1, 2011 will not be impacted by these provisions.

The requirement of a stand-alone asset adequacy analysis should involve minimal costs, because such analyses are already required under sections 95.3(c) and 95.6 of 11 NYCRR 95 (Regulation 126) in view of the interest-sensitive nature of the applicable business.

The cost of submitting data for a company that already voluntarily supplies data as part of the Society of Actuaries data call is expected to be less than \$10,000. For a company that does not currently contribute to industry studies, the cost is expected to be up to \$50,000. The regulation however provides an exemption from submitting data for those insurers that do not meet the premium criteria specified in the regulation.

4. Minimizing adverse impact:

The regulation does not impose any adverse impact on rural areas.

5. Rural area participation:

Numerous discussions with affected insurers have taken place during the course of developing a national standard through the National Association of Insurance Commissioners. Insurers that may be impacted by this standard are aware of the issues, and should have already formed estimates of the impact of the increase in costs and decrease in reserves. Additionally, the Department had extensive discussions with the Life Insurance Council of New York (LICONY) regarding this regulation and this amendment met with LICONY's approval. Moreover, discussion of the proposed rule making was included in the Insurance Department's regulatory agenda, which was published in the June 27, 2007 issue of the *State Register*.

Job Impact Statement

Nature of impact:

The Insurance Department finds that this rule will have little or no impact on jobs and employment opportunities. This regulation sets standards for setting life insurance reserves for insurers and fraternal benefit societies. The regulation is unlikely to impact jobs and employment opportunities.

Categories and number affected:

No categories of jobs or number of jobs will be affected.

Regions of adverse impact:

This rule applies to all insurers and fraternal benefit societies authorized to do business in New York State. There would be no region in New York which would experience an adverse impact on jobs and employment opportunities.

Minimizing adverse impact:

No measures would need to be taken by the Department to minimize adverse impacts.

Self-employment opportunities:

This rule would not have a measurable impact on self-employment opportunities.

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

2001 CSO Preferred Class Structure Mortality Table

I.D. No. INS-42-07-00005-P

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

Proposed action: Amendment of Part 100 (Regulation 179) of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 1304, 4217, 4218, 4221, 4224, 4240, and 4517, and arts. 24 and 26

Subject: Recognition of the 2001 CSO Mortality Table for use in determining minimum reserve liabilities and nonforfeiture benefits and recognition and guidance for use of the 2001 CSO Preferred Class Structure Mortality Table for use in determining minimum reserve liabilities.

Purpose: To recognize and permit the use of the 2001 CSO Preferred Class Structure Mortality Table for preferred lives for individual life insurance and group life insurance products sold to individuals by certificate with premium rates guaranteed from issue for at least two years in accordance with sections 4217 and 4517 of the Insurance Law.

Substance of proposed rule (Full text is posted at the following State website: <http://www.ins.state.ny.us/rproindx.htm>): The First Amendment to Regulation No. 179 recognizes and permits the use of a new minimum mortality table for insurers meeting the conditions specified in the rule, for the valuation of individual life insurance and group life insurance products sold to individuals by certificate with premium rates guaranteed from issue for at least two years. The following is a summary of the rule:

The title of Part 100 of Title 11 was amended to include the 2001 CSO Preferred Class Structure Mortality Table for use in determining minimum reserve liabilities.

Section 100.1 lists the main purposes of the rule and was amended to recognize and prescribe the use of a new mortality table for the valuation of life insurance, and recognizing, permitting, and providing guidance on the use of another mortality table for preferred lives.

Section 100.2 was amended to include the transition dates associated with the 2001 CSO Preferred Class Structure Mortality Table.

New subdivisions (h) through (t) were added to section 100.3, which is the definitions section.

The title of section 100.5 was amended.

The title of section 100.7 was amended.

A new section 100.8 was added that sets forth the general requirements for use of the 2001 CSO Preferred Class Structure Mortality Table. Such table may be substituted for the 2001 CSO Mortality Table for policies issued on or after January 1, 2007, for individual life insurance and group life insurance products sold to individuals by certificate with premium rates guaranteed from issue for at least two years, if certain conditions are met by the insurer. Such table may not be used as the minimum nonforfeiture standard.

A new section 100.9 was added that defines the conditions for use of the 2001 CSO Preferred Class Structure Mortality Table and defines tests of sufficiency which must be met for policies valued as super preferred nonsmoker, preferred nonsmoker, and preferred smoker. This section also requires that insurers annually submit statistical reports showing mortality information.

A new section 100.10 was added that provides guidance on how to choose an appropriate table from the 2001 CSO Preferred Class Structure Mortality Table. This section also requires that an actuarial certification and supporting actuarial report be provided for each class of business other than the residual standard class.

Section 100.8 was renumbered to section 100.11. This is the severability provision.

A new Appendix 25A was added that contains the 2001 CSO Preferred Class Structure Mortality Table.

A new Appendix 25B was added that contains the 2001 Valuation Basic Table.

Text of proposed 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

Data, views or arguments may be submitted to: Frederick Andersen, Insurance Department, One Commerce Plaza, Albany, NY 12257, (518) 474-7929, e-mail: fanderse@ins.state.ny.us

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

Regulatory Impact Statement

1. Statutory authority:

The superintendent's authority for the adoption of 11 NYCRR 100 (Regulation No. 179) derives from sections 201, 301, 1304, 4217, 4218, 4221, 4224, 4240, 4517, Article 24, and Article 26 of the Insurance Law.

These sections establish the superintendent's authority to promulgate regulations governing reserve requirements for life insurers. Sections 201 and 301 of the Insurance Law authorize the superintendent to effectuate any power accorded to him by the Insurance Law, and prescribe regulations interpreting the Insurance Law.

Section 1304 of the Insurance Law requires insurers to maintain reserves for life insurance policies and certificates according to prescribed tables of mortality and rates of interest.

Section 4217(c)(2)(A)(iii) permits, as a minimum standard of valuation for life insurance policies, any ordinary mortality table adopted by the National Association of Insurance Commissioners (NAIC) after 1980, and approved by the superintendent.

Section 4218 requires that when the actual premium charged for life insurance under any life insurance policy is less than the modified net premium calculated on the basis of the commissioners reserve valuation method, the minimum reserve required for such policy shall be the greater of either the reserve calculated according to the mortality table, rate of interest, and method actually used for such policy, or the reserve calculated by the commissioners reserve valuation method replacing the modified net premium by the actual premium charged for the policy in each contract year for which such modified net premium exceeds the actual premium.

Section 4221(k)(9)(B)(vi) permits, for policies of ordinary insurance, the use of any ordinary mortality table, adopted by the NAIC after 1980, and approved by the superintendent, for use in determining the minimum nonforfeiture standard.

Section 4224(a)(1) prohibits unfair discrimination between individuals of the same class and of equal expectation of life, in the amount or payment or return of premiums, or rates charged for life insurance policies.

Section 4240(d)(7) states the superintendent shall have the power to promulgate regulations, as may be appropriate, to carry out the provisions of this section, which covers various issues related to separate accounts of insurance companies, including reserve issues.

Section 4517(c)(2) requires fraternal benefit societies to comply with the minimum valuation standards of section 4217 of the Insurance Law for life insurance certificates issued on or after January 1, 1980.

Article 24 describes unfair methods of competition and unfair and deceptive acts and practices.

Article 26 describes unfair claim settlement practices, other misconduct and discrimination.

2. Legislative objectives:

One major area of focus of the Insurance Law is the solvency of insurers doing business in New York. One way the Insurance Law seeks to ensure solvency is by requiring all insurers licensed to do business in New York State to hold reserve funds necessary in relation to the obligations made to policyholders. The Insurance Law prescribes the mortality tables and interest rates to be used for calculating such reserves.

3. Needs and benefits:

With respect to policies issued on or after January 1, 2007, the 2001 CSO Preferred Class Structure Mortality Table may be used in place of the 2001 CSO Mortality Table under certain conditions, as specified in the rule, for valuing the minimum standards for individual life insurance policies and group life insurance policies sold to individuals by certificate with premium rates guaranteed from issue for at least two years. The split of the 2001 CSO Mortality Table into super-preferred, preferred, and residual standard classes will allow for reserves to better match the risks associated with different underwriting classifications. Use of the 2001 CSO Preferred Class Structure Mortality Table, however, is not mandatory.

The rule requires insurers to submit certain data because experience information is necessary in order to help the Department monitor the ongoing adequacy of the reserve established pursuant to this rule, particularly as the Department considers the implementation of a more principles-based reserve system that puts greater emphasis on an insurer's own experience data.

4. Costs:

Costs to most insurers and fraternal benefit societies authorized to do business in New York State will be minimal with respect to the cost to develop computer programs that incorporate the new 2001 CSO Preferred Class Structure Mortality Table. An insurer that chooses to modify its current system to include this table could produce modifications internally or purchase services from a consultant. Once the new table is incorporated into the insurers' systems, no additional costs should be incurred. An insurer would not need to modify its current computer systems if it decides not to use the 2001 CSO Preferred Class Structure Mortality Table for valuation.

Moreover, within plans of insurance where the insurer chooses to use the 2001 CSO Preferred Class Structure Mortality Table for valuation, it is estimated that insurer reserves will decrease by 10 to 50 percent. It is expected that the largest decrease would result from term life insurance

policies valued with super-preferred mortality rates. This should help reduce overall insurer costs as well.

Costs to the Insurance Department will be minimal, as existing personnel are available to verify that the appropriate reserves are held by insurers for policies affected by the rule. There are no costs to other government agencies or local governments.

The requirement of an actuarial certification and the supporting actuarial report should involve minimal costs for insurers and the Department, because it is likely that an actual to expected mortality analysis is already performed by most insurers that sell applicable business.

The cost of submitting data for an insurer that already voluntarily supplies data as part of the Society of Actuaries data call is expected to be less than \$10,000. For an insurer that does not currently contribute to industry studies, the cost is expected to be up to \$50,000. The rule, however, provides an exemption from submitting data for those insurers that do not use the 2001 CSO Preferred Class Structure Mortality Table for valuation.

5. Local government mandates:

The rule imposes no new programs, services, duties or responsibilities on any county, city, town, village, school district, fire district or other special district.

6. Paperwork:

The rule imposes reporting requirements related to the actuarial certification and supporting actuarial report required for insurers using the new 2001 CSO Preferred Class Structure Mortality Table for valuation. Additionally, the rule requires that insurers opting to use the new table provide data for mortality and other company specific experience in a statistical report for life insurance policies and group life insurance products sold to individuals by certificate with premium rates guaranteed from issue for at least two years.

7. Duplication:

The rule does not duplicate any existing law or regulation.

8. Alternatives:

The only significant alternative to be considered was to keep the current minimum mortality standard for the valuation of individual life insurance and group life insurance products sold to individuals by certificate with premium rates guaranteed from issue for at least two years, which would result in higher reserves for New York authorized life insurers and fraternal benefit societies on some policies.

9. Federal standards:

There are no federal standards in the subject area.

10. Compliance schedule:

This rule applies to financial statements filed on or after December 31, 2007. The 2001 CSO Preferred Class Structure Mortality Table may be used for policies issued on or after January 1, 2007. Use of the 2001 CSO Preferred Class Structure Mortality Table, however, is not mandatory. Voluntary election of such table is conditional, dependent upon the requirements set forth in the rule being met by the insurer. The actuarial certification and supporting actuarial report is due annually on March 1. The statistical report required for insurers that use the 2001 CSO Preferred Class Structure Mortality Table is due annually on July 1. Insurers should have ample time to meet the reporting requirements.

Regulatory Flexibility Analysis

1. Small Businesses:

The Insurance Department finds that this rule will not impose any adverse economic impact on small businesses and will not impose any reporting, recordkeeping or other compliance requirements on small businesses. The basis for this finding is that this rule is directed at all life insurers and fraternal benefit societies authorized to do business in New York State, none of which fall within the definition of "small business" contained in section 102(8) of the State Administrative Procedure Act. The Insurance Department has reviewed filed Reports on Examination and Annual Statements of authorized insurers and fraternal benefit societies and believes that none of them fall within the definition of "small business", because there are none which are both independently owned and have under one hundred employees.

2. Local Governments:

The regulation does not impose any impacts, including any adverse impacts, or reporting, recordkeeping, or other compliance requirements on any local governments.

Rural Area Flexibility Analysis

1. Types and estimated number of rural areas:

Insurers covered by the regulation do business in every county in this state, including rural areas as defined under SAPA 102(10).

2. Reporting, recordkeeping and other compliance requirements; and professional services:

The amendment to this regulation imposes reporting requirements related to the actuarial certification and supporting actuarial report required for insurers using the new 2001 CSO Preferred Class Structure Mortality Table for valuation. Additionally, the rule requires that insurers opting to use the new table provide data for mortality and other company specific experience in a statistical report for life insurance policies and group life insurance products sold to individuals by certificate with premium rates guaranteed from issue for at least two years. Use of the 2001 CSO Preferred Class Structure Mortality Table is not mandatory. Voluntary election of such table is conditional on the requirements set forth in the amendment to the regulation being met by the insurer.

3. Costs:

Costs to most insurers and fraternal benefits societies authorized to do business in New York State will be minimal, including the cost to develop computer programs which incorporate the new 2001 CSO Preferred Class Structure Mortality Table. The use of the new 2001 CSO Preferred Class Structure Mortality Table is optional and can be used for policies issued on or after January 1, 2007. This rule is expected to lower reserve levels for a number of products which use the new 2001 CSO Preferred Class Structure Mortality Table. An insurer that needs to modify its current system to include this table could produce modifications internally or purchase services from a consultant. Once the new table is incorporated into the insurers systems, no additional costs should be incurred due to the new table. An insurer would not need to modify its current computer systems if it decides not to use the 2001 CSO Preferred Class Structure Mortality Table for valuation.

For policies issued on or after January 1, 2007, within plans of insurance where the insurer chooses to use the 2001 CSO Preferred Class Structure Mortality Table for valuation, it is estimated that reserves will decrease by ten to fifty percent. It is expected that the largest decrease would result from term life insurance policies valued with super-preferred mortality rates.

Costs to the Insurance Department will be minimal, as existing personnel are available to verify that the appropriate reserves are held by insurers for policies affected by this rule. There are no costs to other government agencies or local governments.

The requirement of an actuarial certification and the supporting actuarial report should involve minimal costs for insurers and the Department because it is likely that an actual to expected mortality analysis is already performed by most insurers that sell applicable business.

The cost of submitting data for an insurer that already voluntarily supplies data as part of the Society of Actuaries data call is expected to be less than \$10,000. For an insurer that does not currently contribute to industry studies, the cost is expected to be up to \$50,000. The rule, however, provides an exemption from submitting data for those insurers that do not use the 2001 CSO Preferred Class Structure Mortality Table for valuation.

4. Minimizing adverse impact:

It does not impose any adverse impact on rural areas.

5. Rural area participation:

The tables in the rule are the same as those developed for the American Council of Life Insurers (ACLI) by Tillinghast of Towers Perrin and those adopted by the NAIC in September 2006. The ACLI represents 377 life insurers operating in the United States, including several New York domiciled insurers. Additionally, the Department had extensive discussions with the Life Insurance Council of New York (LICONY) regarding this rule. Moreover, a discussion of the proposed rule was included in the Insurance Department's regulatory agenda, which was published in the June 27, 2007 issue of the *State Register*.

Job Impact Statement

Nature of impact:

The Insurance Department finds that this rule will have a positive impact or no impact on jobs and employment opportunities. The rule adopts a new mortality table for use in determining minimum reserve liabilities and nonforfeiture benefits. This rule will lower reserve requirements and therefore decrease the cost of doing business in New York.

Categories and number affected:

The Insurance Department finds that no categories of jobs or number of jobs will be affected.

Regions of adverse impact:

This rule applies to all life insurers and fraternal benefit societies authorized to do business in New York State. There would be no region in

New York that would experience an adverse impact on jobs and employment opportunities.

Minimizing adverse impact:

No measures would need to be taken by the Department to minimize adverse impacts.

Self-employment opportunities:

This rule would not have a measurable impact on self-employment opportunities.

Department of Labor

NOTICE OF ADOPTION

Public Employee Occupational Safety and Health Standards

I.D. No. LAB-28-07-00015-A

Filing No. 1028

Filing date: Oct. 1, 2007

Effective date: Oct. 17, 2007

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

Action taken: Amendment of section 800.3 of Title 12 NYCRR.

Statutory authority: Labor Law, section 27-a4(a)

Subject: Public employees occupational safety and health standards.

Purpose: To incorporate by reference into New York State Occupational Safety and Health Standards, those safety and health standards adopted by the U.S. Department of Labor, Occupational Safety and Health Administration, as of Oct. 17, 2006.

Text or summary was published in the notice of proposed rule making, I.D. No. LAB-28-07-00015-P, Issue of July 11, 2007.

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

Text of rule and any required statements and analyses may be obtained from: Teresa Stoklosa, Department of Labor, Counsel's Office, State Office Campus, Bldg. 12, Rm. 509, Albany, NY 12240, (518) 457-4380, e-mail: teresa.stoklosa@labor.state.ny.us

Assessment of Public Comment

The agency received no public comment.

Division of the Lottery

EMERGENCY RULE MAKING

Lucky Sum Promotional Game Feature

I.D. No. LTR-42-07-00010-E

Filing No. 1035

Filing date: Oct. 2, 2007

Effective date: Oct. 2, 2007

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

Action taken: Amendment of Parts 2828 and 2832 of Title 21 NYCRR.

Statutory authority: Tax Law, section 1604(a)

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

Specific reasons underlying the finding of necessity: The New York Lottery will be conducting Lucky Sum as a feature to existing games available to New York's Numbers and Win 4 players. Game sales commenced on January 29, 2007. This game is necessary to assist the Lottery in reaching its projected revenue target for this fiscal year. A Notice of Proposed Rulemaking for this rule was submitted to GORR on August 13, 2007; however to continue operation of this game feature, this emergency

adoption is necessary. This feature is intended to improve somewhat slow revenues and will provide needed aid to education in this fiscal year.

Subject: Lucky Sum promotional game feature.

Purpose: To add the Lucky Sum promotional game feature to current New York Lottery regulations.

Text of emergency rule: Section 1. Section 2828.3 is amended by adding a new subdivision (h) to read as follows:

(h) *Lucky Sum is a feature of New York's Numbers game. Lucky Sum shall determine winners from bet tickets by correctly matching the sum of the player's number selection against the sum of the winning numbers drawn by the Lottery for that drawing.*

(1) *To place a bet, a purchaser must communicate*

(i) *the desired game bet data to an agent pursuant to subdivision (e) of this section; and*

(ii) *communicate to the agent that such purchaser's desire to add a Lucky Sum wager to the normal wager, who will issue a bet ticket. Such bet ticket will reflect the sum of the numbers played by the purchaser on that wager as the additional Lucky Sum wager.*

(2) *Lucky Sum wagers shall not be placed with pairs wagers.*

(3) *Up to fifty percent of the sales from each drawing will be allocated to a prize pool for that drawing.*

(4) *Prize structure and odds for this feature.*

Sum of Number Picked	Number of Ways to Match a Number	Expected Odds	Prize
0	1	1,000	\$500.00
1	3	333	\$166.00
2	6	167	\$83.00
3	10	100	\$50.00
4	15	67	\$33.00
5	21	48	\$23.50
6	28	36	\$17.50
7	36	28	\$13.50
8	45	22	\$11.00
9	55	18	\$9.00
10	63	16	\$7.50
11	69	14	\$7.00
12	73	14	\$6.50
13	75	13	\$6.50
14	75	13	\$6.50
15	73	14	\$6.50
16	69	14	\$7.00
17	63	16	\$7.50
18	55	18	\$9.00
19	45	22	\$11.00
20	36	28	\$13.50
21	28	36	\$17.50
22	21	48	\$23.50
23	15	67	\$33.00
24	10	100	\$50.00
25	6	167	\$83.00
26	3	333	\$166.00
27	1	1,000	\$500.00

(5) *Lucky Sum bets may be purchased for a minimum of \$1.00 per wager.*

§ 2. Section 2832.3 is amended by adding a new subdivision (g) to read as follows:

(g) *Lucky Sum is a feature of Win-4 game. Lucky Sum shall determine winners from bet tickets by correctly matching the sum of the player's number selection against the sum of the winning numbers drawn by the Lottery for that drawing.*

(1) *Lucky Sum wagers shall not be placed with pairs wagers.*

(2) *To place a bet, a purchaser must communicate:*

(i) *the desired game bet data to an agent pursuant to subdivision (e) of this section; and*

(ii) *communicate to the agent that such purchaser's desire to add a Lucky Sum wager to the normal wager, who will issue a bet ticket. Such bet ticket will reflect the sum of the numbers played by the purchaser on that wager as the additional Lucky Sum wager.*

(3) *Up to fifty percent of the sales from each drawing will be allocated to a prize pool for that drawing.*

(4) *Prize structure and odds for this feature.*

Sum of Number Picked	Number of Ways to Match a Number	Expected Odds	Prize
0	1	10,000	\$5,000.00
1	4	2,500	\$1,250.00
2	10	1000	\$500.00
3	20	500	\$250.00
4	35	286	\$142.00
5	56	179	\$89.00
6	84	119	\$60.00
7	120	83	\$42.00
8	165	61	\$30.00
9	220	45	\$22.50
10	282	35	\$17.50
11	348	29	\$14.00
12	415	24	\$12.00
13	480	21	\$10.00
14	540	19	\$9.00
15	592	17	\$8.00
16	633	16	\$7.50
17	660	15	\$7.50
18	670	15	\$7.50
19	660	15	\$7.50
20	633	16	\$7.50
21	592	17	\$8.00
22	540	19	\$9.00
23	480	21	\$10.00
24	415	24	\$12.00
25	348	29	\$14.00
26	282	35	\$17.50
27	220	45	\$22.50
28	165	61	\$30.00
29	120	83	\$42.00
30	84	119	\$60.00
31	56	179	\$89.00
32	35	286	\$142.00
33	20	500	\$250.00
34	10	1,000	\$500.00
35	4	2,500	\$1,250.00
36	1	10,000	\$5,000.00

(5) Lucky Sum bets may be purchased for a minimum of \$1.00 per wager.

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 Dec. 30, 2007.

Text of emergency rule and any required statements and analyses may be obtained from: Julie B. Silverstein, Acting General Counsel, New York Lottery, One Broadway Center, P.O. Box 7500, Schenectady, NY 12301-7500, (518) 388-3408, e-mail: jbarker@lottery.state.ny.us

Regulatory Impact Statement

1. Statutory authority: Pursuant to the authority conferred in New York State Tax Law, Section 1604[a] and the Official Compilation of Codes, Rules and Regulations of the State of New York, Title 21, Chapter XLIV, Section 2828 and 2832, the following official game rules shall take effect and shall remain in full force and effect throughout the New York Lottery's Lucky Sum as a new feature to existing games.

2. Legislative objectives: The purpose of operating Lottery games is to generate revenue for the support of education in the State. Amendment of these regulations forwards the mission of the New York State Lottery to generate revenue for education.

3. Needs and benefits: The New York Lottery has sustained competitive pressure from large jackpot lottery games in adjoining states. New Yorkers routinely travel outside the state to participate in those games. The New York Lottery's Lucky Sum, as an existing game feature, allows the New York Lottery to continue its effort to keep and enlarge its market share of players (from within New York State and those visiting New York State from other states) who participate in large jackpot lottery games. The New York Lottery's Lucky Sum as a new feature to existing games is anticipated on a full annual basis, to bring in more than \$53.9 million in revenue to benefit education in the State.

4. Costs:

a. Costs to regulated parties for the implementation 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: No additional operating costs are anticipated, since funds originally appropriated for the expenses of operating the existing lottery games are expected to be sufficient to support this new game.

c. Sources of cost evaluations: The foregoing cost evaluations are based on the New York State Lottery's experience in operating State Lottery games for more than 30 years.

5. Local government mandates: None.

6. Paperwork: There are no changes in paperwork requirements. Game feature brochures will be issued by the New York State Lottery for public convenience at retailer locations free of charge.

7. Duplication: None.

8. Alternatives: The alternative to adding New York Lottery's Lucky Sum as an existing game feature is not to proceed and forfeit the investment already made by the New York State Lottery for the game feature. The failure to proceed will also result in lost revenue to education that is anticipated to be earned.

9. Federal standards: None.

10. Compliance schedule: None.

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

The proposal does not require a Regulatory Flexibility Statement, Rural Flexibility Statement or Job Impact Statement. There will be no adverse impact on jobs, rural areas, small business or local governments.

Office of Mental Health

**EMERGENCY
RULE MAKING**

Personalized Recovery-Oriented Services

I.D. No. OMH-29-07-00014-E

Filing No. 1023

Filing date: Sept. 27, 2007

Effective date: Sept. 27, 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); 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 interventions 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.

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 November 25, 2007.

Text of emergency rule and any required statements and analyses may be obtained from: Joyce Donohue, Bureau of Policy, Regulation and Legislation, Office of Mental Health, 8th Fl., 44 Holland Ave., Albany, NY 12229, (518) 474-1331, e-mail: cocbjdd@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 persons 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 pre-

served. 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 State fiscal year. 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 appropriateness 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 rulemaking 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 when adopted.

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 14NYCRR 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 recordkeeping 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.

Assessment of Public Comment

The agency has received public comments on the Notice of Proposed Rulemaking for Part 512, Personalized Recovery-Oriented Services, and is in the process of reviewing them. Upon completion of this review, a comprehensive assessment of the public comments will be published in an upcoming issue of the *State Register*.

EMERGENCY RULE MAKING

Child and Family Clinic Plus Program

I.D. No. OMH-42-07-00001-E

Filing No. 1022

Filing date: Sept. 27, 2007

Effective date: Sept. 27, 2007

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

Action taken: Amendment of Part 587 of Title 14 NYCRR.

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

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

Specific reasons underlying the finding of necessity: These amendments provide authority to establish Child and Family Clinic Plus, a program authorized by the 2006-2007 enacted budget. Failure to initiate

this program immediately would result in children and their families being without services necessary to their health, safety and general welfare.

Subject: Child and Family Clinic Plus Program.

Purpose: To establish the program.

Text of emergency rule: Subdivision (b) of Section 587.4 is amended to add a new definition (1) and existing definitions (1) through (5) are renumbered (2) through (6) to read as follows:

587.4 (b) Program definitions.

(1) *Child and Family Clinic Plus provider* means a licensed clinic that has been approved by the Office of Mental Health to provide Child and Family Clinic Plus services.

(2) Off-site locations, for purposes of providing outpatient services and reimbursement, [are] means any sites in the community where a recipient may require services.

[(2)] (3) Program capacity shall mean the number of recipients who can be on site at a given time.

[(3)] (4) Program space means discrete space dedicated to the purpose of the outpatient program and includes all space used by recipients enrolled in the program.

[(4)] (5) Provider of service means the entity which is responsible for the operation of a program. Such entity may be an individual, partnership, association or corporation. For purposes of this Part, unless otherwise noted, the term also applies to a psychiatric center or institute operated by the Office of Mental Health.

[(5)] (6) Satellite location of a primary program means a physically separate adjunct site to a certified clinic treatment program, continuing day treatment program, day treatment program serving children or intensive psychiatric rehabilitation treatment program provides either a full or partial array of outpatient services on a regularly and routinely scheduled basis (full or part time).

Subdivision (c) of Section 587.4 is amended to add new definitions (5), (7), (10), (13) and (16), and to renumber existing definitions (5) as (6), (6) as (8), (7) as (9), (8) as (11), (9) as (12), (10) as (14), (11) as (15) and (12) through (29) as (17) through (34) respectively, to read as follows:

587.4 (c) Service definitions.

(1) Activity therapy means therapy designed to assist a recipient in developing the functional skills and social and environmental supports needed to function more successfully in current or intended life environments (i.e., living, learning, working and social). Such therapy should provide an opportunity for a recipient to practice the skills and build or sustain the supports needed to improve functioning.

(2) Assessment is the continuous clinical process of identifying an individual's behavioral strengths and weaknesses, problems and service needs, through the observation and evaluation of the individual's current mental, physical and behavioral condition and history. The assessment shall be the basis for establishing a diagnosis, treatment plan or psychiatric rehabilitation service plan.

(3) Case management services are the process of linking the individual to the service system and monitoring the provision of services with the objective of continuity of care and service. Case management includes the following components:

(i) Linking. The process of referring the individual to all required services and supports as specified in the individual service plan.

(ii) Case-specific advocacy. The process of interceding on behalf of the individual to gain access to needed services and supports.

(iii) Monitoring. The process of observing the individual to assure that needed services and supports are received.

(4) Carved-out services are those specialized services that are not included in the benefit package of a managed care provider, other than a duly authorized managed special care provider, for all current and future managed care enrollees, regardless of aid category. Such services are long term services for individuals with chronic illnesses and include the following:

(i) Day Treatment Programs;

(ii) Continuing Day Treatment Programs;

(iii) Intensive Psychiatric Rehabilitation Programs;

(iv) Partial Hospitalization;

(v) Comprehensive Medicaid Case Management (CMCM);

(vi) Rehabilitation services provided to a resident of OMH rehabilitation treatment services and family based treatment programs;

(vii) Services provided to children with serious emotional disturbances in designated clinics.

(5) *Child and Family Clinic Plus Services are Mental Health Screening, Comprehensive Assessment, In-Home Services and Evidence-Based Treatment.*

(6) Clinical support services are services provided to collaterals, by at least one therapist, with or without recipients for the purpose of providing resources and consultation for goal oriented problem solving, assessment of treatment strategies and provision of skill development to assisting the recipient in management of his or her illness.

(7) *Comprehensive Assessment is an assessment that follows the American Academy of Child and Adolescent Psychiatry practice parameters for comprehensive assessment and includes the regular and methodical use of psychometric tools. This will include collecting the recipient's mental health history, and any current signs and symptoms of mental illness or emotional disturbance, identification of child and family strengths, and the assessment of the data to determine the recipient's mental health status and need for treatment.*

[(6)] (8) Crisis intervention services are activities and interventions, including medication and verbal therapy, designed to address acute distress and associated behaviors when the individual's condition requires immediate attention.

[(7)] (9) Discharge planning is the process of planning for termination from a program or identifying the resources and supports needed for transition of an individual to another program and making the necessary referrals, including linkages for treatment, rehabilitation and supportive services based on assessment of the recipient's current mental status, strengths, weaknesses, problems, service needs, the demands of the recipient's living, working and social environment, and the client's own goals, needs and desires.

(10) *Evidence-Based Treatment is the application of therapeutic and or psychopharmacological approaches that have been scientifically proven to be effective in the treatment of specific emotional disturbances.*

[(8)] (11) Family treatment means therapeutic interventions designed to treat the recipient's psychiatric condition (whether the recipient is an adult or a minor) to address family issues that have a direct impact on the symptoms experienced by the recipient, and to promote successful problem solving, communication, and understanding between a recipient and family members as it relates to the recipient's symptoms, treatment, and recovery.

[(9)] (12) Health screening service is the gathering of data concerning the recipient's medical history and any current signs and symptoms, and the assessment of the data to determine his or her physical health status and need for referral for noted problems. The data may be provided by the recipient or obtained with his or her participation. The assessment of the data shall be done by a nurse practitioner, physician, physician's assistant, psychiatrist or registered professional nurse. The assessment of physical health status shall be integrated into the patient's treatment plan.

(13) *In-Home Services are clinic services of a minimum duration of 30 minutes provided by a qualified mental health professional to a child and/or his or her family, pursuant to his or her treatment plan, within the child's or family's living environment.*

[(10)] (14) Medication therapy means prescribing and/or administering medication, reviewing the appropriateness of the recipient's existing medication regimen through review of records and consultation with the recipient and/or family or caregiver, and monitoring the effects of medication on the recipient's mental and physical health.

[(11)] (15) Medication education means providing recipients with information concerning the effects, benefits, risks and possible side effects of a proposed course of medication.

(16) *Mental Health Screening is a broad-based approach to identify children and adolescents with emotional disturbances and intervene at the earliest possible opportunity.*

[(12)] (17) Pre-admission screening is the initial face-to-face process of contacting, interviewing and evaluating a potential recipient of mental health services to determine the individual's need for services.

[(13)] (18) Psychiatric rehabilitation goal setting is the process by which a recipient selects a specific environment in which he or she intends to live, work, learn, and/or socialize. The psychiatric rehabilitation goal identifies a specific environment, specific time frames, and is mutually agreed upon by the recipient and the staff.

[(14)] (19) Psychiatric rehabilitation treatment means therapeutic interventions designed to increase the functioning of a person with psychiatric disabilities so that he or she can succeed in a community environment of living, working, learning and social relationships.

[(15)] (20) Psychiatric rehabilitation functional and resource assessment is the process by which the recipient and practitioner develop an understanding of the skills the recipient can and cannot perform and the social and environmental resources that are available related to achieving the recipient's psychiatric rehabilitation goals.

[(16)] (21) Psychiatric rehabilitation readiness determination means an interview and observation process which evaluates rehabilitation readiness based on a recipient's perceived need, motivation, and awareness of the process involved in making a change in his or her life.

[(17)] (22) Psychiatric rehabilitation service planning is the process of designing and continuously revising an individualized program to assist the patient in obtaining and maintaining a psychiatric rehabilitation goal.

[(18)] (23) Psychiatric rehabilitation skills and resource development is the process of improving a recipient's use of skills and arranging for or adapting social and environmental resources necessary to achieve a psychiatric rehabilitation goal.

[(19)] (24) Psychiatric rehabilitation support services are consultation and technical assistance services provided to collaterals, by at least one therapist, with or without recipients. The purpose of this service is to enhance the capacity of the collateral to serve as a resource in assisting the recipient to achieve or maintain his or her psychiatric rehabilitation goal.

[(20)] (25) Referral means a post-assessment planning activity with the objective of referring or directing an individual to a program providing the appropriate services.

[(21)] (26) Rehabilitation readiness development is the process of building a recipient's skills to proceed with the rehabilitation goal setting process. This service might include confidence building activities, self-awareness activities, or trial visits to various environments.

[(22)] (27) Social training is an activity whose purpose is to assist a child in the acquisition or development of age-appropriate social and interpersonal skills.

[(23)] (28) Socialization is an activity whose purpose is to develop, improve or maintain a child's capacity for social or recreational involvement by providing age-appropriate opportunities for development, application and practice of social or recreational skills.

[(24)] (29) Supportive skills training is the development of physical, emotional and intellectual skills needed to cope with mental illness and the performance demands of personal care and community living activities. Such training is provided through direct instruction techniques including explanation, modeling, role playing and social re-enforcement interventions.

[(25)] (30) Symptom management, as a service for adults, means the development and provision of appropriate skills and techniques specific to the individual recipient's condition to enable him or her to recognize the onset of psychiatric symptoms and engage in activities designed to prevent, manage, or reduce such symptoms.

[(26)] (31) Symptom management, as a service for children, means a set of skill building interventions, adjunct to verbal therapy.

[(27)] (32) Task and skill training is a nonvocational activity whose purpose is to enhance a child's age-appropriate skills necessary for functioning in home, school and community settings. Task and skill training activities shall include, but not be limited to, personal care, budgeting, shopping, transportation, use of community resources, time management, and study skills.

[(28)] (33) Treatment planning is the process of developing, evaluating and revising an individualized course of treatment based on an assessment of the recipient's diagnosis, behavioral strengths and weaknesses, problems, and service needs.

[(29)] (34) Verbal therapy means providing goal oriented therapy including psychotherapy, behavior therapy, family and group therapy and other face-to-face contacts between staff and recipients designed to address the specific dysfunction of the recipient as identified in his or her treatment plan. As a service in a program serving children with a diagnosis of emotional disturbance, play therapy and expressive art therapy may also be included.

Section 587.9 is amended to add a new paragraph (f), and existing paragraphs (f) through (k) are renumbered (g) through (l), to read as follows:

(f) *A clinic treatment program that has been approved to be a Children and Family Clinic Plus provider shall also provide the following services:*

(1) *Mental Health Screening. Such services shall be provided in a community setting, and shall be provided with the prior written consent of the child's parent or legal guardian.*

(2) *Comprehensive Assessment. A comprehensive assessment can be performed over the course of not more than three (3) visits per client, and is intended to determine the presence and nature of any emotional disturbance and to develop a treatment plan where appropriate.*

(3) *In-Home Services.*

(4) *Evidence-Based Treatment.*

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. OMH-42-07-00001-P, Issue of October 17, 2007. The emergency rule will expire November 25, 2007.

Text of emergency rule and any required statements and analyses may be obtained from: Joyce Donohue, Bureau of Policy, Regulation and Legislation, Office of Mental Health, 44 Holland Ave., 8th Fl., Albany, NY 12229, (518) 474-1331, e-mail: cocbjdd@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 the authority and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction.

Subdivision (a) of Section 31.04 of the Mental Hygiene Law empowers the Commissioner to issue regulations setting standards for licensed programs for the provision of services for persons with mental illness.

Chapter 54 of the Laws of 2006 provides funding appropriations in support of the Child and Family Clinic Plus Program.

2. Legislative Objectives: Articles 7 and 31 of the Mental Hygiene Law reflect the Commissioner’s authority to establish regulations regarding mental health programs.

3. Needs and Benefits: Clinic treatment has been the foundation of the public mental health system for over thirty years. Each year, nearly 100,000 children and families are served in clinic treatment. This presents New York with a unique opportunity to demonstrate the impact that a transformation in State policy, financing and regulation, can make. The structure and financing of the clinic treatment program have remained constant and have not kept pace with findings generated by decades of scientific study in the recognition, diagnosis and treatment of childhood mental illness.

Currently, clinic services are very structured, designed to be delivered within an office-based setting, and require children and families to self-identify. To effectively address the mental health needs of children and their families in a timely manner, services need to be readily available and provided in a larger variety of settings, like the home. In order to achieve this shift in service provision, OMH recognizes the need for changes to be made to current clinic service structure and funding to improve access to effective and flexible services. Building on the knowledge that early and effective intervention increases the likelihood of positive outcomes; the OMH also recognizes the need to systematically identify childhood mental illness early through screening activities and to improve services by incorporating evidenced-based practices. Additionally, the President’s New Freedom Commission’s goal to address disparities in mental health services must be considered. These disparities are readily seen through the lenses of culture, race, age and gender. The opportunity to reduce these disparities in the children’s mental health system is within our grasp. When taken together, these actions are expected to result in the transformation of the children’s mental health system into one that more effectively addresses the needs of the children and families of New York State.

By this rulemaking, and as funded and authorized by the 2006-07 enacted State Budget, OMH is seeking to transform local mental health clinics from a passive program waiting for clients to present, to an active program that will intervene earlier in a child’s developmental trajectory. Through Child and Family Clinic-Plus, the children’s mental health system will adopt a public health approach to the early recognition and treatment of health concerns. With this new approach, children will be screened for emotional disturbance in their natural environment each year. Children in need of treatment will have access to a comprehensive assessment that utilizes the practice parameters from the American Academy of Child and Adolescent Psychiatry as well as evidence-based tools and scales. Children and families requiring treatment will find that Clinic-Plus brings improved access, in-home services, and treatments that have been shown through science to work. The initiative calls for the expansion of clinic services, creating greater access for children and their families receiving clinic treatment and in-home treatment services.

Each Child and Family Clinic-Plus provider will collaborate with its respective County or the City of New York to conduct systematic early recognition activities for the identified priority populations; demonstrate skill in engaging families in treatment; offer a range of evidence-based treatments that are individually determined and family focused; and will provide a constellation of support services in the home and community that lead to skill mastery for the child and family. Each Clinic-Plus will be licensed by the OMH as an outpatient clinic and will receive Medicaid and State Aid enhancements.

- The primary components of Child and Family Clinic-Plus include:
- Broad-based screening in natural environments
- Comprehensive assessment
- Expanded clinic capacity
- In-home services
- Evidence Based Treatment

Numerous research studies document the lack of adequate identification and treatment for children with serious emotional disturbance. In what was perhaps the largest epidemiological study of its kind, Kessler et al shows that the age of onset for serious mental illness in adulthood occurs in early adolescence, yet identification and treatment are often delayed for years. The age of onset is much earlier than once thought and has profound implications for children’s mental health. There is a long and rich scientific history substantiating the fact that there is a developmental progression to behavioral/emotional problems among young children. Emotional or behavioral problems unrecognized in childhood can cascade into full blown psychiatric disorders with serious debilitating consequences in adolescence or adulthood. Furthermore, there is a strong gradient of risk, such that problems left unrecognized and untreated can become far more severe and intractable illnesses in adulthood. In fact, the continuity of young children’s behavioral or emotional disorders into later problems in adolescence or adulthood is among the strongest and most unequivocal of scientific findings.

Decades of research, support the following:

- (1) mental health problems can be recognized as early as preschool;
- (2) risk factors for development of mental health problems can be identified in childhood and many are modifiable;
- (3) failure to identify and to intervene can have life-long and often devastating effects;
- (4) scientifically-validated tools for early recognition exist; and
- (5) a range of effective intervention service programs exist and they have a strong scientific base.

4. Costs:

(a) Costs to private regulated parties: There will be no mandated unreimbursed costs to the regulated parties.

(b) Costs to state and local government: The annual state cost for the program is estimated to be \$21,500,000.00. There is no local Medicaid share or other costs for this program.

(c) The cost projection was calculated as follows:

Screening for approximately 235,000 children	\$ 1,881,000
New clinic admissions for approximately 23,500*	11,679,000
In-home services (17,500)	7,940,000
Total	\$ 21,500,000

* Includes comprehensive assessments and clinic expansion

5. Local Government Mandates: These regulatory amendments will not involve or result in any additional imposition of duties or responsibilities upon county, city, town, village, school or fire districts.

6. Paperwork: This rule should not substantially increase the paperwork requirements of affected providers.

7. Duplication: These regulatory amendments to not duplicate existing State or federal requirements.

8. Alternatives:

A. Alternatives to providing authorization for Child and Family Clinic Plus.

The only alternative would be inaction. As this program, Child and Family Clinic Plus, has been established and funded in statute, this alternative was considered as contrary to the intent of the legislation.

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

10. Compliance schedule: The authority to establish and fund the Child and Family Clinic Plus program is effective on the filing date of this rulemaking.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not being submitted with this notice because the amended rule will not impose a significant negative economic impact on small businesses, or local governments. The clinic expansion associated with Child and Family Clinic Plus contains no local government share of Medicaid. The establishment of the Child and Family Clinic Plus Program is required by the enacted 2006-2007 state budget.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not being submitted with this notice because the amended rules will have no negative impact on services and programs serving residents of rural counties. Child and Family Clinic Plus

is an expansion of existing clinic services creating increased access for children and families statewide. Children and families in the 44 counties designated as rural counties by the New York State Legislature, as well as non-rural counties will benefit from the establishment of this new statewide program.

Job Impact Statement

This rulemaking establishes a new program: Child and Family Clinic Plus which will involve new employment opportunities for staff providing these services. It will not have any negative impact on jobs and employment activities.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Child and Family Clinic Plus Program

I.D. No. OMH-42-07-00001-P

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

Proposed action: Amendment of Part 587 of Title 14 NYCRR.

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

Subject: Child and Family Clinic Plus Program.

Purpose: To establish the Child and Family Clinic Plus Program.

Text of proposed rule: Subdivision (b) of Section 587.4 is amended to add a new definition (1) and existing definitions (1) through (5) are renumbered (2) through (6) to read as follows:

587.4 (b) Program definitions.

(1) *Child and Family Clinic Plus provider means a licensed clinic that has been approved by the Office of Mental Health to provide Child and Family Clinic Plus services.*

(2) Off-site locations, for purposes of providing outpatient services and reimbursement, [are] *means any sites in the community where a recipient may require services.*

[(2)] (3) Program capacity shall mean the number of recipients who can be on site at a given time.

[(3)] (4) Program space means discrete space dedicated to the purpose of the outpatient program and includes all space used by recipients enrolled in the program.

[(4)] (5) Provider of service means the entity which is responsible for the operation of a program. Such entity may be an individual, partnership, association or corporation. For purposes of this Part, unless otherwise noted, the term also applies to a psychiatric center or institute operated by the Office of Mental Health.

[(5)] (6) Satellite location of a primary program means a physically separate adjunct site to a certified clinic treatment program, continuing day treatment program, day treatment program serving children or intensive psychiatric rehabilitation treatment program provides either a full or partial array of outpatient services on a regularly and routinely scheduled basis (full or part time).

Subdivision (c) of Section 587.4 is amended to add new definitions (5), (7), (10), (13) and (16), and to renumber existing definitions (5) as (6), (6) as (8), (7) as (9), (8) as (11), (9) as (12), (10) as (14), (11) as (15) and (12) through (29) as (17) through (34) respectively, to read as follows:

587.4 (c) Service definitions.

(1) Activity therapy means therapy designed to assist a recipient in developing the functional skills and social and environmental supports needed to function more successfully in current or intended life environments (i.e., living, learning, working and social). Such therapy should provide an opportunity for a recipient to practice the skills and build or sustain the supports needed to improve functioning.

(2) Assessment is the continuous clinical process of identifying an individual's behavioral strengths and weaknesses, problems and service needs, through the observation and evaluation of the individual's current mental, physical and behavioral condition and history. The assessment shall be the basis for establishing a diagnosis, treatment plan or psychiatric rehabilitation service plan.

(3) Case management services are the process of linking the individual to the service system and monitoring the provision of services with the objective of continuity of care and service. Case management includes the following components:

(i) Linking. The process of referring the individual to all required services and supports as specified in the individual service plan.

(ii) Case-specific advocacy. The process of interceding on behalf of the individual to gain access to needed services and supports.

(iii) Monitoring. The process of observing the individual to assure that needed services and supports are received.

(4) Carved-out services are those specialized services that are not included in the benefit package of a managed care provider, other than a duly authorized managed special care provider, for all current and future managed care enrollees, regardless of aid category. Such services are long term services for individuals with chronic illnesses and include the following:

(i) Day Treatment Programs;

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(vi) Rehabilitation services provided to a resident of OMH rehabilitation treatment services and family based treatment programs;

(vii) Services provided to children with serious emotional disturbances in designated clinics.

(5) *Child and Family Clinic Plus Services are Mental Health Screening, Comprehensive Assessment, In-Home Services and Evidence-Based Treatment.*

(6) Clinical support services are services provided to collaterals, by at least one therapist, with or without recipients for the purpose of providing resources and consultation for goal oriented problem solving, assessment of treatment strategies and provision of skill development to assisting the recipient in management of his or her illness.

(7) *Comprehensive Assessment is an assessment that follows the American Academy of Child and Adolescent Psychiatry practice parameters for comprehensive assessment and includes the regular and methodical use of psychometric tools. This will include collecting the recipient's mental health history, and any current signs and symptoms of mental illness or emotional disturbance, identification of child and family strengths, and the assessment of the data to determine the recipient's mental health status and need for treatment.*

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[(7)] (9) Discharge planning is the process of planning for termination from a program or identifying the resources and supports needed for transition of an individual to another program and making the necessary referrals, including linkages for treatment, rehabilitation and supportive services based on assessment of the recipient's current mental status, strengths, weaknesses, problems, service needs, the demands of the recipient's living, working and social environment, and the client's own goals, needs and desires.

(10) *Evidence-Based Treatment is the application of therapeutic and or psychopharmacological approaches that have been scientifically proven to be effective in the treatment of specific emotional disturbances.*

[(8)] (11) Family treatment means therapeutic interventions designed to treat the recipient's psychiatric condition (whether the recipient is an adult or a minor) to address family issues that have a direct impact on the symptoms experienced by the recipient, and to promote successful problem solving, communication, and understanding between a recipient and family members as it relates to the recipient's symptoms, treatment, and recovery.

[(9)] (12) Health screening service is the gathering of data concerning the recipient's medical history and any current signs and symptoms, and the assessment of the data to determine his or her physical health status and need for referral for noted problems. The data may be provided by the recipient or obtained with his or her participation. The assessment of the data shall be done by a nurse practitioner, physician, physician's assistant, psychiatrist or registered professional nurse. The assessment of physical health status shall be integrated into the patient's treatment plan.

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(16) *Mental Health Screening is a broad-based approach to identify children and adolescents with emotional disturbances and intervene at the earliest possible opportunity.*

[(12)] (17) Pre-admission screening is the initial face-to-face process of contacting, interviewing and evaluating a potential recipient of mental health services to determine the individual's need for services.

[(13)] (18) Psychiatric rehabilitation goal setting is the process by which a recipient selects a specific environment in which he or she intends to live, work, learn, and/or socialize. The psychiatric rehabilitation goal identifies a specific environment, specific time frames, and is mutually agreed upon by the recipient and the staff.

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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: Subdivision (b) of Section 7.09 of the Mental Hygiene Law grants the Commissioner of the Office of Mental Health the authority and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction.

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2. Legislative objectives: Articles 7 and 31 of the Mental Hygiene Law reflect the Commissioner's authority to establish regulations regarding mental health programs.

3. Needs and benefits: Clinic treatment has been the foundation of the public mental health system for over thirty years. Each year, nearly 100,000 children and families are served in clinic treatment. This presents New York with a unique opportunity to demonstrate the impact that a transformation in State policy, financing and regulation, can make. The structure and financing of the clinic treatment program have remained constant and have not kept pace with findings generated by decades of scientific study in the recognition, diagnosis and treatment of childhood mental illness.

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Children in need of treatment will have access to a comprehensive assessment that utilizes the practice parameters from the American Academy of Child and Adolescent Psychiatry as well as evidence-based tools and scales. Children and families requiring treatment will find that Clinic-Plus brings improved access, in-home services, and treatments that have been shown through science to work. The initiative calls for the expansion of clinic services, creating greater access for children and their families receiving clinic treatment and in-home treatment services.

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The primary components of Child and Family Clinic-Plus include:

- Broad-based screening in natural environments
- Comprehensive assessment
- Expanded clinic capacity
- In-home services
- Evidence Based Treatment

Numerous research studies document the lack of adequate identification and treatment for children with serious emotional disturbance. In what was perhaps the largest epidemiological study of its kind, Kessler *et al.* shows that the age of onset for serious mental illness in adulthood occurs in early adolescence, yet identification and treatment are often delayed for years. The age of onset is much earlier than once thought and has profound implications for children's mental health. There is a long and rich scientific history substantiating the fact that there is a developmental progression to behavioral/emotional problems among young children. Emotional or behavioral problems unrecognized in childhood can cascade into full blown psychiatric disorders with serious debilitating consequences in adolescence or adulthood. Furthermore, there is a strong gradient of risk, such that problems left unrecognized and untreated can become far more severe and intractable illnesses in adulthood. In fact, the continuity of young children's behavioral or emotional disorders into later problems in adolescence or adulthood is among the strongest and most unequivocal of scientific findings.

Decades of research, support the following:

- (1) mental health problems can be recognized as early as preschool;
- (2) risk factors for development of mental health problems can be identified in childhood and many are modifiable;
- (3) failure to identify and to intervene can have life-long and often devastating effects;
- (4) scientifically-validated tools for early recognition exist; and
- (5) a range of effective intervention service programs exist and they have a strong scientific base.

4. Costs:

(a) Costs to private regulated parties: There will be no mandated unreimbursed costs to the regulated parties.

(b) Costs to state and local government: The annual state cost for the program is estimated to be \$21,500,000.00. There is no local Medicaid share or other costs for this program.

(c) The cost projection was calculated as follows:

Screening for approximately 235,000 children	\$ 1,881,000
New clinic admissions for approximately 23,500*	11,679,000
In-home services (17,500)	7,940,000
Total	\$ 21,500,000

* Includes comprehensive assessments and clinic expansion

5. Local government mandates: These regulatory amendments will not involve or result in any additional imposition of duties or responsibilities upon county, city, town, village, school or fire districts.

6. Paperwork: This rule should not substantially increase the paperwork requirements of affected providers.

7. Duplication: These regulatory amendments to not duplicate existing State or federal requirements.

8. Alternatives:

A. Alternatives to providing authorization for Child and Family Clinic Plus.

The only alternative would be inaction. As this program, Child and Family Clinic Plus, has been established and funded in statute, this alternative was considered as contrary to the intent of the legislation.

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

10. Compliance schedule: The authority to establish and fund the Child and Family Clinic Plus program is effective on the filing date of this rulemaking.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not being submitted with this notice because the amended rule will not impose a significant negative economic impact on small businesses, or local governments. The clinic expansion associated with Child and Family Clinic Plus contains no local government share of Medicaid. The establishment of the Child and Family Clinic Plus Program is required by the enacted 2006-2007 state budget.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not being submitted with this notice because the amended rules will have no negative impact on services and programs serving residents of rural counties. Child and Family Clinic Plus is an expansion of existing clinic services creating increased access for children and families statewide. Children and families in the 44 counties designated as rural counties by the New York State Legislature, as well as non-rural counties will benefit from the establishment of this new statewide program.

Job Impact Statement

This rulemaking establishes a new program: Child and Family Clinic Plus which will involve new employment opportunities for staff providing these services. It will not have any negative impact on jobs and employment activities.

Office of Mental Retardation and Developmental Disabilities

EMERGENCY RULE MAKING

Notification of Incidents and Access to Records

I.D. No. MRD-42-07-00008-E

Filing No. 1032

Filing date: Oct. 1, 2007

Effective date: Oct. 1, 2007

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

Action taken: Addition of section 624.8 and amendment of sections 624.1-624.6 and 624.20 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 13.07, 13.09(b), 33.23 and 33.25; and L. 2007, chs. 24 and 271

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

Specific reasons underlying the finding of necessity: The emergency regulations expand upon the provisions of Jonathan's Law to require notification of advocates and correspondents who are not "qualified persons" when incidents occur and allegations of abuse are made. The emergency regulations also expand upon the statutory provisions by extending the requirements from only certified facilities to all programs and services in the OMRDD system.

The additional incident notifications resulting from the new regulatory requirements will create new opportunities for oversight by the individuals who are notified. Through notification, these individuals are better able to monitor whether the health and safety needs of individuals are properly addressed and whether appropriate steps are being taken to remedy potentially harmful conditions which may have contributed to the incident. Without the promulgation of these regulations on an emergency basis, the additional monitoring enabled by the requirements would not occur until such time as the regulations could be finalized through the regular rule making process. During this period of time, potentially harmful situations that might have been remedied through the additional oversight could

persist and adversely affect the health, safety and welfare of people receiving services.

Subject: Notification of incidents and access to records.

Purpose: To implement MHL sections 33.23 and 33.25 (chapters 24 and 271 of the Laws of 2007) concerning incident notifications and records and documents pertaining to allegations and investigations of abuse. The regulations require notification of certain incidents and allegations of abuse and associated follow-up activities. Additionally the rule provides for the release of records and documents pertaining to allegations and investigations of abuse.

Substance of emergency rule: General:

- The regulations amend existing OMRDD regulations on incidents and abuse (Part 624).
- The regulations apply to all facilities and services operated, certified, authorized or funded through contract by OMRDD. This includes residential facilities, day programs, HCBS waiver services, and Medicaid Service Coordination.
- New notification and disclosure requirements do not apply to events or situations which are not under the auspices of the agency, such as allegations of abuse by family members in private residences. Requirements that agencies intervene and take appropriate action in these events or situations are unchanged.
- The OMR 147(I) and OMR 147(A) are removed from the regulation. OMRDD is replacing these forms with a single revised form.
- The OMR 147 must be used for all reportable incidents, serious reportable incidents and allegations of abuse.
- Full documentation of compliance is required.
- Existing requirements are unchanged for notification to CQCAPD, law enforcement officials, Statewide Central Register of Child Abuse and Maltreatment, etc.
- For the Willowbrook class, agencies must continue to comply with the incident reporting requirements of the Willowbrook Permanent Injunction.

Regulations to implement Section 33.23 MHL:

- The regulations build on notification requirements in pre-existing OMRDD regulations, which required notification of serious reportable incidents and allegations of abuse to guardians, parents and advocates/correspondents.
- The following types of events/situations are subject to the new requirements:
 - Reportable incidents in the categories of injury, medication error and death.
 - Serious reportable incidents in the same categories.
 - All allegations of abuse.
- Current notification requirements are maintained for serious reportable incidents which are in the other categories (missing person, restraint, possible criminal act, and sensitive situation). Notification must occur within 24 hours of completion of the OMR 147.

Neither notification nor disclosure is required for reportable incidents in the category of sensitive situation or for events/situations which do not rise to the level of reportable incidents (*e.g.* "agency reportable incidents").

The new requirements require notification to one of the following: guardian, parent, spouse or adult child.

Exceptions:

- The guardian, parent, spouse or adult child objects to notification to himself or herself.
- The person receiving services is a capable adult who objects to the notification being made to someone else.
- The person who would otherwise be notified is the alleged abuser.
- If there is no guardian, parent, spouse or adult child (or they are unavailable), but the person has an advocate or correspondent, notification should be made to that individual in the same manner. Advocates/correspondents must also be offered a meeting and must be sent the report on actions taken. Upon request, advocates/correspondents must be sent the redacted OMR 147. (Note: the advocate or correspondent is not eligible to request disclosure of the investigation report and other investigation documents).
- If there is no guardian, parent, spouse or adult child (or they are unavailable), and the person receiving services is a "capable adult" as defined in the regulations, the person receiving services must be notified. In addition, the person receiving services must be offered a meeting and must receive the report on actions taken.

- Current regulatory requirements that service coordinators be notified are maintained. Agencies are not required to offer a meeting to service coordinators. Agencies are also not required to offer to provide information on the status and resolution of an allegation of abuse.
- The notification must be by telephone or in person, or by other methods at the request of the recipient of the notice.
- The notification must be made within 24 hours of the completion of the OMR 147.
- The notice must include:
 - A description of the event or situation and a description of initial actions taken to address the incident or alleged abuse, if any,
 - An offer to meet with the chief executive officer or designee, and
 - For allegations of abuse, an offer to provide information on the status and resolution of the allegation (this is a pre-existing requirement).
- Upon request, a copy of the OMR 147 reporting form must be provided to the person receiving services, guardian, parent, spouse, adult child, or advocate/correspondent. Records must be redacted.
- The agency must provide a written report on actions taken to address the incident or alleged abuse for every incident and allegation subject to the new notification process.
 - The report must be provided to the individual that was notified.
 - The report must include: any immediate steps taken in response to the incident or alleged abuse to safeguard the health or safety of the person receiving services, and a general description of any initial medical or dental treatment or counseling provided to the person in response to the incident or alleged abuse.
 - The report must be on a form developed by OMRDD or a similar agency form.
 - The report must be provided within 10 days of the completion of the OMR 147.
 - The report on actions taken cannot include names of others involved in the incident/allegation or investigation or information tending to identify them.

Regulations to implement Section 33.25 MHL:

- The regulations require the release of records and documents pertaining to allegations and investigations into abuse under the auspices of the agency.
- Only guardians, parents, spouses and adult children who are considered to be a "qualified person" according to the definition in the Mental Hygiene Law, are eligible to receive records.
- If the otherwise eligible requestor is the alleged abuser he or she is not eligible to receive records.
- If the consumer is a capable adult and objects to the release of records, the otherwise eligible requestor is not eligible to receive records.
- Requests must be in writing.
- Documents and records must be released 21 days after the closure of the alleged abuse case or 21 days after the request, if the request is made after closure.

Closure of the alleged abuse case occurs after the standing committee has ascertained that no further investigation is necessary and the allegation is substantiated, disconfirmed or inconclusive.

- Records must be redacted.
- A small window of retroactivity established by law (Chapter 271 of the Laws of 2007) allows requests for records related to allegations of abuse which occurred or were discovered on or after January 1, 2003 but prior to May 5, 2007. Requests for these records must be made by December 31, 2007.
- Except as noted above, agencies are only required to release records pertaining to allegations of abuse which occurred or were discovered on or after May 5, 2007.
- Records may not be redisclosed by recipients.

Redaction (applicable to the release of documents and records pursuant to Section 33.25 MHL and the OMR 147). The following should be redacted:

- Names or other information tending to identify people receiving services and employees. Redaction shall be waived if the employee or person receiving services authorizes disclosure (unless redaction is needed because the information would tend to identify a different person whose identity is shielded by the regulations). The definition of employee is very inclusive, but only for the purposes of redaction of these records in compliance with the new law and the implementing regulations. It includes consultants, contractors, volunteers, family care providers and family care respite/substitute providers, and individuals who live in home of the provider.
- Names or other information tending to identify anyone who made a report to the Statewide Central Register of Child Abuse and Maltreatment (SCR), contacted the SCR, or otherwise cooperated in a child abuse/maltreatment investigation.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire December 29, 2007.

Text of emergency rule and any required statements and analyses may be obtained from: Barbara Brundage, Director, Regulatory Affairs Unit, Office of Mental Retardation and Developmental Disabilities, 44 Holland Ave., Albany, NY 12229, (518) 474-1830; e-mail: barbara.brundage@omr.state.ny.us

Additional matter required by statute: Pursuant to the requirements of the State Environmental Quality Review Act (SEQRA) and in accordance with 14 NYCRR Part 622, OMRDD has on file a negative declaration with respect to this action. Thus, consistent with the requirements of 6 NYCRR Part 617, OMRDD, as lead agency, has determined that the action described herein will not have a significant effect on the environment, and an environmental impact statement will not be prepared.

Regulatory Impact Statement

1. Statutory authority: a. The New York State Office of Mental Retardation and Developmental Disabilities' (OMRDD) statutory responsibility to assure and encourage the development of programs and services in the area of care, treatment, rehabilitation, education and training of persons with mental retardation and developmental disabilities, as stated in Section 13.07 of the New York State Mental Hygiene Law.

b. OMRDD's authority to adopt rules and regulations necessary and proper to implement any matter under its jurisdiction as stated in Section 13.09(b) of the Mental Hygiene Law.

c. Section 33.23 of the Mental Hygiene Law, which requires specific incident notifications and the release of specified reports.

d. Section 33.25 of the Mental Hygiene Law, which requires the release of records and documents pertaining to allegations and investigations of abuse.

2. Legislative objectives: These amendments further the legislative objectives embodied in sections 13.07, 13.09(b), 33.23 and 33.25 of the Mental Hygiene Law. The promulgation of these amendments will provide a more extensive notification process for certain incidents and allegations of abuse. In addition, the amendments provide greater access by specified individuals to records and documents pertaining to allegations and investigations of abuse.

3. Needs and benefits: Chapter 24 of the Laws of 2007 (MHL Sections 33.23 and 33.25), otherwise known as "Jonathan's Law," was signed by the Governor on May 5, 2007 and was effective immediately. A chapter amendment to the new law, Chapter 271 of the Laws of 2007, was signed on July 18.

The regulatory amendments are necessary to implement the new laws and to make longstanding OMRDD regulations related to incidents and abuse consistent with the statutory requirements. In addition, these amendments clarify ambiguities in the law, as well as provide more specific direction and guidance to providers so that implementation is more effective and consistent statewide. Further, the regulations build on the notification process requirements established by statute to extend certain provisions to advocates and correspondents who are not "qualified persons" and to require compliance by all providers in the OMRDD system, not just "facilities" as specified in the law.

The new law and the associated regulations require providers to implement a more extensive notification process for certain incidents and all allegations of abuse. This notification process will provide timely information about incidents that affect the health or safety of a person receiving services to the following: a person's guardian, parent, spouse, adult child or advocate/correspondent. In addition to an initial telephone notification, the individual will have access to the initial incident/allegation of abuse report, will be provided a report on initial actions taken and will be offered

the opportunity to meet with the agency Chief Executive Officer/DDSO Director (or a designee) to discuss the incident or allegation of abuse.

The law and implementing regulations also provide a qualified person with access to records and documents pertaining to allegations and investigations of abuse. For this purpose a qualified person is defined in Mental Hygiene Law 33.16 and may include: persons receiving services or who formerly received services; and guardians, parents, spouses and adult children of such persons. The regulations extend applicability of the new requirements from only events occurring "at a facility" as specified by statute to allegations of abuse occurring while individuals are receiving facility-based services at a location away from the facility. In addition, the regulations extend applicability to services in the OMRDD system which are not facility-based, such as at-home residential habilitation and supported employment. OMRDD considers that allegations of abuse by employees should be treated the same regardless of the type of service received or location of service delivery.

4. Costs:

a. The amendments impose minor additional costs beyond the cost of complying with the new laws. Compliance with the new laws will likely require additional expenditures for personnel, paperwork, phone charges and postage. Although pre-existing OMRDD regulations already required notification of some types of incidents and allegations of abuse, the law requires notification (with its attendant costs) of additional incidents. In addition, the law requires that a report on actions taken be provided for each incident and allegation of abuse subject to the new notification requirements. Additional meetings may occur as a result of the mandated offer to hold a meeting. Lastly, documents and records must be provided upon request and must be redacted in accordance with the law.

While the statute limited the individuals being notified to "qualified persons," the regulations extended the new notification process requirements to include advocates and correspondents. While advocates and correspondents were required to be notified of some incidents by the pre-existing OMRDD regulations, minor additional costs will be incurred through both notification of additional incidents and through the additional features of the notification process imposed by Jonathan's Law, such as the provision of the report on actions taken.

In addition, the statute only applied to allegations of abuse occurring at a facility. However, providers in the OMRDD system operate many services which are not "facilities," such as service coordination, supported employment, and at-home residential habilitation. The OMRDD regulations extended the requirements of Jonathan's Law to include all services in the OMRDD system, as well as allegations of abuse when individuals are receiving facility-based services at a location away from the facility. This extension applies to both the notification process and the eligibility to request records and documents pertaining to allegations and investigations of abuse.

OMRDD is unable to quantify the modest additional costs that will be incurred by these extensions of the statutory requirements.

b. OMRDD will incur additional costs as a provider of state-operated services as noted above. These additional costs cannot be quantified.

OMRDD will use existing staff to administer this rule and does not anticipate any significant expenditure related to its administration. There are minimal additional expenditures related to informing and training providers of both Jonathan's Law and the implementing regulations.

c. There will be no additional costs to local governments.

5. Local government mandates: There are no new requirements imposed by the rule on any county, city, town, village; or school, fire, or other special district.

6. Paperwork: Compliance with the new laws entails an increase in paperwork. The new law requires that a written report on actions taken be provided for every incident that is subject to the new requirements. OMRDD has developed a new form to assist agencies in providing this report. Agencies are also required to provide redacted incident reports upon request as a part of the notification process. Further, agencies are required to provide redacted records and documents pertaining to allegations and investigations into abuse. The regulations add minimal new paperwork requirements to the statutory requirements by extending provisions related to the notification process to include advocates and correspondents, and extending requirements to encompass all services in the OMRDD system and incidents related to facility-based programs which occur in community settings with staff.

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

8. Alternatives: The law only requires the notification requirements to be made to a qualified person as defined in MHL 33.16. "Qualified per-

sons" include only guardians, parents, spouse or adult child. OMRDD had considered limiting the applicability of the notification requirements to "qualified persons." However, OMRDD recognizes the valuable role played by siblings, family members, friends and others who are advocates and correspondents but who are not "qualified persons." OMRDD considers that individuals without a "qualified person" who have an advocate or correspondent should also be able to benefit from the additional notification process requirements. OMRDD consequently extended the new notification process requirements to include advocates/correspondents.

9. Federal standards: The amendments do not exceed any minimum standards of the federal government for the same or similar subject areas.

10. Compliance schedule: In a mailing on August 31, 2007, providers were notified of OMRDD's intention to adopt emergency regulations effective October 1. The mailing also informed providers of the substance of the emergency regulations, to enable agencies to achieve full compliance by October 1. OMRDD also disseminated similar draft regulations and trained hundreds of providers during the summer.

OMRDD intends propose similar regulations in the future and to finalize regulations within the time frames provided for by the State Administrative Procedure Act (SAPA).

Regulatory Flexibility Analysis

1. Effect on small business: These regulatory amendments will apply to providers of services that operate all programs certified, authorized or approved by OMRDD.

OMRDD has determined, through a review of the certified cost reports, that the organizations which operate the facilities or provide the developmental disabilities services employ fewer than 100 employees at the discrete certified or authorized sites and would, therefore, be classified as small businesses.

The amendments have been reviewed by OMRDD in light of their impact on these small businesses and on local governments. OMRDD has determined that these amendments will not cause undue hardship to small business providers due to increased costs for additional services or increased compliance requirements.

2. Compliance requirements: The new law required a variety of compliance activities. These activities include: providing telephone notice to a qualified person for certain incidents and allegations of abuse, offering a meeting with the agency's Chief Executive Officer or DDSO Director or a designee, and offering to provide a written report on actions taken. In addition, upon the request of a qualified person, documents and records pertaining to allegations and investigations of abuse must be released. All the above referenced documents must have names and identifying information redacted. The implementing regulations extend the requirements to advocates and correspondents, to non-facility based services and to situations when facility-based services are delivered at a location away from the facility. Agencies will need to make the changes needed for implementation in these situations where the regulatory requirements exceed the statutory requirements.

3. Professional services: Modest additional professional services are required as a result of these amendments, due to the need for the involvement of legal professionals in redaction and interpretation of the regulations, to the extent that the regulatory requirements exceed the statutory requirements. The amendments will have no effect on the professional service needs of local governments.

4. Compliance costs:

There are no costs to local governments.

The amendments impose minor new compliance costs. There are minimal additional costs associated with implementation and compliance with the law. In the areas noted above where the regulatory requirements exceed the statutory requirements, these modest compliance costs will be increased as notification is required in new situations and in additional service types.

5. Economic and technological feasibility: The amendments do not impose on regulated parties the use of any technological processes.

6. Minimizing adverse economic impact: As stated in the Regulatory Impact Statement, the proposed regulation will have no fiscal effect on State or local governments, and minimal fiscal impact on regulated parties (including the state as a provider). Modest additional costs are necessary to the extent regulatory requirements exceed statutory requirements. OMRDD has reviewed and considered the approaches for minimizing economic impact as suggested in section 202-b(1) of the State Administrative Procedure Act. In order to minimize adverse economic impact, OMRDD has developed a standardized form for the report on actions taken. The use of this form will minimize staff resources devoted to

completing the form, instead of each agency developing its own form or not using a form for this purpose.

7. Small business and local government participation: OMRDD convened a Jonathan's Law implementation workgroup which included representatives from provider associations. The group met on June 1 and June 20. Presentations were made to various groups including committees of the Cerebral Palsy Associations of New York State and the New York State Association of Residential and Community Agencies (NYSACRA). OMRDD staff presented at training sessions with hundreds of provider representatives hosted by NYSACRA on June 28 and July 20. OMRDD staff also presented at a training session hosted by the Long Island Alliance on August 23. In addition, OMRDD staff made a presentation at a meeting of the Conference of Local Mental Hygiene Directors on August 17. Informational mailings were sent to affected providers regarding the implementation of the new law on May 11 and May 15. A detailed informational mailing specifically discussing the emergency regulations was sent to providers and other interested parties on August 31. OMRDD also solicited comments from the Self-Advocacy Association, the Statewide Family Support Services Committee and the NYSARC Adult Services Committee. In addition, numerous questions and comments were received from voluntary providers, local government representatives and others at the events noted above and through individual contact.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis for these amendments is not submitted because the amendments will not impose any adverse impact or significant reporting, recordkeeping or other compliance requirements on public or private entities in rural areas because of the location of their operations (rural/urban). This finding is based on the fact that the proposed rule changes the way in which notifications are made regarding certain incidents and allegations of abuse. The proposed rule also provides greater access by qualified persons, including parents and legal guardians, to records and documents pertaining to allegations and investigations of abuse and mistreatment. OMRDD expects that adoption of the amendments will not have adverse effects on regulated parties because of the location of their operations. Further, the amendments will have no adverse fiscal impact on providers as a result of the location of their operations. Specific effects of the rule on providers of services have been discussed in the Regulatory Flexibility Analysis for Small Businesses and Local Governments.

Job Impact Statement

A Job Impact Statement for these amendments is not submitted because it is apparent from the nature and purposes of the amendments that they will not have an adverse impact on jobs and/or employment opportunities and they may have a slightly positive impact on employment opportunities due to new features in the rule. This finding is based on the fact that the regulatory requirements exceed the statutory requirements of Jonathan's Law to require modest additional notifications and access to records as noted in the Regulatory Impact Statement. It is anticipated that providers will generally utilize existing staff to accomplish these tasks. In unusual circumstances, providers may find it necessary to hire or contract for additional staff.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Health Care Decisions Act

I.D. No. MRD-42-07-00007-P

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

Proposed action: Amendment of section 633.10 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 13.07, 13.09(b); Surrogate's Court Procedure Act, section 1750-b; and L. 2007, ch. 105

Subject: Amendment of certain regulatory provisions implementing the Health Care Decisions Act consistent with chapter 105 of the Laws of 2007.

Purpose: To include, in regulation, a prioritized list of family members who may be qualified to make a decision to withhold or withdraw life-sustaining treatment in certain circumstances.

Text of proposed rule: ° Paragraph 633.10(a)(7) is amended by the addition of a new subparagraph (iv) to read as follows:

(iv) *Qualified family member.*

(a) *This subparagraph implements the provisions of subdivision (1) of SCPA section 1750-b, only for the purposes of a qualified family*

member making a decision to withhold or withdraw life-sustaining treatment pursuant to such section.

(b) In the case of a person for whom no guardian has been appointed pursuant to SCPA sections 1750 or 1750-a, a "guardian" as used in SCPA section 1750-b shall also mean a "qualified family member."

(c) A decision to withhold or withdraw life-sustaining treatment may be made in accordance with SCPA section 1750-b by the following qualified family members in the order stated:

- (1) an actively involved (see section 633.99 of this Part) spouse;
- (2) an actively involved parent;
- (3) an actively involved adult child;
- (4) an actively involved adult sibling; and
- (5) an actively involved adult family member (see section 633.99 of this Part).

(d) If the first qualified family member on the list in clause (c) of this subparagraph is not reasonably available and willing, and is not expected to become reasonably available and willing to make a timely decision given the person's medical circumstances, a decision may be made by the next qualified family member on the list, in the order of priority stated.

(e) If more than one qualified family member exists within a category on the list in clause (c) of this subparagraph, the qualified family member with the higher level of active involvement shall have the opportunity to make the decision first. If the qualified family members within a category are equally actively involved, any of such qualified family members shall have equal opportunity to make a decision.

(f) If the first reasonably available and willing qualified family member makes a decision not to withhold or withdraw life-sustaining treatment, other qualified family members would not be authorized to overturn such decision. However, nothing in this subparagraph limits the right of any such qualified family member to object to such decision pursuant to SCPA section 1750-b(5)(ii).

Text of proposed rule and any required statements and analyses may be obtained from: Barbara Brundage, Director, Regulatory Affairs Unit, Office of Mental Retardation and Developmental Disabilities, 44 Holland Ave., Albany, NY 12229, (518) 474-1830; e-mail: barbara.brundage@omr.state.ny.us

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

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

Additional matter required by statute: Pursuant to the requirements of the State Environmental Quality Review Act (SEQRA) and in accordance with 14 NYCRR Part 622, OMRDD has on file a negative declaration with respect to this action. Thus, consistent with the requirements of 6 NYCRR Part 617, OMRDD, as lead agency, has determined that the action described herein will not have a significant effect on the environment, and an environmental impact statement will not be prepared.

Regulatory Impact Statement

1. Statutory authority:

a. The New York State Office of Mental Retardation and Developmental Disabilities' (OMRDD) statutory responsibility to assure and encourage the development of programs and services in the area of care, treatment, rehabilitation, education and training of persons with mental retardation and developmental disabilities, as stated in the New York State Mental Hygiene Law Section 13.07.

b. OMRDD's authority to adopt rules and regulations necessary and proper to implement any matter under its jurisdiction as stated in the New York State Mental Hygiene Law Section 13.09(b).

c. OMRDD's authority under the New York State Surrogate's Court Procedure Act Section 1750-b and Chapter 105 of the Laws of 2007 to promulgate regulations to implement the statutory provisions.

2. Legislative objectives: These proposed amendments further the legislative objectives embodied in Chapter 105 of the Laws of 2007. This new law mandates that OMRDD revise its regulations, in consultation with parents, advocates, and family members of persons with developmental disabilities, to include a prioritized list of family members who may be qualified to make decisions to withhold or withdraw life-sustaining treatment on behalf of a person with developmental disabilities who does not have the capacity to make such decisions and for whom no guardian has been appointed pursuant to Article 1750 or 1750-a of the Surrogate's Court Procedure Act.

3. Needs and benefits: The Health Care Decisions Act (HCDA) authorizes court appointed guardians under Article 17-A of the Surrogate's

Court Procedure Act to make a decision to withhold or withdraw life-sustaining treatment for persons with developmental disabilities who do not have the capacity to do so themselves. This statute does not, however, cover the majority of persons with developmental disabilities who often do not have the capacity to make such decisions and who do not have such guardians appointed to act on their behalf.

Chapter 105 of the Laws of 2007 requires OMRDD to promulgate regulations that address this issue. In the absence of the proposed regulations and in the face of an impending end-of-life crisis, the families of persons with developmental disabilities must often scramble for guardianship to avoid helplessly watching their loved ones suffer a needlessly prolonged agony. Often, they cannot obtain - or afford - guardianship in time to prevent needless suffering. The new legislation and OMRDD's proposed regulations will enhance and safeguard the exercise of the constitutional rights of persons with mental retardation to refuse life-sustaining treatment by enabling certain qualified, non-guardian, family members with a significant and ongoing involvement in such a person's life to act as surrogates within the confines of the narrowly defined circumstance. Furthermore, when the decision maker is a non-guardian family member, as qualified by the law and the proposed regulations, the oversight accorded to a decision concerning life-sustaining care is in no way diminished and is subject to exactly the same rigorous standards and safeguards as a decision by a court appointed guardian.

4. Costs:

a. Costs to the Agency and to the State and its local governments: There will be no costs to the OMRDD, the State or its local governments. Existing agency resources will be utilized.

b. Costs to private regulated parties: There will be no additional costs and no initial capital investment costs nor initial non-capital expenses as a result of the proposed regulations. There will be no additional costs incurred by OMRDD or the not-for-profit corporations authorized by OMRDD to provide services to persons with developmental disabilities in New York State. Families of persons with developmental disabilities will be spared the sometimes burdensome legal costs associated with becoming guardians, as well as the hardship and travail of petitioning the courts in what are already difficult and painful circumstances.

5. Local government mandates: There are no new requirements imposed by the rule on any county, city, town, village; or school, fire, or other special district.

6. Paperwork: There will be no new paperwork required by compliance with the proposed regulations.

7. Duplication: The proposed amendments do not duplicate any existing State or Federal requirements that are applicable to parties and the circumstances described above.

8. Alternatives: As discussed above, Chapter 105 of the Laws of 2007 requires OMRDD to develop and promulgate, in its regulations, a prioritized list of family members that may be qualified to make decisions concerning life-sustaining care on behalf of persons with developmental disabilities. Further, the sponsor's memorandum accompanying Chapter 105 indicates that the Legislature was aware of OMRDD's existing regulations governing major medical decisions made by family members on behalf of persons with developmental disabilities. Accordingly, the prioritized listing contained in the proposed regulations is an adaptation of the existing list applicable to major medical decisions. OMRDD decided to replicate applicable parts of this pre-existing listing without significant modification so as to minimize confusion.

In its outreach efforts, OMRDD shared a draft of the proposed amendments with NYSARC and the Commissioner's Advisory Council which includes in its membership parents, advocates and family members of persons with developmental disabilities. The draft regulations did not make mention of provisions of the HCDA which establish certain family members' right to object to decisions regarding the withholding or withdrawal of life-sustaining treatment. At the request of NYSARC, mention of these statutory provisions was added in the proposed regulations.

9. Federal standards: The proposed amendments do not exceed any minimum standards of the federal government for the same or similar subject areas.

10. Compliance schedule: OMRDD expects to adopt the proposed amendments as soon as possible within the time frames mandated by the State Administrative Procedure Act so as to enable the December 30, 2007 effective date required by Chapter 105 of the Laws of 2007. The proposed regulations do not require any new systemic compliance activities beyond what was already required by the Health Care Decisions Act passed in 2002.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not being submitted because the amendments will not impose any adverse economic impact or significant reporting, recordkeeping or other compliance requirements on small businesses or local governments. This is because the amendments only make a mandated revision to OMRDD's regulations by establishing a prioritized list of family members who may be qualified to make decisions to withhold or withdraw life-sustaining treatment on behalf of a person with developmental disabilities who does not have the capacity to make such decisions and for whom no guardian has been appointed pursuant to Article 1750 or 1750-a of the Surrogate's Court Procedure Act.

As discussed more thoroughly in the Regulatory Impact Statement, the statutory authority in Chapter 105 of the Laws of 2007 only provides for a very narrowly defined regulatory amendment which is kept to a minimum, consistent with the legislation. There will be no new compliance activities beyond the processes that are already required by the Health Care Decisions Act.

Rural Area Flexibility Analysis

A rural area flexibility analysis for these amendments is not being submitted because the proposed amendments will not impose any adverse economic impact on rural areas. This is because the amendments only make a mandated revision to OMRDD's regulations by establishing a prioritized list of family members who may be qualified to make decisions to withhold or withdraw life-sustaining treatment on behalf of a person with developmental disabilities who does not have the capacity to make such decisions and for whom no guardian has been appointed pursuant to Article 1750 or 1750-a of the Surrogate's Court Procedure Act. Chapter 105 of the Laws of 2007 requires that such a prioritized list be promulgated as an addition to OMRDD's regulations.

Job Impact Statement

A Job Impact Statement for these amendments is not being submitted because it is apparent from the nature and purposes of the amendments that they will not have an adverse impact on jobs and employment opportunities. This is because the amendments only make a mandated revision to OMRDD's regulations by establishing a prioritized list of family members who may be qualified to make decisions to withhold or withdraw life-sustaining treatment on behalf of a person with developmental disabilities who does not have the capacity to make such decisions and for whom no guardian has been appointed pursuant to Article 1750 or 1750-a of the Surrogate's Court Procedure Act. Chapter 105 of the Laws of 2007 requires that such a prioritized list be promulgated as an addition to OMRDD's regulations.

Public Service Commission

NOTICE OF ADOPTION

Current/Voltage Transformer Reclassification and Calibration System by Schneider Electric

I.D. No. PSC-21-07-00005-A
Filing date: Sep. 27, 2007
Effective date: Sept. 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 Sept. 19, 2007, adopted an order approving the application of Schneider Electric (Schneider) for its instrument transformer services devices known as current transformer verification, current transformer reclassification, voltage/potential transformer verification and voltage/potential transformer reclassification.

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

Subject: Approval of new types of electricity meters, transformers, and auxiliary devices.

Purpose: To approve the use of the Schneider instrument transformers for electric revenue billing applications.

Substance of final rule: The Commission adopted an order approving the application of Schneider Electric for its Instrument Transformer Service devices known as Current Transformer Verification, Current Transformer Reclassification for use in existing medium and high current transformers

located in substations up to 765 kV, and Voltage/Potential Transformer Verification and Voltage/Potential Transformer Reclassification for substation use up to 500 kV to be used in electric revenue billing applications 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. (07-E-0086SA1)

NOTICE OF ADOPTION

Follow-on Merger Credit by National Grid USA

I.D. No. PSC-26-07-00017-A
Filing date: Oct. 1, 2007
Effective date: Oct. 1, 2007

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

Action taken: The commission, on Sept. 19, 2007, adopted an order approving the joint petition of Niagara Mohawk Power Corporation d/b/a National Grid to implement a follow-on merger credit associated with the recent acquisition by National Grid USA of the New England Gas Company assets of Southern Union Company.

Statutory authority: Public Service Law, section 66

Subject: Follow-on merger credit created by the recent acquisition by National Grid USA of the New England Gas Company assets of Southern Union Company.

Purpose: To approve a follow-on merger credit.

Substance of final rule: The Public Service Commission adopted an order approving the joint petition of Niagara Mohawk Power Corporation d/b/a National Grid to implement a Follow-on Merger Credit associated with the recent acquisition by National Grid USA of the New England Gas Company assets of the Southern Union Company, subject to the terms and conditions set forth in 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. (01-M-0075SA34)

NOTICE OF ADOPTION

Approval of New Types of Electricity Meters, Transformers and Auxiliary Devices by Aqua New York

I.D. No. PSC-26-07-00019-A
Filing date: Sept. 27, 2007
Effective date: Sept. 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 Sept. 19, 2007, adopted an order approving of Aqua New York d/b/a Aqua New York of Sea Cliff's application for the use of the Neptune Encoder/R900i in residential and commercial billing applications.

Statutory authority: Public Service Law, section 89(d)(1)

Subject: Approval of new types of water meters and auxiliary devices.

Purpose: To permit water utilities in New York State to use the Neptune Encoder/R900i for customer billing process.

Substance of final rule: The Commission adopted an order approving the application of Aqua New York of Sea Cliff to use the Neptune Encoder/R900i water meter module for use in metering and revenue billing applications 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. (07-E-0625SA1)

NOTICE OF ADOPTION

Submetering of Electricity by 123 Washington LLC

I.D. No. PSC-28-07-00007-A

Filing date: Sept. 28, 2007

Effective date: Sept. 28, 2007

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

Action taken: The commission, on Sept. 19, 2007, adopted an order in Case 07-E-0723 approving the petition filed by 123 Washington LLC to submeter electricity at 123 Washington St., New York, NY.

Statutory authority: Public Service Law, sections 2, 4(1), 65(1), 66(1), (2), (3), (4), (12) and (14)

Subject: Petition for the submetering of electricity.

Purpose: To grant the petition of 123 Washington LLC to submeter electricity at 123 Washington St., New York, NY.

Substance of final rule: The Commission approved a petition by 123 Washington LLC to submeter electricity at 123 Washington Street, New York, located in the territory of Consolidated Edison Company of New York, Inc.

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. (07-E-0723SA1)

NOTICE OF ADOPTION

Submetering of Electricity by be@189 Schermerhorn LP

I.D. No. PSC-28-07-00009-A

Filing date: Sept. 28, 2007

Effective date: Sept. 28, 2007

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

Action taken: The commission, on Sept. 19, 2007, adopted an order in Case 07-E-0743 approving the petition filed by be@189 Schermerhorn LP to submeter electricity at 189 Schermerhorn St., New York, NY.

Statutory authority: Public Service Law, sections 2, 4(1), 65(1), 66(1), (2), (3), (4), (12) and (14)

Subject: Petition for the submetering of electricity.

Purpose: To grant the petition of be@189 Schermerhorn LP to submeter electricity at 189 Schermerhorn St., New York, NY.

Substance of final rule: The Commission approved a petition by be@189 Schermerhorn LP to submeter electricity at 189 Schermerhorn Street, New York, New York, located in the territory of Consolidated Edison Company of New York, Inc.

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. (07-E-0743SA1)

NOTICE OF ADOPTION

Approval of New Types of Electricity Meters, Transformers and Auxiliary Devices by Kuhlman Electric Corporation

I.D. No. PSC-30-07-00005-A

Filing date: Sept. 27, 2007

Effective date: Sept. 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 Sept. 19, 2007, adopted an order approving the application of Kuhlman Electric Corporation (Kuhlman) to use the family of oil-filled current and voltage transformers for use in commercial and industrial applications.

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

Subject: Approval of new types of electricity meters, transformers, and auxiliary devices.

Purpose: To approve the use of the Kuhlman instrument transformers for commercial and industrial metering applications.

Substance of final rule: The Commission adopted an order approving the application of Kuhlman Electric Corporation's devices for revenue metering and billing applications. Service types specified are CXM-200 for 34.5kV service, CXM-250 for 46kV service, CXM-350 for 69kV service, CXM-550 for 115kV service, CXM-650 for 138kV service, CXM-1050 for 230kV service, CXM-1300 for 345kV service; POF-200 for 34.5kV service, POF-250 for 46kV service, POF-550 for 115kV service, POF-650 for 13kV service; UTE-145 for 138kV service and UTF-245 for 230kV service.

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. (07-E-0757SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Energy Efficiency Program by Orange and Rockland Utilities, Inc.

I.D. No. PSC-42-07-00012-P

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

Proposed action: Orange and Rockland Utilities, Inc. has submitted a proposal for an electric energy efficiency program in P.S.C. Case 06-E-1433.

Statutory authority: Public Service Law, sections 5, 65, 66 and 72

Subject: Energy Efficiency Program.

Purpose: To consider any energy efficiency program for Orange and Rockland Utilities, Inc.'s electric service.

Substance of proposed rule: Orange and Rockland Utilities, Inc. (Orange and Rockland) has submitted a proposal for an electric energy efficiency program in PSC Case 06-E-1433. The Commission may accept, reject or modify Orange and Rockland's proposal. It may consider counter-proposals submitted by other parties as part of their comments on the

Orange and Rockland proposal, submitted by other parties or take other action as appropriate in its consideration of the energy efficiency issue.

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

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

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

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

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

(06-E-1433SA4)

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

Revenue Decoupling by Orange and Rockland Utilities, Inc.

I.D. No. PSC-42-07-00013-P

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

Proposed action: Orange and Rockland Utilities, Inc. has submitted a proposal for a revenue decoupling mechanism in P.S.C. Case 06-E-1433.

Statutory authority: Public Service Law, sections 5, 65, 66 and 72

Subject: Revenue decoupling.

Purpose: To consider a revenue decoupling mechanism for Orange and Rockland Utilities, Inc.

Substance of proposed rule: Orange and Rockland Utilities, Inc. (Orange and Rockland) has submitted a proposal for a revenue decoupling mechanism in PSC Case 06-E-1433. The Commission may accept, reject or modify Orange and Rockland's proposal. It may consider counter-proposals, submitted by other parties as part of their comments on the Orange and Rockland proposal, or take other action as appropriate in its consideration of the revenue decoupling issue.

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

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

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

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

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

(06-E-1433SA5)

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

Lightened Regulation by Noble Belmont Windpark, LLC

I.D. No. PSC-42-07-00014-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, the petition of Noble Belmont Windpark, LLC (Bellmont) for an order providing for lightened regulation.

Statutory authority: Public Service Law, sections 4(1), 66(1) and 110

Subject: Belmont's request for lightened regulation as an electric corporation.

Purpose: To consider the request in connection with the development of the Belmont Project, a wind-powered generating facility.

Substance of proposed rule: By a petition filed September 17, 2007, Noble Belmont Windpark, LLC (Bellmont) seeks authorization of its wind energy project in Clinton County pursuant to Public Service Law § 68. Belmont also seeks an order providing for lightened regulation as an electric corporation because it will share interconnection facilities with Noble Ellenburg Windpark, LLC, an affiliated electric corporation.

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-1096SA1)

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

Submetering of Electricity by Stellar Morrison, LLC

I.D. No. PSC-42-07-00015-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 grant, deny or modify, in whole or part, the petition filed by Stellar Morrison, LLC to submeter electricity at One Building Apartment Complex, 1240 Morrison Ave., Bronx, NY.

Statutory authority: Public Service Law, sections 2, 4(1), 65(1), 66(1), (2), (3), (4), (12) and (14)

Subject: Submetering of electricity.

Purpose: To submeter electricity at One Building Apartment Complex, 1240 Morrison Ave., Bronx, NY.

Substance of proposed rule: The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by Stellar Morrison, LLC, to submeter electricity at One Building Apartment Complex, 1240 Morrison Avenue, Bronx, New York, located in the territory of Consolidated Edison Company of New York, Inc.

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

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

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

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

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

(07-E-1141SA1)

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

Audit Report Concerning Consolidated Edison Company of New York, Inc.

I.D. No. PSC-42-07-00016-P

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

Proposed action: The Public Service Commission is considering the recommendations contained in an independent audit report in Case 06-M-1078, any recommendations that may be developed and/or identified as a

result of the audit, and directing Consolidated Edison Company of New York, Inc. (Con Edison) to implement said recommendations.

Statutory authority: Public Service Law, sections 5, 65(1) and 66(1)

Subject: Audit report concerning Con Edison.

Purpose: To consider directing Con Edison to implement the recommendations in or developed from the audit report.

Substance of proposed rule: The Public Service Commission is considering whether to approve, reject or modify the recommendations made in an independent Audit Report and other recommendations that may be developed and/or identified as a result of the audit directing Consolidated Edison Company of New York, Inc. to implement said recommendations.

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

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

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

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

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

(06-M-1078SA1)

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

Discontinuance of Water Service by Groman Shores LLC

I.D. No. PSC-42-07-00017-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, or modify, a petition filed by Groman Shores LLC (the company) for approval to abandon its water system.

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

Subject: Discontinuance of water service.

Purpose: To allow the company to abandon its water system.

Substance of proposed rule: On September 13, 2007, Groman Shores LLC (the company) filed a petition for approval to abandon its water system. The company provides unmetered water service on a seasonal basis April 1 to October 1, to 75 customers in the Town of Sandy Creek, Oswego County. The Commission may approve or reject, in whole or in part, or modify the company's petition.

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

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

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

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

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

(07-W-1087SA1)

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

Water Rates and Charges by Warwick Water Corporation

I.D. No. PSC-42-07-00018-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, tariff revisions filed by Warwick Water Corporation to make various changes in the rates, charges, rules and regulations in its tariff schedule, P.S.C. No. 2—Water, to become effective Jan. 1, 2008.

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

Subject: Water rates and charges.

Purpose: To increase Warwick Water Corporation's annual revenues by \$125,625 or 53 percent.

Substance of proposed rule: On September 24, 2007, Warwick Water Corporation (Warwick or the company) filed to become effective January 1, 2008, Leaf No. 12, Revision 1, to its tariff schedule, P.S.C. No. 2—Water. Warwick requests to increase its annual revenues by about \$125,625 or 53%. The company provides metered rate water service to 355 in the Town of Warwick, Orange County. Based on an annual usage of 60,000 gallons, the typical residential customer's annual bill would increase from \$783 to \$1,199. The minimum quarterly charge would increase from \$144.50 to \$224, and the rate per thousand gallons for usage in excess of 9,000 gallons per quarter would increase from \$4.00 to \$5.94. Fire protection service is not provided. Warwick's tariff, along with its proposed changes (Leaf No. 12, Revision 1) is available on the Commission's Home Page on the World Wide Web (www.dps.state.ny.us)—located under the file room—Tariffs. The Commission may approve or reject, in whole or in part, or modify, the company's proposed tariff revisions.

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

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

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

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

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

(07-W-1129SA1)

Department of State

ERRATUM

A Notice of Adoption, I.D. No. DOS-02-07-00010-A, pertaining to Uniform Fire Prevention and Building Code, published in the October 3, 2007 issue of the *State Register* referred to the incorrect Title of the NYCRR in the action taken. The correct action taken is: Repeal of Parts 1220-1226 and addition of new Parts 1219-1227 to Title 19 NYCRR.

The Department of State apologizes for any confusion this may have caused.

EMERGENCY RULE MAKING

Firefighter Training

I.D. No. DOS-42-07-00019-E

Filing No. 1037

Filing date: Oct. 2, 2007

Effective date: Oct. 2, 2007

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

Action taken: Addition of Part 438 to Title 19 NYCRR.

Statutory authority: Executive Law, section 156(6) (L. 2006, ch. 615)

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

Specific reasons underlying the finding of necessity: Chapter 615 of the Laws of 2006 required that regulations concerning firefighter training be adopted by Feb. 12, 2007. Regulations were adopted on an emergency basis and this rule keeps the regulations in effect until a permanent rule can be adopted.

Subject: Firefighter training.

Purpose: To set forth standards concerning firefighter training, describe the process whereby firefighter training hours and additional training hours will be allocated to counties and establish qualifications of instructors delivering State fire training courses.

Substance of emergency rule: Section 438.1 Purpose. The purpose of this rule is to implement the requirements of subdivision 6 of section 156 of the Executive Law, as enacted by Chapter 615 of the Laws of 2006. This subdivision empowers the State Fire Administrator to plan, coordinate, and provide training related to fire and arson prevention and control for paid and volunteer firefighters and governmental officers and employees. Subdivision 6 also directs the Office of Fire Prevention and Control (OFPC) to adopt rules and regulations relating to training, including training standards, the allocation of training hours to counties and the establishment of a uniform procedure for counties to request and OFPC to provide additional training hours.

Section 438.2 contains definitions of terms used in Part 438.

Section 438.3 describes training standards to guide OFPC in its implementation of the rule including instructor and student qualifications, live fire training requirements, and a listing of the standards, manuals, statutes, and regulations which will be used to provide the training authorized by subdivision 6 of section 156 of the Executive Law.

Section 438.4 deals with firefighter training hours, course allocations and scheduling procedures delivered through the Outreach Training Program.

Section 438.5 deals with additional firefighter training hours.

Section 438.6 deals with the supplemental firefighter training program.

Section 438.7 deals with the municipal training program.

Section 438.8 deals with the fire brigade training program.

Section 438.9 deals with firefighter training course allocations and scheduling procedures delivered through the Regional Training Program and Residential Training Program.

Section 438.10 deals with restrictions relating to OFPC's fire training programs.

Section 438.11 deals with the State Fire Administrator's ability to suspend and/or terminate authorization to deliver state fire training courses if an officer, instructor or program violates one or more of the provisions of this Part.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire December 30, 2007.

Text of emergency rule and any required statements and analyses may be obtained from: Elisha S. Tomko, Department of State, 41 State St., Albany, NY 12231, (518) 474-6740.

Regulatory Impact Statement

1. STATUTORY AUTHORITY

Section 156(6) of the Executive Law requires that the Office of Fire Prevention and Control of the Department of State (OFPC) provide fire and arson prevention and control training to firefighters and related governmental officers and employees. This section requires OFPC to adopt rules related to such training. These rules must include statements concerning training standards used by OFPC, the process by which OFPC allocates training hours to counties, and a uniform procedure for counties to request and OFPC to provide additional training hours.

2. LEGISLATIVE OBJECTIVES

The legislative objectives behind section 156(6) are to make more transparent the process by which OFPC allocates training hours to counties, to establish a uniform procedure for counties to request and OFPC to provide additional training hours, and to require that OFPC state the training standards which it will follow when it delivers training.

3. NEEDS AND BENEFITS

Section 156(6) of the Executive Law requires that OFPC adopt a rule which deals with firefighter training. Adoption of this rule would add transparency to the process by which firefighter training hours are allocated to counties, describe the training standards which will be followed by OFPC when it delivers training, establish the qualifications of instructors

delivering state fire training courses and prescribe a uniform procedure for counties to request and OFPC to provide additional training hours.

4. COSTS

a. Cost to regulated parties for the implementation of and continuing compliance with the proposed rule.

Fire departments would experience no additional out-of-pocket costs if the rule is adopted. The equipment and facilities required by the training provided for in this rule are already in the possession of these departments.

b. Costs to the Agency, the State and Local Governments for the Implementation and Continuation of the Rule.

The cost to the Office of Fire Prevention and Control for the implementation of the proposed rule is approximately \$1,500,000 per year. This amount is currently expended for training outreach programs; no additional costs beyond this amount would be required if this rule is adopted.

There would be no costs to local governments for the implementation and continuation of the proposed rule.

5. LOCAL GOVERNMENT MANDATES

This rule making will not impose any program, service, duty or responsibility upon counties, cities, towns, villages, school districts, fire districts or other special districts. Participation in the firefighter training provided for in this rule is at the option of each fire department.

6. PAPERWORK

Several new forms would be required as a result of the rule:

County fire coordinators desiring that training be provided to fire departments within their jurisdiction will be required to answer a survey related to such training and submit a proposed training schedule.

If this rule is adopted, state fire instructors, municipal fire instructors, and county fire instructors would be required to complete student attendance cards, and state fire instructors would be required to submit payroll vouchers.

7. DUPLICATION

No rules or other legal requirements of either the state or federal government exist at the present time which duplicate, overlap, or conflict with the proposed rule.

8. ALTERNATIVES

Section 156(6) of the Executive Law requires that OFPC adopt a rule which deals with firefighter training. This section requires that the rule describe the process by which firefighter training hours are allocated to counties, the training standards which will be followed by OFPC when it delivers such training, and prescribe a uniform procedure for counties to request and OFPC to provide additional training hours. Since OFPC does not have statutory authority to consider any alternative other than to adopt a rule addressing these issues, no other significant alternatives were considered.

9. FEDERAL STANDARDS

No standards have been set by the federal government for the same or similar subject areas addressed by this proposed rule.

10. COMPLIANCE SCHEDULE

Fire departments interested in receiving the training which is provided for in this proposed rule can comply immediately with the requirements of the rule.

Regulatory Flexibility Analysis

1. Effect of rule

The proposed rule potentially would affect all of the counties and all of the approximately 1850 fire departments located in New York State. The proposed rule would not affect small businesses located in New York State.

2. Compliance requirements

Counties and fire departments wishing to avail themselves of the training offered by the proposed rule would be required to submit a proposed fire training schedule to the Office of Fire Prevention and Control of the Department of State.

3. Professional services

Counties and fire departments will not need any additional professional services in order to comply with the proposed rule.

4. Compliance costs

There would be no initial capital costs to counties or fire departments which would be associated with compliance with the rule, or annual costs to these entities for continuing compliance with the rule.

5. Economic and technological feasibility

The proposed rule sets forth a voluntary process whereby counties and fire departments may make requests for firefighter training. The only requirement that the rule imposes on these counties and fire departments is that they make requests for this training. It is therefore economically and

technologically feasible for these counties and fire departments to comply with this rule.

6. Minimizing adverse impact

The proposed rule sets forth a voluntary process whereby counties and fire departments may make requests for firefighter training. Since the rule would regulate the administration of a state program rather than the activities of counties and fire departments, engaging in this voluntary process would not have any adverse economic impact on these entities.

7. Small business and local government participation

Representatives of fire departments and local governments participated in legislative hearings at which they urged the implementation of a more transparent process for the allocation of firefighter training resources. This resulted in the passage of Chapter 615 of the Laws of 2006, which requires the promulgation of these rules.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas

The proposed rule would apply throughout New York State. All of the counties and all of the approximately 1850 fire departments in New York State, including those located in rural areas as that term is defined in section 102(10) of the State Administrative Procedure Act (“SAPA”), would potentially be affected by the rule.

The proposed rule would not regulate any activities of private entities in rural areas of the State.

2. Reporting, recordkeeping and other compliance requirements, and professional services

Counties wishing to avail themselves of the training offered by the proposed rule would be required to submit a proposed fire training schedule to the Office of Fire Prevention and Control of the Department of State. Counties and fire departments located in rural areas will not need any additional professional services in order to comply with the proposed rule.

3. Costs

There would be no initial capital costs to counties and fire companies located in rural areas associated with compliance with the rule, or annual cost for continuing compliance with the rule by these entities.

4. Minimizing adverse impact

The proposed rule sets forth a voluntary process whereby counties may make requests for firefighter training. The rule would regulate the administration of a state program rather than the activities of public or private entities located in rural areas. Since this process is voluntary, it would not have any adverse economic impact on rural areas of New York State.

5. Rural area participation

Representatives of rural areas participated in legislative hearings at which they urged the implementation of a more transparent process for the allocation of firefighter training resources. This resulted in the passage of Chapter 615 of the Laws of 2006.

Job Impact Statement

1. Nature of impact

The nature of the impact that the rule will have on jobs and employment opportunities is minimal. The rule will result in the employment of several additional Office of Fire Prevention and Control (OFPC) fire protection specialists and may result in the employment of several temporary part time instructors by the Department of State.

2. Categories and numbers affected

The rule will result in the employment of several additional fire protection specialists and may result in the employment of several temporary part time instructors by the Department of State.

3. Regions of adverse impact

The minimal impact that the rule will have on jobs and employment opportunities will not result in an disproportionate impact on any region of the state.

4. Minimizing adverse impact

The proposed rule would not have any adverse impact on existing jobs.

The intent of Chapter 615 of the laws of 2006 is to provide firefighter training, not to promote the development of new employment opportunities.

State University of New York

EMERGENCY
RULE MAKING

State University of New York Tuition and Fees Schedule

I.D. No. SUN-29-07-00020-E

Filing No. 1024

Filing date: Sept. 27, 2007

Effective date: Sept. 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 302.1(d), (e), (g) and (h) of Title 8 NYCRR.

Statutory authority: Education Law, section 355(2)(b) and (h)

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

Specific reasons underlying the finding of necessity: Amendment of these regulations needs to proceed on an emergency basis because increases in tuition were effective for the Fall 2007 semester.

Subject: State University of New York tuition and fees schedule.

Purpose: To amend the State University of New York tuition and fees schedule to increase tuition for resident and nonresident students in the professional programs of physical therapy, dentistry, law and pharmacy.

Text of emergency rule: (d) Students enrolled in the professional program of pharmacy.

Tuition

(1) Students, New York State residents: [\$6,290] \$6,850 per semester or [\$4,193] \$4,567 per quarter.

(2) Students, out-of-state residents: [\$10,870] \$11,850 per semester or [\$7,247] \$7,900 per quarter.

(3) Special students, New York State residents: [\$524] \$571 per semester credit hour or [\$349] \$381 per quarter credit hour or equivalent.

(4) Special students, out-of-state residents: [\$906] \$988 per semester credit hour or [\$604] \$658 per quarter credit hour or equivalent.

Credit Hour Equivalent

The Chancellor shall determine the equivalent of a credit hour.

* * * *

(e) Students enrolled in the professional program of law (J.D. and LL.M).

Tuition

(1) Students, New York State residents: [\$6,085] \$6,600 per semester or [\$4,057] \$4,400 per quarter.

(2) Students, out-of-state residents: [\$9,135] \$10,000 per semester or [\$6,090] \$6,667 per quarter.

(3) Special students, New York State residents: [\$507] \$550 per semester credit hour or [\$338] \$367 per quarter credit hour or equivalent.

(4) Special students, out-of-state residents: [\$761] \$833 per semester credit hour or [\$508] \$556 per quarter credit hour or equivalent.

Credit Hour Equivalent

The Chancellor shall determine the equivalent of a credit hour.

* * * *

(g) Students enrolled in dentistry programs.

Tuition

(1) Students, New York State residents: [\$7,400] \$8,100 per semester or [\$4,933] \$5,400 per quarter.

(2) Students, out-of-state residents: [\$14,800] \$16,250 per semester or [\$9,867] \$10,833 per quarter.

(3) Special students, New York State residents: [\$617] \$675 per semester credit hour or [\$411] \$450 per quarter credit hour or equivalent.

(4) Special students, out-of-state residents: [\$1,233] \$1,354 per semester credit hour or [\$822] \$903 per quarter credit hour or equivalent.

Credit Hour Equivalent

The Chancellor shall determine the equivalent of a credit hour.

* * * *

(h) Students enrolled in the professional program of physical therapy.

Tuition

(1) Students, New York State residents: [\$5,460] \$5,710 per semester or [\$3,640] \$3,807 per quarter.

(2) Students, out-of-state residents: [\$8,770] \$9,145 per semester or [\$5,847] \$6,097 per quarter.

(3) Special students, New York State residents: [\$455] \$476 per semester credit hour or [\$303] \$317 per quarter credit hour or equivalent.

(4) Special students, out-of-state residents: [\$731] \$762 per semester credit hour or [\$487] \$508 per quarter credit hour or equivalent.

Credit Hour Equivalent

The Chancellor shall determine the equivalent of a credit hour.

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 October 17, 2007.

Text of emergency rule and any required statements and analyses may be obtained from: Marti Anne Ellermann, Senior Counsel, State University of New York, State University Plaza, S-331, Albany, NY 12246, (518) 443-5400, e-mail: Marti.Ellermann@SUNY.EDU

Regulatory Impact Statement

1. **Statutory Authority:** Education Law, Sections 355(2)(b) and 355(2)(h). Section 355(2)(b) authorizes the State University Trustees to make and amend rules and regulations for the governance of the State University and institutions therein. Section 355(2)(h) authorizes the State University Trustees to regulate the admission of students, tuition charges and other fees and charges, curricula and all other matters pertaining to the operation and administration of each State-operated institution of the University. In accordance with Section 355(2)(h)(4) of the Education Law, no change in tuition can be made effective prior to enactment of the annual budget for the State University of New York. Chapter 53 of the Laws of 2007 enacted the appropriations for the operations of the State University of New York during the 2007-2008 fiscal year, including necessary tuition revenue.

2. **Legislative Objectives:** The present measure will provide essential financial support for the operations of the State University of New York, in furtherance of its statutorily defined mission as set forth in Article 8 of the Education Law.

3. **Needs and Benefits:** The present measure establishes a series of tuition increases in certain professional degree programs of the State University of New York as necessitated by the 2007-2008 State Budget.

The tuition changes authorized by this measure affect certain professional schools within the State University of New York: the Schools of Law and Pharmacy at the State University of New York at Buffalo, the Schools of Dental Medicine and the Professional Programs in Physical Therapy at State University of New York at Buffalo and Stony Brook.

This measure is needed in order to provide essential financial support for specific professional programs of the State University of New York for the 2007-2008 fiscal year. The State University's cost for these professional programs exceeds the funding provided by tuition and State support. It should be noted that even with the recommended increases, the tuition charged by these University of New York programs is still competitive when compared to similar programs at peer institutions in other university systems.

This amendment affects four professional programs within the State University of New York. Tuition for New York State residents at the School of Law will increase to \$13,200 per year (\$20,000 non-residents), and at the Pharmacy School to \$13,700 per year (\$23,700 non-residents).

The amendment also increases tuition for students in the professional dental program (D.D.S.) at the Universities at Buffalo and Stony Brook. Under this measure, tuition will increase \$1,400 per year for New York State residents and \$2,900 per year for nonresidents.

Finally, the amendment increases tuition for students pursuing the terminal Professional Degree in Physical Therapy. The new annual rate is \$11,420 for New York State residents and \$18,290 for nonresidents.

4. **Costs:** Students enrolled in these programs of the State University of New York will be required to pay additional tuition ranging from \$500 per year for Doctor of Physical Therapy degrees to \$1,400 for the Schools of Dentistry. The tuition increases will affect students in these programs as shown:

	# Resident	\$ Increase	# Non-resident	\$ Increase
Dental	450	\$1400	53	\$2900
Pharmacy	306	1120	29	1960
Law	636	1030	90	1730
P. Therapy	259	500	18	750

5. **Local Government Mandates:** There are no local government mandates.

6. **Paperwork:** No parties will experience any new reporting responsibilities. State University of New York publications and documents con-

taining notices regarding costs of attendance will need to be revised to reflect these changes.

7. **Duplication:** None.

8. **Alternatives:** There is no acceptable alternative to these increases given the 2007-2008 State Budget.

9. **Federal Standards:** None.

10. **Compliance Schedule:** Not applicable.

Regulatory Flexibility Analysis

No regulatory flexibility analysis is submitted with this notice because the proposed rule does not impose any requirements on small businesses and local governments. This proposed rule making will not impose any adverse economic impact on small businesses and local governments or impose any reporting, recordkeeping or other compliance requirements on small businesses and local governments.

Rural Area Flexibility Analysis

No rural area flexibility analysis is submitted with this notice because the proposed rule does not impose any requirements on rural areas. The rule will not impose any adverse economic impact on rural areas or impose any reporting, recordkeeping, professional services or other compliance requirements on rural areas.

Job Impact Statement

No job impact statement is submitted with this notice because the proposed rule does not impose any adverse economic impact on existing jobs, employment opportunities, or self-employment. This regulation governs tuition charges for State University of New York and will not have any adverse impact on the number of jobs or employment.

NOTICE OF ADOPTION

State University of New York Tuition and Fees Schedule

I.D. No. SUN-29-07-00020-A

Filing No. 1025

Filing date: Sept. 27, 2007

Effective date: Oct. 17, 2007

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

Action taken: Amendment of section 302.1(d), (e), (g) and (h) of Title 8 NYCRR.

Statutory authority: Education Law, section 355(2)(b) and (h)

Subject: State University of New York tuition and fees schedule.

Purpose: To amend the State University of New York tuition and fees schedule to increase tuition for resident and nonresident students in the professional programs of physical therapy, dentistry, law and pharmacy.

Text or summary was published in the notice of emergency/proposed rule making, I.D. No. SUN-29-07-00020-EP, Issue of July 18, 2007.

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

Text of rule and any required statements and analyses may be obtained from: Marti Anne Ellermann, Senior Counsel, State University of New York, State University Plaza, S-331, Albany, NY 12246, (518) 443-5400, e-mail: Marti.Ellermann@SUNY.EDU

Assessment of Public Comment

The agency received no public comment.

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

State Basic Financial Assistance

I.D. No. SUN-42-07-00011-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 amend section 602.8(c) of Title 8 NYCRR.

Statutory authority: Education Law, sections 355(1)(c) and 6304(1)(b); and L. 2007, ch. 53

Subject: State basic financial assistance for operating expenses of community colleges under the program of the State University of New York and the City University of New York.

Purpose: To modify existing limitations formula for basic State financial assistance for operating expenses of community colleges of the State University and the City University of New York in order to conform to the provisions of the Education Law and the 2007-2008 Budget Bill.

Text of proposed rule: 602.8(c) Basic State financial assistance.

(1) Full opportunity colleges. The basic State financial assistance for community colleges, implementing approved full opportunity programs, shall be the lowest of the following:

(i) two-fifths (40%) of the net operating budget of the college, or campus of a multiple campus college, as approved by the State University trustees;

(ii) two-fifths (40%) of the net operating costs of the college, or campus of a multiple campus college; or

(iii) for the current college fiscal year the total of the following:

(a) the budgeted or actual number (whichever is less) of full-time equivalent students enrolled in programs eligible for State financial assistance multiplied by [\$2,525] \$2,675; and

(b) up to one-half (50%) of rental costs for physical space.

(2) Non-full opportunity colleges. The basic State financial assistance for community colleges not implementing approved full opportunity programs shall be the lowest of the following:

(i) one-third (33%) of the net operating budget of the college, or campus of a multiple campus college, as approved by the State University trustees;

(ii) one-third (33%) of the net operating costs of the college, or campus of a multiple campus college; or

(iii) for the college fiscal year current, the total of the following:

(a) the budgeted or actual number (whichever is less) of full-time equivalent students enrolled in programs eligible for State financial assistance multiplied by [\$2,105] \$2,230; and

(b) up to one-half (50%) of rental cost for physical space.

(3) Notwithstanding the provisions of paragraphs (1) and (2) of this subdivision, a community college or a new campus of a multiple campus community college in the process of formation shall be eligible for basic State financial assistance in the amount of one-third of the net operating budget or one-third of the net operating costs, whichever is the lesser, for those colleges not implementing an approved full opportunity program plan, or two-fifths of the net operating budget or two-fifths of the net operating costs, whichever is the lesser, for those colleges implementing an approved full opportunity program, during the organization year and the first two fiscal years in which students are enrolled.

Text of proposed rule and any required statements and analyses may be obtained from: Dona S. Bulluck, State University of New York, State University Plaza, 353 Broadway, Albany, NY 12246, (518) 443-5400, e-mail: dona.Bulluck@suny.edu

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

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

Consensus Rule Making Determination

The State University of New York has determined that no person is likely to object to this rule as written because it provides timely State operating assistance to public community colleges of the State and City Universities of New York and adopts amendments to the tuition regulations for community colleges under the program of the State University of New York for the 2007-2008 fiscal year.

Job Impact Statement

No job impact statement is submitted with this notice because the adoption of this rule does not impose any adverse economic impact on existing jobs, employment opportunities, or self-employment. This rule making governs the financing of community colleges operating under the program of the State University and will not have any adverse impact on the number of jobs or employment opportunities in the state.

Office of Temporary and Disability Assistance

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

Child Support Standards Chart

I.D. No. TDA-42-07-00009-P

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

Proposed action: This is a consensus rule making to amend section 347.10(a)(8), (9), (b) and (c) of Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20(3)(d), 34(3), 111-a and 111-i

Subject: Child support standards chart.

Purpose: To reflect the revised poverty income guidelines amount, the revised self-support reserve and the updated child support standards chart.

Text of proposed rule: Paragraph (8) of subdivision (a) of section 347.10 is amended to read as follows:

(8) "Poverty income guidelines amount" means the poverty income guidelines amount for a single person as reported annually by the Federal Department of Health and Human Services for a single person household[;]. For calendar year 2007, the poverty income guidelines amount is \$10,210.

Paragraph (9) of subdivision (a) of section 347.10 is amended to read as follows:

(9) "Self-support reserve" means 135 percent of the poverty income guidelines amount, which is updated annually by the Federal Department of Health and Human Services, and which will be provided by the office annually. For calendar year [2006] 2007, the self-support reserve is [\$13,230] \$13,783.

Items 18, 20 and 21 of the child support guidelines worksheet contained in subdivision (b) of section 347.10 are amended to read as follows:

- 18. Subtract line 17 from line 16. 18. \$ _____
 - a. If line 18 is greater than or equal to [\$13,230] \$13,783 (the self-support reserve) enter the line 17 amount on line 22 below.
No further calculations are necessary.
 - b. If line 18 is less than [\$13,230] \$13,783, proceed to step 19.
- 20. Self-Support Reserve. 20. [\$ 13,230]
\$13,783
- 21. Subtract line 20 from line 19. 21. \$ _____
 - a. If line 18 is less than [\$9,800] \$10,210 (poverty level), enter on line 22 the greater of \$300 or the amount from line 21.
 - b. If line 18 is greater than or equal to [\$9,800] \$10,210 (poverty level), but less than [\$13,230] \$13,783 enter on line 22 the greater of \$600 or the amount from line 21.

Paragraph (3) of subsection IV-2 of the child support guidelines worksheet contained in subdivision (b) of section 347.10 is amended to read as follows:

(3) [In] If an absent parent's annual income minus [his/her] his or her share of the basic child support obligation would reduce such parent's income to an amount equal to or greater than self-support reserve, such parent's monthly basic child support obligation is equal to [his/her] his or her income multiplied by the applicable child support percentage as defined in this section, plus additional payments for child care, health care and educational expenses as defined in subparagraphs (i), (ii), (iii) and (iv) of paragraph (2) of this subdivision, divided by 12.

The text of section 347.10 (c) is amended and the chart sections for annual incomes from \$0 through \$21,999 contained in that subdivision are repealed and replaced with the following chart sections reflecting the 2007 federal poverty income guidelines amount and the self support reserve:

(c) The following child support standards chart sets forth annual obligation amounts yielded by annual absent parent income levels, up to \$200,000, through application of the child support percentages as defined in this section:

Released CHILD SUPPORT STANDARDS CHART
[April 1, 2006] April 1, 2007 PREPARED BY
NEW YORK STATE OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE, DIVISION OF CHILD SUPPORT ENFORCEMENT

The tables provided as part of the Child Support Standards Chart should be used to determine the annual child support obligation amount [pursuant to the provisions of Chapter 567 of the Laws of New York of 1989]. The current poverty income guidelines amount for a single person and the self-support reserve as reported by the United States Department of Health and Human Services [is \$9,800 and the self-support reserve for 2006 is \$13,230] are set forth in the "Definitions" in subdivision (a) of this section.

How to use the Chart:

1. Locate the "Income Range" you are looking for in the upper right hand corner of each page.
2. Locate the row labeled "Annual Income" on one of the tables of that page.
3. Go across the top of the table to the column corresponding to the "Number of Children" for whom support is sought.
4. The dollar amount listed where the "Annual Income" row and the "Number of Children" column meet is the amount of the basic child support obligation, where additional amounts are not applicable for the child care, health care and education for the children for whom support is sought.
5. Where additional amounts for child care, health care and/or educational expenses are appropriate, see the worksheet [on page 21].

Please note: Where the total income of both parents exceeds \$80,000, the law permits, but does not require, the use of the Child Support Percentages in calculating the annual child support obligation amount on the income above \$80,000.

THE CHILD SUPPORT STANDARDS CHART

Child Support Percentages

One child	17% of combined parental income
Two children	25% of combined parental income
Three children	29% of combined parental income
Four children	31% of combined parental income
Five or more children	no less than 35% of combined parental income

INCOME RANGE
0 - 11,999

ANNUAL INCOME		NUMBER OF CHILDREN				
FROM	THRU	1	2	3	4	5+
000	11,999	300	300	300	300	300

ANNUAL INCOME		NUMBER OF CHILDREN				
FROM	THRU	1	2	3	4	5+
12,000	12,099	300	300	300	300	300
12,100	12,199	300	300	300	300	300
12,200	12,299	300	300	300	300	300
12,300	12,399	300	300	300	300	300
12,400	12,499	600	300	300	300	300
12,500	12,599	600	300	300	300	300
12,600	12,699	600	300	300	300	300
12,700	12,799	600	300	300	300	300
12,800	12,899	600	600	300	300	300
12,900	12,999	600	600	300	300	300

ANNUAL INCOME		NUMBER OF CHILDREN				
FROM	THRU	1	2	3	4	5+
13,000	13,099	600	300	300	300	300
13,100	13,199	600	300	300	300	300
13,200	13,299	600	300	300	300	300
13,300	13,399	600	300	300	300	300
13,400	13,499	600	300	300	300	300
13,500	13,599	600	300	300	300	300
13,600	13,699	600	300	300	300	300
13,700	13,799	600	600	300	300	300
13,800	13,899	600	600	300	300	300
13,900	13,999	600	600	300	300	300

ANNUAL INCOME		NUMBER OF CHILDREN				
FROM	THRU	1	2	3	4	5+
14,000	14,099	600	600	300	300	300
14,100	14,199	600	600	317	317	317
14,200	14,299	600	600	417	417	417
14,300	14,399	600	600	517	517	517
14,400	14,499	617	617	617	617	617
14,500	14,599	717	717	717	717	717
14,600	14,699	817	817	817	817	817
14,700	14,799	917	917	917	917	917
14,800	14,899	1,017	1,017	1,017	1,017	1,017
14,900	14,999	1,117	1,117	1,117	1,117	1,117

ANNUAL INCOME		NUMBER OF CHILDREN				
FROM	THRU	1	2	3	4	5+

FROM		THRU		ANNUAL OBLIGATION AMOUNT				
15,000	15,099	1,217	1,217	1,217	1,217	1,217	1,217	1,217
15,100	15,199	1,317	1,317	1,317	1,317	1,317	1,317	1,317
15,200	15,299	1,417	1,417	1,417	1,417	1,417	1,417	1,417
15,300	15,399	1,517	1,517	1,517	1,517	1,517	1,517	1,517
15,400	15,499	1,617	1,617	1,617	1,617	1,617	1,617	1,617
15,500	15,599	1,717	1,717	1,717	1,717	1,717	1,717	1,717
15,600	15,699	1,817	1,817	1,817	1,817	1,817	1,817	1,817
15,700	15,799	1,917	1,917	1,917	1,917	1,917	1,917	1,917
15,800	15,899	2,017	2,017	2,017	2,017	2,017	2,017	2,017
15,900	15,999	2,117	2,117	2,117	2,117	2,117	2,117	2,117

ANNUAL INCOME		NUMBER OF CHILDREN				
FROM	THRU	1	2	3	4	5+
16,000	16,099	2,217	2,217	2,217	2,217	2,217
16,100	16,199	2,317	2,317	2,317	2,317	2,317
16,200	16,299	2,417	2,417	2,417	2,417	2,417
16,300	16,399	2,517	2,517	2,517	2,517	2,517
16,400	16,499	2,617	2,617	2,617	2,617	2,617
16,500	16,599	2,717	2,717	2,717	2,717	2,717
16,600	16,699	2,817	2,817	2,817	2,817	2,817
16,700	16,799	2,839	2,917	2,917	2,917	2,917
16,800	16,899	2,856	3,017	3,017	3,017	3,017
16,900	16,999	2,873	3,117	3,117	3,117	3,117

ANNUAL INCOME		NUMBER OF CHILDREN				
FROM	THRU	1	2	3	4	5+
17,000	17,099	2,890	3,217	3,217	3,217	3,217
17,100	17,199	2,907	3,317	3,317	3,317	3,317
17,200	17,299	2,924	3,417	3,417	3,417	3,417
17,300	17,399	2,941	3,517	3,517	3,517	3,517
17,400	17,499	2,958	3,617	3,617	3,617	3,617
17,500	17,599	2,975	3,717	3,717	3,717	3,717
17,600	17,699	2,992	3,817	3,817	3,817	3,817
17,700	17,799	3,009	3,917	3,917	3,917	3,917
17,800	17,899	3,026	4,017	4,017	4,017	4,017
17,900	17,999	3,043	4,117	4,117	4,117	4,117

ANNUAL INCOME		NUMBER OF CHILDREN				
FROM	THRU	1	2	3	4	5+
18,000	18,099	3,060	4,217	4,217	4,217	4,217
18,100	18,199	3,077	4,317	4,317	4,317	4,317
18,200	18,299	3,094	4,417	4,417	4,417	4,417
18,300	18,399	3,111	4,517	4,517	4,517	4,517
18,400	18,499	3,128	4,600	4,617	4,617	4,617
18,500	18,599	3,145	4,625	4,717	4,717	4,717
18,600	18,699	3,162	4,650	4,817	4,817	4,817
18,700	18,799	3,179	4,675	4,917	4,917	4,917
18,800	18,899	3,196	4,700	5,017	5,017	5,017
18,900	18,999	3,213	4,725	5,117	5,117	5,117

ANNUAL INCOME		NUMBER OF CHILDREN				
FROM	THRU	1	2	3	4	5+
19,000	19,099	3,230	4,750	5,217	5,217	5,217
19,100	19,199	3,247	4,775	5,317	5,317	5,317
19,200	19,299	3,264	4,800	5,417	5,417	5,417
19,300	19,399	3,281	4,825	5,517	5,517	5,517
19,400	19,499	3,298	4,850	5,617	5,617	5,617
19,500	19,599	3,315	4,875	5,655	5,717	5,717
19,600	19,699	3,332	4,900	5,684	5,817	5,817
19,700	19,799	3,349	4,925	5,713	5,917	5,917
19,800	19,899	3,366	4,950	5,742	6,017	6,017
19,900	19,999	3,383	4,975	5,771	6,117	6,117

ANNUAL INCOME		NUMBER OF CHILDREN				
FROM	THRU	1	2	3	4	5+
20,000	20,099	3,400	5,000	5,800	6,200	6,217
20,100	20,199	3,417	5,025	5,829	6,231	6,317
20,200	20,299	3,434	5,050	5,858	6,262	6,417
20,300	20,399	3,451	5,075	5,887	6,293	6,517
20,400	20,499	3,468	5,100	5,916	6,324	6,617
20,500	20,599	3,485	5,125	5,945	6,355	6,717
20,600	20,699	3,502	5,150	5,974	6,386	6,817

20,700	20,799	3,519	5,175	6,003	6,417	6,917
20,800	20,899	3,536	5,200	6,032	6,448	7,017
20,900	20,999	3,553	5,225	6,061	6,479	7,117

NUMBER OF CHILDREN

ANNUAL INCOME		1	2	3	4	5+
FROM	THRU	ANNUAL OBLIGATION AMOUNT				
21,000	21,099	3,570	5,250	6,090	6,510	7,217
21,100	21,199	3,587	5,275	6,119	6,541	7,317
21,200	21,299	3,604	5,300	6,148	6,572	7,417
21,300	21,399	3,621	5,325	6,177	6,603	7,455
21,400	21,499	3,638	5,350	6,206	6,634	7,490
21,500	21,599	3,655	5,375	6,235	6,665	7,525
21,600	21,699	3,672	5,400	6,264	6,696	7,560
21,700	21,799	3,689	5,425	6,293	6,727	7,595
21,800	21,899	3,706	5,450	6,322	6,758	7,630
21,900	21,999	3,723	5,475	6,351	6,789	7,665

Text of proposed rule and any required statements and analyses may be obtained from: Jeanine Stander Behuniak, Office of Temporary and Disability Assistance, 40 N. Pearl St., 16C, Albany, NY 12243-0001, (518) 474-9779, e-mail: Jeanine.Behuniak@OTDA.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

The Office of Temporary and Disability Assistance (OTDA) is proposing amendments to 18 NYCRR 347.10 to reflect the revised poverty income guidelines amount as reported by the federal Department of Health and Human Services, the revised self-support reserve, and the updated child support standards chart which are used to calculate child support obligations. OTDA has determined that no person is likely to object to the adoption of the proposed rule as written.

The proposed amendments to 18 NYCRR 347.10 are necessary to conform the regulation to the requirements of section 111-i (2) of the Social Services Law (SSL). Section 111-i(2) (a) of the SSL provides that OTDA shall publish annually in its regulations the revised self-support reserve to reflect the annual updating of the poverty income guidelines amount for a single person, and section 111-i(2) (b) of the SSL provides that OTDA shall publish in its regulations a child support standards chart to reflect the dollar amounts yielded through application of the child support percentage. Thus, OTDA is required by State statute to update its regulatory provisions on an annual basis.

The updated financial information does not reflect discretion exercised by OTDA. The self-support reserve and the child support percentage are defined in the Domestic Relations Law, and the poverty income guidelines amount for a single person is reported by the federal Department of Health and Human Services. Thus the proposed amendments are not establishing new financial criteria. Instead they are setting forth existing requirements.

The proposed child support standards chart presently is being utilized by the local child support enforcement units to calculate child support obligations. Thus the proposed amendments will conform 18 NYCRR 347.10 to reflect the actual practices of the local child support enforcement units in the State.

It is expected that no person will object to the proposed amendments contained in this consensus rule since the amendments are necessary to comply with the SSL, and the amendments reflect updated financial information which is being used to calculate child support obligations.

Job Impact Statement

A job impact statement has not been prepared for the proposed regulatory amendments. It is evident from the subject matter of the amendments that the job of the worker making the decisions required by the proposed amendments will not be affected in any real way. Thus the changes will not have any impact on jobs and employment opportunities in the State.

Workers' Compensation Board

**EMERGENCY
RULE MAKING**

Independent Medical Examinations

I.D. No. WCB-42-07-00002-E

Filing No. 1026

Filing date: Sept. 28, 2007

Effective date: Sept. 28, 2007

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

Action taken: Amendment of section 300.2(d)(11) of Title 12 NYCRR.

Statutory authority: Workers' Compensation Law, sections 117 and 137
Finding of necessity for emergency rule: Preservation of general welfare.

Specific reasons underlying the finding of necessity: Recent decisions issued by board panels have interpreted the current regulation as requiring reports of independent medical examinations (IMEs) be received by the board within ten calendar days of the exam. Due to the time it takes to prepare the report and mail it, the fact the board is not open on legal holidays, Saturdays and Sundays, and that U.S. Post Offices are not open on legal holidays and Sundays, it is extremely difficult to timely file said reports. If a report is not timely filed it is precluded and is not considered when a decision is rendered. As the medical professional preparing the report must send the report on the same day and in the same manner to the board, workers' compensation insurance carrier/self-insured employer, claimant's treating provider and representative, and the claimant it is not possible to send the report by facsimile or electronic means. The recent decisions have greatly, negatively impact the professionals who conduct IMEs, the IME entities, insurance carriers and self-insured employers. When untimely reports are precluded, the insurance carriers and self-insured employers are prevented from adequately defending their position. Accordingly, emergency adoption of this rule is necessary.

Subject: Filing written reports of Independent medical examinations (IMEs).

Purpose: To amend the time for filing written reports of IMEs with the board and furnished to all others.

Text of emergency rule: Paragraph (11) of subdivision (d) of section 300.2 of Title 12 NYCRR is amended to read as follows:

(11) A written report of a medical examination duly sworn to, shall be filed with the Board, and copies thereof furnished to all parties as may be required under the Workers' Compensation Law, within 10 business days after the examination, or sooner if directed, except that in cases of persons examined outside the State, such reports shall be filed and furnished within 20 business days after the examination. A written report is filed with the Board when it has been received by the Board pursuant to the requirements of the Workers' Compensation Law.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the State Register at some future date. The emergency rule will expire December 26, 2007.

Text of emergency rule and any required statements and analyses may be obtained from: Cheryl M. Wood, Workers' Compensation Board, 20 Park St., Rm. 401, Albany, NY 12207, (518) 486-9564, e-mail: OfficeofGeneralCounsel@wcb.state.ny.us

Regulatory Impact Statement

1. Statutory authority:

The Workers' Compensation Board (hereinafter referred to as Board) is clearly authorized to amend 12 NYCRR 300.2(d)(11). Workers' Compensation Law (WCL) Section 117(1) authorizes the Chair to make reasonable regulations consistent with the provisions of the Workers' Compensation Law and the Labor Law. Section 141 of the Workers' Compensation Law authorizes the Chair to make administrative regulations and orders providing, in part, for the receipt, indexing and examining of all notices, claims and reports, and further authorizes the Chair to issue and revoke certificates of authorization of physicians, chiropractors and podiatrists as provided in sections 13-a, 13-k, and 13-l of the Workers' Compensation Law. Section 137 of the Workers' Compensation Law mandates requirements for the notice, conduct and reporting of independent medical examinations.

Specifically, paragraph (a) of subdivision (1) requires a copy of each report of an independent medical examination to be submitted by the practitioner on the same day and in the same manner to the Board, the carrier or self-insured employer, the claimant's treating provider, the claimant's representative and the claimant. Sections 13-a, 13-k, 13-l and 13-m of the Workers' Compensation Law authorize the Chair to prescribe by regulation such information as may be required of physicians, podiatrists, chiropractors and psychologists submitting reports of independent medical examinations.

2. Legislative objectives:

Chapter 473 of the Laws of 2000 amended Sections 13-a, 13-b, 13-k, 13-l and 13-m of the Workers' Compensation Law and added Sections 13-n and 137 to the Workers' Compensation Law to require authorization by the Chair of physicians, podiatrists, chiropractors and psychologists who conduct independent medical examinations, guidelines for independent medical examinations and reports, and mandatory registration with the Chair of entities that derive income from independent medical examinations. This rule would amend one provision of the regulations adopted in 2001 to implement Chapter 473 regarding the time period within which to file written reports from independent medical examinations.

3. Needs and benefits:

Prior to the adoption of Chapter 473 of the Laws of 2000, there were limited statutory or regulatory provisions applicable to independent medical examiners or examinations. Under this statute, the Legislature provided a statutory basis for authorization of independent medical examiners, conduct of independent medical examinations, provision of reports of such examinations, and registration of entities that derive income from such examinations. Regulations were required to clarify definitions, procedures and standards that were not expressly addressed by the Legislature. Such regulations were adopted by the Board in 2001.

Among the provisions of the regulations adopted in 2001 was the requirement that written reports from independent medical examinations be filed with the Board and furnished to all parties as required by the WCL within 10 days of the examination. Guidance was provided in 2002 to some to participants in the process from executives of the Board that filing was accomplished when the report was deposited in a U.S. mailbox and that "10 days" meant 10 calendar days. In 2003 claimants began raising the issue of timely filing with the Board of the written report and requesting that the report be excluded if not timely filed. In response some representatives for the carriers/self-insured employers presented the 2002 guidance as proof they were in compliance. In some cases the Workers' Compensation Law Judges (WCLJs) found the report to be timely, while others found it to be untimely. Appeals were then filed to the Board and assigned to Panels of Board Commissioners. Due to the differing WCLJ decisions and the appeals to the Board, Board executives reviewed the matter and additional guidance was issued in October 2003. The guidance clarified that filing is accomplished when the report is received by the Board, not when it is placed in a U.S. mailbox. In November 2003, the Board Panels began to issue decisions relating to this issue. The Panels held that the report is filed when received by the Board, not when placed in a U.S. mailbox, the CPLR provision providing a 5-day grace period for mailing is not applicable to the Board (WCL Section 118), and therefore the report must be filed within 10 days or it will be precluded.

Since the issuance of the October 2003 guidance and the Board Panel decisions, the Board has been contacted by numerous participants in the system indicating that ten calendar days from the date of the examination is not sufficient time within which to file the report of the exam with the Board. This is especially true if holidays fall within the ten day period as the Board and U.S. Postal Service do not operate on those days. Further the Board is not open to receive reports on Saturdays and Sundays. If a report is precluded because it is not filed timely, it is not considered by the WCLJ in rendering a decision.

By amending the regulation to require the report to be filed within ten business days rather than calendar days, there will be sufficient time to file the report as required. In addition by stating what is meant by filing there can be no further arguments that the term "filed" is vague.

4. Costs:

This proposal will not impose any new costs on the regulated parties, the Board, the State or local governments for its implementation and continuation. The requirement that a report be prepared and filed with the Board currently exists and is mandated by statute. This rule merely modifies the manner in which the time period to file the report is calculated and clarifies the meaning of the word "filed".

5. Local government mandates:

Approximately 2511 political subdivisions currently participate as municipal employers in self-insured programs for workers' compensation coverage in New York State. These self-insured municipal employers will be affected by the proposed rule in the same manner as all other employers who are self-insured for workers' compensation coverage. As with all other participants, this proposal merely modifies the manner in which the time to file a report is calculated, and clarifies the meaning of the word "filed".

6. Paperwork:

This proposed rule does not add any reporting requirements. The requirement that a report be provided to the Board, carrier, claimant, claimant's treating provider and claimant's representative in the same manner and at the same time is mandated by WCL Section 137(1). Current regulations require the filing of the report with the Board and service on all others within ten days of the examination. This rule merely modifies the manner in which the time period to file the report is calculated and clarifies the meaning of the word "filed".

7. Duplication:

The proposed rule does not duplicate or conflict with any state or federal requirements.

8. Alternatives:

One alternative discussed was to take no action. However, due to the concerns and problems raised by many participants, the Board felt it was more prudent to take action. In addition to amending the rule to require the filing within ten business days, the Board discussed extending the period within which to file the report to fifteen days. In reviewing the law and regulations the Board felt the proposed change was best. Subdivision 7 of WCL Section 137 requires the notice of the exam be sent to the claimant within seven business days, so the change to business days is consistent with this provision. Further, paragraphs (2) and (3) of subdivision 1 of WCL Section 137 require independent medical examiners to submit copies of all request for information regarding a claimant and all responses to such requests within ten days of receipt or response. Further, in discussing this issue with participants to the system, it was indicated that the change to business days would be adequate.

The Medical Legal Consultants Association, Inc., suggested that the Board provide for electronic acceptance of IME reports directly from IME providers. However, at this time the Board cannot comply with this suggestion as WCL Section 137(1)(a) requires reports to be submitted by the practitioners on the same day and in the same manner to the Board, the insurance carrier, the claimant's attending provider and the claimant. Until such time as the report can be sent electronically to all of the parties, the Board cannot accept it in this manner.

9. Federal standards:

There are no federal standards applicable to this proposed rule.

10. Compliance schedule:

It is expected that the affected parties will be able to comply with this change immediately.

Regulatory Flexibility Analysis

1. Effect of rule:

Approximately 2511 political subdivisions currently participate as municipal employers in self-insured programs for workers' compensation coverage in New York State. These self-insured local governments will be required to file reports of independent medical examinations conducted at their request within ten business days of the exam, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding.

Small businesses that are self-insured will also be affected by the proposed rule. These small businesses will be required to file reports of independent medical examinations conducted at their request within ten business days of the exam, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding.

Small businesses that derive income from independent medical examinations are a regulated party and will be required to file reports of independent medical examinations conducted at their request within ten business days of the exam, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding.

Individual providers of independent medical examinations who own their own practices or are engaged in partnerships or are members of corporations that conduct independent medical examinations also constitute small businesses that will be affected by the proposed rule. These individual providers will be required to file reports of independent medical examinations conducted at their request within ten business days of the

exam, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding.

2. Compliance requirements:

Self-insured municipal employers, self-insured non-municipal employers, independent medical examiners, and entities that derive income from independent medical examinations will be required to file reports of independent medical examinations within ten business days, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding. The new requirement is solely the manner in which the time period to file reports of independent medical examinations is calculated.

3. Professional services:

It is believed that no professional services will be needed to comply with this rule.

4. Compliance costs:

This proposal will not impose any compliance costs on small business or local governments. The rule solely changes the manner in which a time period is calculated and only requires the use of a calendar.

5. Economic and technological feasibility:

No implementation or technology costs are anticipated for small businesses and local governments for compliance with the proposed rule. Therefore, it will be economically and technologically feasible for small businesses and local governments affected by the proposed rule to comply with the rule.

6. Minimizing adverse impact:

This proposed rule is designed to minimize adverse impacts due to the current regulations for small businesses and local governments. This rule provides only a benefit to small businesses and local governments.

7. Small business and local government participation:

The Board received input from a number of small businesses who derive income from independent medical examinations, some providers of independent medical examinations and the Medical Legal Consultants Association, Inc. which is a non-for-profit association of independent medical examination firms and practitioners across the State.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

This rule applies to all claimants, carriers, employers, self-insured employers, independent medical examiners and entities deriving income from independent medical examinations, in all areas of the state.

2. Reporting, recordkeeping and other compliance requirements:

Regulated parties in all areas of the state, including rural areas, will be required to file reports of independent medical examinations within ten business days, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding. The new requirement is solely the manner in which the time period to file reports of independent medical examinations is calculated.

3. Costs:

This proposal will not impose any compliance costs on rural areas. The rule solely changes the manner in which a time period is calculated and only requires the use of a calendar.

4. Minimizing adverse impact:

This proposed rule is designed to minimize adverse impact for small businesses and local government that already exist in the current regulations. This rule provides only a benefit to small businesses and local governments.

5. Rural area participation:

The Board received input from a number of entities who derive income from independent medical examinations, some providers of independent medical examinations and the Medical Legal Consultants Association, Inc. which is a not-for-profit association of independent medical examination firms and practitioners across the State.

Job Impact Statement

The proposed regulation will not have an adverse impact on jobs. The regulation merely modifies the manner in which the time period to file a written report of an independent medical examination is filed and clarifies the meaning of the word "filed". These regulations ultimately benefit the participants to the workers' compensation system by providing a fair time period in which to file a report.