

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.

Office of Children and Family Services

NOTICE OF ADOPTION

Performance and Outcome-Based Provisions for Preventive Services

I.D. No. CFS-43-07-00013-A
Filing No. 35
Filing date: Jan. 17, 2008
Effective date: Feb. 6, 2008

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

Action taken: Amendment of section 423.5 of Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20(3)(d), 153-k and 409-a; L. 2007, ch. 53, 57, part H

Subject: Performance and outcome-based provisions for preventive services.

Purpose: To promote the efficient use of State and local resources.

Text of final rule: Section 423.5 of Title 18 NYCRR is amended to read as follows:

(a) General requirements. A social services district will be reimbursed for [75] 65 percent of the costs of mandated, *non-mandated*, and *community optional* preventive services provided pursuant to section 409-a of the *Social Services Law* [to children and their families] when the following conditions are met:

(1) [such]children and their families *receiving such preventive services* meet the client eligibility criteria as defined in sections 423.3 and 430.9 of this Title *or a community optional preventive services program approved by the Office of Children and Family Services ("OCFS") under subdivision (3) of section 409-a of the Social Services Law;*

(2) the social services district receives approval of its *county's child and family services* [multi-year service] plan pursuant to section 34-a of the Social Services Law;

(3) *the social services district certifies that it will not be using these funds to supplant other state and local funds and that it will not submit claims for reimbursement for the same type and level of services that the district previously provided and claimed under any contract in existence on October 1, 2002 as other than child protective, preventive, independent living, or after care services or adoption administration and services, other than adoption subsidies provided pursuant to title 9 of article 6 of the Social Services Law and implementing regulations;*

(4) *for a district to receive an increase in funding for child protective, preventive, independent living, or after care services, or adoption administration and services over the amount the district received for such services that were reimbursable in state fiscal year 2004-05:*

(i) *the amount of funds that the district expends on such services from its flexible fund for family services allocation and any flexible fund for family services funds transferred at the district's request to the title XX social services block grant must, to the extent that families are eligible therefore, be equal to or greater than the amount the district spent for such services that were reimbursed during state fiscal year 2004-05 with temporary assistance to needy families block grant funds for families eligible for emergency assistance to families and with temporary assistance to needy families block grant funds transferred to the title XX social services block grant; or*

(ii) *the district must increase the gross amount of such funds above the amount claimed for state fiscal year 2004-05, in which case, the increase in funding will only be available for 65 percent of the claims that exceed the gross amount claimed in state fiscal year 2004-05;*

(5) *beginning January 1, 2008, such preventive services, whether purchased or provided directly by the district, include performance or outcome-based provisions.*

(i) *For purposes of complying with this requirement, performance means quantifiable and verifiable interim changes in, or maintenance of, the conditions or behaviors of the target population resulting from the provision of services that indicate progress towards an outcome, and outcome means the anticipated change in, or maintenance of, conditions or behaviors of a targeted population as a result of the provision of services.*

(ii) *In the absence of the required performance or outcome-based provisions, OCFS may limit up to 100% of a district's state reimbursement for preventive services expenditures related to any increases in the amount of the district's gross claims for such expenditures that are otherwise reimbursable during state fiscal year 2007-08 and thereafter that exceed the amount of its gross claims for the period October 1, 2005 through September 30, 2006 that were claimed through March 31, 2007. However, OCFS may determine, in its discretion, not to reduce a district's reimbursement in this manner if the district is able to demonstrate, in a form and manner determined by OCFS, that the absence of the required performance or outcome-based provisions is due to extenuating circumstances beyond the district's control including, but not limited to, the inability to amend a contract for the purchase of preventive services that was in effect on April 9, 2007 that extends past January 1, 2008.*

[(3) the social services district expends an amount on child protective services equal to or greater than its child protective services maintenance of effort amount as published annually by the office based on expenditures and rate of child protective services reporting and indicators. In the event that the social services district does not meet its child protective services maintenance of effort amount, preventive services expenditures up to such an amount will be reimbursed as child protective services expenditures; and

(4) expenditures of the social services district are in excess of its title XX ceiling and total preventive services expenditures of such district exceed the preventive services maintenance of effort amount as specified in section 409-b of the Social Services Law unless otherwise specified in the State's annual aid to localities budget.]

(b) In-kind or indirect services and donated funds.

[(1) Up to one half of the social services district's total annual share of the cost of mandated preventive services may be met by in-kind or indirect services or by nontax levy funds, including, but not limited to, privately donated funds. However, this limitation does not apply to that amount equal to the total reimbursable preventive services expenditures, the local share of which was met by privately donated funds and subject to State reimbursement, during the State fiscal year ending March 31, 1981.

(2) A social services district's share of the costs of nonmandated preventive services provided pursuant to subdivision (2) of section 409-a of the Social Services Law or of the costs of community preventive services provided pursuant to subdivision (3) of section 409-a of the Social Services Law may be met in whole or in part by in-kind or indirect services or by nontax levy funds, including, but not limited to, privately donated funds.]

Claims for preventive services and independent living services submitted by a social services district for reimbursement may be comprised of in-kind, indirect services, and non-tax levy funds, including but not limited to privately donated funds, up to the same amount as the social services district's claims for such services during federal fiscal year 1998-99 were comprised of in-kind, indirect services and non-tax levy funds; provided, however, that up to 17½ percent of a social services district's claims for preventive services and independent living services may be comprised of privately donated funds if the percentage of its claims comprised of privately donated funds was less than 17 1/2 percent during federal fiscal year 1998-99. Federal reimbursement of such claims shall be available only to the extent permitted by federal law or regulations.

[(c) Nonmandated preventive services. Expenditures for non-mandated preventive services shall be subject to 50 percent State reimbursement, provided that the Legislature has appropriated sufficient funds for this purpose and that these expenditures are not reimbursed through title XX of the Social Services Act.

(d) Reimbursement by the department to local social services departments for day care, homemaker, housekeeper/chore, home management, transportation, and family planning as mandated preventive services shall not exceed 30 percent of Group I and II local department's and 15 percent of Group III and IV local department's total expenditures for mandated preventive services unless adjusted by a decline in foster care days as set forth in this paragraph. Groups I, II, III and IV as defined in section 679.2 of this Title and are as follows:

(1) Group I. Social services districts having a caseload of less than 1,000 cases;

(2) Group II. Social services districts having a caseload of 1,000, but less than 5,000 cases;

(3) Group III. Social services districts having a caseload of 5,000, but less than 50,000 cases; and

(4) Group IV. Social services districts having a caseload of 50,000 cases and over. Each local social services department's percentage will be increased by one percent for every three percent decline in foster care days. Such percentage will be computed by the department annually for each Federal fiscal year, using the State fiscal year 1979-80 as a base year. This provision will become effective October 1, 1983.

(e) Reimbursement by the department to local social services departments for emergency cash, goods and shelter as preventive services shall not exceed three percent of such local department's total expenditures for mandated preventive services. Such reimbursement shall only be made for those expenditures not eligible for reimbursement under the Emergency Assistance to Needy Families with Children Program pursuant to Part 372 of this Title.]

(c) [(f)] Reimbursement by *OCFS* [the department] for foster care services, including casework contact requirements pursuant to section

441.21 of this Title and diligence of efforts requirements pursuant to section 430.12 of this Title may not be claimed as preventive services.

(d) [(g)] Reimbursement by *OCFS* [the department] for child protective services, including activities of receiving and investigating reports and monitoring shall not be claimed as preventive services.

(e) [(h)] Reimbursement by *OCFS* [the department] to local social services *districts* [departments] for preventive services expenditures shall be claimed on such forms as designated by *OCFS* [the department].

(f) [(i)] Notwithstanding any provision of this section, reimbursement by *OCFS* [the department] to local social services *districts* [departments] for preventive services expenditures shall not be made unless the local social services *districts* [departments] explore and use other available funding sources including [emergency assistance to needy families with children and] title XIX of the Social Security Act where applicable.

(g) [(j)] Notwithstanding any provision of this section, reimbursement by *OCFS* [the department] to local social services *districts* [departments] for preventive services expenditures shall not be made if *OCFS* [the department] determines that such local *districts* [departments] are over-utilizing particular forms or types of preventive services or are not providing balanced preventive services programs based on the identified needs of children and families residing in such local *districts* [departments].

(h) *Social services districts shall prepare and submit to OCFS information about compliance with this section in a form and manner and at the times specified by OCFS.*

Final rule as compared with last published rule: Nonsubstantive changes were made in section 423.5(a)(3).

Text of 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

Revised Regulatory Impact Statements

Non-substantive changes were made to these proposed regulations pertaining to performance and outcome-based provisions for preventive services to promote the efficient use of State and local resources. The changes do not require changes to the Regulatory Impact Statement as originally published.

Revised Regulatory Flexibility Analysis

Non-substantive changes were made to these proposed regulations pertaining to performance and outcome-based provisions for preventive services to promote the efficient use of State and local resources. The changes do not require changes to the Regulatory Flexibility Analysis as originally published.

Revised Rural Area Flexibility Analysis

Non-substantive changes were made to these proposed regulations pertaining to performance and outcome-based provisions for preventive services to promote the efficient use of State and local resources. The changes do not require changes to the Rural Area Flexibility Analysis as originally published.

Revised Job Impact Statement

Non-substantive changes were made to these proposed regulations pertaining to performance and outcome-based provisions for preventive services to promote the efficient use of State and local resources. The changes do not require changes to the Job Impact Statement as originally published.

Assessment of Public Comment

The agency received no public comment.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Payment of Adoption Subsidies

I.D. No. CFS-06-08-00002-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 421.24 of Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20(3)(d), 34(f) and 450-458; and L. 1997, ch. 436

Subject: Payment of adoption subsidies to approved adoptive parent(s) prior to the finalization of the adoption of a child under certain circumstances and the elimination of the requirement that such approved adoptive parent(s) also be certified or approved as foster parent(s).

Purpose: To authorize the payment of adoption subsidy prior to finalization of the adoption to approved adoptive parent(s) without requiring that the adoptive parent(s) also be certified or approved as foster parent(s).

Text of proposed rule: Paragraph (2) of subdivision (c) of section 421.24, Title 18 NYCRR, is amended to read as follows:

(2) Such payments must be made as follows:

(i) In the case of a child in the guardianship and custody or the care and custody of a social services official who is being adopted by the foster parent(s) with whom the child has been boarded, such payment must continue as a foster care payment until the date of the court order finalizing the adoption and must be made in accordance with Part 427 of this Title. Monthly payments for the care and maintenance of the child as an adopted child under the provisions of this subdivision must begin on the date of the court order finalizing the adoption.

(ii) In the case of a child in the guardianship and custody or the care and custody of a social services official who is placed with and is to be adopted by *foster parent(s)* other than the foster parent(s) with whom the child had been previously boarded and who is otherwise eligible for an adoption subsidy payment, such payment must initially be made as a foster care payment and must be made from the day of placement for adoption to the *foster parent(s)* with whom the child is placed, provided such placement does not result in a violation of section 378.3 or 378.4 of the Social Services Law *and/or section 443.1(j) of this Title*. If the placement would result in a violation of either of such sections, *the person(s) adopting the child must be approved adoptive parent(s) and* payment must be made as an adoption subsidy payment from the date of placement, *in accordance with the provisions of subparagraph (iii) of this paragraph*. [A certificate or approval to board must be issued to the parent(s) receiving the child for adoption. A completed and approved adoptive home study made pursuant to this Part will be deemed to meet the requirements of Part 443 of this Title for the issuance of such certificate or approval to board.] Foster care payments under this provision must be made in accordance with Part 427 of this Title. Except where the provisions of section 378.3 or 378.4 of the Social Services Law *and/or section 443.1(j) of this Title* require that adoption subsidy payments be made to the prospective adoptive parent(s) prior to finalization of the adoption, such payments must begin upon the date of the court order finalizing the adoption and must be made in accordance with the provisions of this section.

(iii) *In the case of a child in the guardianship and custody or the care and custody of a social services official who is freed for and placed for adoption, is otherwise eligible for adoption subsidy payments and is to be adopted by approved adoptive parent(s) who are not also certified or approved foster parent(s), such payment must be made as an adoption subsidy payment from the date of placement with the approved adoptive parent(s).*

(iv) In the case of a child in the guardianship and custody of a voluntary authorized agency who is freed for and placed out for adoption, and who is otherwise eligible for an adoption subsidy, an adoption subsidy payment for the care and maintenance of the child will be made from the date the department approves the subsidy agreement submitted for approval if:

(a) an approved home study has been completed; and

(b) a placement agreement has been signed and the child has been placed in the home.

Text of proposed 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

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:

Section 20(3)(d) of the Social Services Law (SSL) authorizes the Office of Children and Family Services (OCFS) to establish rules and regulations to carry out its duties pursuant to the provisions of the SSL.

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

Sections 450 through 458 of the SSL sets forth the standards for the administration of the adoption subsidy program for handicapped and hard to place foster children who are free for adoption.

Chapter 436 of the Laws of 1997 transferred to OCFS all authority, powers and obligation held by the former New York State Department of Social Services regarding child welfare services, including foster care and adoption subsidy.

2. Legislative objectives:

In enacting the adoption subsidy program, the legislature clearly intended to promote permanency through adoption for foster children and reduce unnecessary and inappropriate long-term foster care, in accordance with OCFS regulations. Payment of maintenance subsidy may be made on behalf of a child placed out for adoption or who has been adopted.

3. Needs and benefits:

Currently, OCFS regulations require that adoption subsidy payments for a child in the guardianship and custody of a social services district begin upon finalization of the adoption. Until finalization, foster board payments are to continue. In one situation, current state regulations authorize the payment of adoption subsidy prior to finalization of the adoption. This exception for adoption subsidy payments is when the placement of the child in the home of the prospective adoptive parent(s) would result in a violation of the foster home capacity limitations set forth in section 378(3) or 378(4) of the SSL. In addition, OCFS policy, as promulgated by 18 NYCRR 421.24 and 86 ADM-36, has been to certify or approve prospective adoptive parents as foster parents using the criteria for approval of prospective adoptive parent(s) set forth in 18 NYCRR Part 421 (adoption), instead of those standards set forth in 18 NYCRR Part 443 for foster homes. Current state regulations do not authorize the payment of adoptions subsidy prior to the finalization of the adoption of a child by prospective adoptive parents who are approved adoptive parents in accordance with 18 NYCRR Part 421 but who are also not certified or approved as foster parents in accordance with 18 NYCRR Part 443.

Title IV-E of the Social Security Act (SSA) sets forth the standards for States to be eligible for federal reimbursement for foster care, adoption assistance and the administration of those programs. The federal definition of a foster family home in 45 CFR 1355.20 provides that foster family homes that are approved must be held to the same standards as foster homes that are licensed (certified). Federal policy is that prior to finalization, Title IV-E eligible children in adoptive homes may receive foster care maintenance payments only if the home is a certified or approved foster home. Federal standards allow claiming and reimbursement under the Title IV-E adoption assistance program for subsidy payments made prior to the finalization of the adoption (section 473(a)(5) of the SSA). The proposed regulation would therefore avoid any conflict between state and federal standards over Title IV-E reimbursement for foster care and would authorize the payment of adoption subsidy for such adoptive placements prior to the finalization of the adoption.

4. Costs:

There is no change in the gross cost for the implementation of this regulatory change; however, there is a slight shift between the state, Federal and local shares as payments that may otherwise be made under the Foster Care Block Grant for a foster care board rate would shift to the Adoption Subsidy Program. The state share is projected to increase by \$280,000 and the local share would decrease by an estimated \$30,000. There is sufficient funding in the Adoption Subsidy Program appropriation to absorb this minimal cost. Since the proposed regulation is necessary to conform with Title IV-E foster care requirements and is consistent with Title IV-E adoption assistance program standards, it will allow for the appropriate claiming of Title IV-E funds and therefore preserves the receipt of Federal revenues.

5. Local government mandates:

The proposed regulation alters the mandate on local government in a manner that replaces one equivalent set of requirements with another.

6. Paperwork:

No additional paperwork requirements are mandated by the proposed regulation.

7. Duplication:

The proposed regulation does not duplicate other state requirements.

8. Alternatives:

One alternative considered was to develop one set of certification/approval standards that would uniformly apply to all foster and adoptive homes. It was determined that expanding regulatory mandates relating to children who will not be adopted by their foster parents, or who do not live in family settings would not be in their best interests. The more stringent requirements may act as a disincentive or an additional barrier to recruitment of adoptive parents.

9. Federal standards:

The Title IV-E adoption assistance program provides that individuals with whom a child with special needs is placed for adoption shall be eligible for adoption assistance payments during the period of the placement, on the same terms and subject to the same conditions as if such individuals had adopted such child. It also provides that prior to the finalization of the adoption Title IV-E eligible children in adoptive homes

may receive foster care maintenance payments only if the home is certified or approved as a foster home. Furthermore, the Title IV-E foster care program provides that states use the same standards to certify or approve all foster homes.

10. Compliance schedule:

Compliance with the proposed regulation will begin upon adoption.

Regulatory Flexibility Analysis

1. Effect of Rule:

Social services districts will be affected by the proposed regulation. There are 58 social services districts. Voluntary foster care agencies also authorized to provide adoption services are also impacted. There are 97 domestic agencies and an additional 17 foreign agencies approved by OCFS who have their corporate authority from states outside of New York State.

2. Compliance Requirements:

Currently, OCFS regulations require that adoption subsidy payments for a child in the guardianship; and custody of a social services district begin upon finalization of the adoption. Until finalization, foster board payments are to continue. In one situation, current state regulations authorize the payment of adoption subsidy prior to finalization of the adoption. The exception for adoption subsidy payments is where the placement of the child in the home of the prospective adoptive parent(s) would result in a violation of the foster home capacity limitations set forth in section 378(3) or 378(4) of the SSL. In addition, OCFS policy, as promulgated in 18 NYCRR 421.24 and 86 ADM-36, has been to certify or approve prospective adoptive parents as foster parents using the criteria for approval of prospective adoptive parents set forth in 18 NYCRR Part 421 (adoption), instead of those standards set forth in 18 NYCRR Part 443 for foster homes. Current state regulations do not authorize the payment of adoption subsidy prior to the finalization of the adoption of a child by prospective adoptive parents who are approved adoptive parents in accordance with 18 NYCRR Part 421 but who are also not certified or approved as foster parents in accordance with 18 NYCRR Part 443.

Title IV-E of the Social Security Act (SSA) sets forth the standards for States to be eligible for federal reimbursement for foster care, adoption assistance and the administration of those programs. The federal definition of a foster family home in 45 CFR 1355.20 provides that foster family homes that are approved must be held to the same standards as foster homes that are licensed (certified). Federal policy is that prior to finalization, Title IV-E eligible children in adoptive homes may receive foster care maintenance payments only if the home is a certified or approved foster home. Federal standards also allow claiming and reimbursement under the Title IV-E adoption assistance program for subsidy payments made prior to the finalization of the adoption (section 473(a)(5) of the SSA). The proposed regulation would therefore avoid any conflict between state and federal standards over Title IV-E reimbursement for foster care and would authorize the payment of adoption subsidy for such adoptive placements prior to the finalization of the adoption.

3. Professional Requirements:

No need for additional staff is anticipated.

4. Compliance Costs:

There is no change in the gross cost for the implementation of this regulatory change; however, there is a slight shift between the state, Federal and local shares as payments that may otherwise be made under the Foster Care Block Grant for a foster care board rate would shift to the Adoption Subsidy Program. The state share is projected to increase by \$280,000 and the local share would decrease by an estimated \$30,000. There is sufficient funding in the Adoption Subsidy Program appropriation to absorb this minimal cost. Since the proposed regulation is necessary to conform with Title IV-E foster care requirements and is consistent with Title IV-E adoption assistance program standards, it will allow for the appropriate claiming of Title IV-E funds and therefore preserves the receipt of Federal revenues.

5. Economic and Technological Feasibility:

The proposed regulation will not impose additional economic or technological burdens on social services districts or child welfare services providers. The proposed regulation may be implemented with or without modifications to CONNECTIONS.

6. Minimizing Adverse Impact:

The proposed regulation is required to conform with Title IV-E foster care requirements and is consistent with Title IV-E adoption assistance program standards. In order to appropriately claim the associated costs correctly the change is necessary.

7. Small Business and Local Government Participation:

The user community, including both local districts and voluntary agencies, participated in CONNECTIONS design meetings. The proposed regulatory policy change is a part of the design.

Rural Area Flexibility Analysis

1. Effect on Rural Areas:

The proposed regulations will affect the 44 social services districts that are in rural areas. Voluntary authorized agencies that provide adoption services will also be impacted. Currently, there are approximately 100 total voluntary authorized agencies in rural areas of New York State.

2. Compliance Requirements:

Currently, OCFS regulations require that adoption subsidy payments or a child in the guardianship and custody of a social services district begin upon finalization of the adoption. Until finalization, foster board payments are to continue. In one situation, current state regulations authorize the payment of adoption subsidy prior to finalization of the adoption. This exception or adoption subsidy payments is when the placement of the child in the home of the prospective adoptive parent(s) would result in a violation of the foster home capacity limitations set forth in section 378(3) or 378(4) of the SSL. In addition, OCFS policy, as promulgated by 18 NYCRR 421.24 and 86 ADM-36, has been to certify or approve prospective adoptive parents as foster parents using the criteria for approval of prospective adoptive parents set forth in 18 NYCRR 421.16 (adoption), instead of those standards set forth in 18 NYCRR Part 443 for foster homes. Current OCFS regulations do not authorize the payment of adoption subsidy prior to the finalization of the adoption of a child by prospective adoptive parents who are approved adoptive parents in accordance with 18 NYCRR Part 421 but who are also not certified or approved as foster parents in accordance with 18 NYCRR Part 443.

Title IV-E of the Social Security Act (SSA) sets forth the standards for States to be eligible for federal reimbursement for foster care, adoption assistance and the administration of those programs. The federal definition of a foster family home in 45 CR 1355.20 provides that foster family homes that are approved must be held to the same standards as foster family homes that are licensed (certified). Federal policy is that prior to finalization, Title IV-E eligible children in adoptive homes may receive foster care maintenance payments only if the home is a certified or approved foster home. Federal standards also allow claiming and reimbursement under the Title IV-E adoption assistance program for subsidy payments made prior to the finalization of the adoption (section 473(a)(5) of the SSA). The proposed regulation would therefore avoid any conflict between state and federal standards over Title IV-E reimbursement for foster care and would authorize the payment of adoption subsidy or such adoptive placements prior to the finalization of the adoption.

3. Professional Services:

No need for additional staff is anticipated.

4. Compliance Costs:

There is no change in the gross cost for the implementation of this regulatory change; however, there is a slight shift between the state, Federal and local shares as payments that may otherwise be made under the Foster Care Block Grant for a foster care board rate would shift to the Adoption Subsidy Program. The state share is projected to increase by \$280,000 and the local share would decrease by an estimated \$30,000. There is sufficient funding in the Adoption Subsidy Program appropriation to absorb this minimal cost. Since the proposed regulation is necessary to conform with Title IV-E foster care requirements and is consistent with Title IV-E adoption assistance program standards, it will allow for the appropriate claiming of Title IV-E funds and therefore preserves the receipt of Federal revenues.

5. Minimizing Adverse Impact:

The proposed regulation is required to conform with Title IV-E foster care requirements and is consistent with Title IV-E adoption assistance program standards. In order to appropriately claim the associated costs correctly the change is necessary.

6. Small Business Participation:

The user community, including both social services districts and voluntary agencies, participated in CONNECTIONS design meetings. The proposed regulatory policy change is a part of the design.

Job Impact Statement

A full job statement has not been prepared for the proposed regulation requiring beginning adoption subsidy payments at adoptive placement for those adoptive parents who are not also foster parents. The proposed regulation would not result in the loss of any jobs.

Department of Civil Service

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Supplemental Military Leave Benefits

I.D. No. CVS-06-08-00001-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 sections 21.15 and 28-1.17 of Title 4 NYCRR.

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

Subject: Supplemental military leave with pay, military leave at reduced pay, and a grant of training leave at reduced pay, through December 31, 2008.

Purpose: To extend the availability of supplemental military leave benefits for certain New York State employees until December 31, 2008.

Substance of proposed rule: The proposed rule amends sections 21.15 and 28-1.17 of the Attendance Rules for Employees in New York State Departments and Institutions to continue the availability of the single grant of supplemental military leave with pay and further leave at reduced pay through December 31, 2008, and to provide for separate grants of the greater of 22 working days or 30 calendar days of training leave at reduced pay during calendar year 2008. Union represented employees already receive these benefits pursuant to memoranda of understanding (MOUs) negotiated with the Governor's Office of Employee Relations (GOER). The proposed rule merely amends section 21.15 of the Attendance Rules consistent with the current MOUs, and amends section 28-1.17 to extend equivalent benefits to employees serving in positions designated managerial or confidential (m/c).

Under current statute, section 242 of the New York State Military Law provides that public officers and employees who are members of the organized militia or any reserve force or reserve component of the armed forces of the United States may receive the greater of 22 working days or 30 calendar days of leave with pay to perform ordered military duty in the service of New York State or the United States during each calendar year or any continuous period of absence.

Following the events of September 11, 2001, certain State employees were ordered to extended active military duty, or frequent periods of intermittent active military duty. These employees faced the loss of State salary, with attendant loss of benefits for their dependents, upon exhaustion of the annual grant of Military Law paid leave. Accordingly, supplemental military leave, leave at reduced pay and training leave at reduced pay were made available to such employees pursuant to MOUs negotiated with the employee unions. Corresponding amendments to the Attendance Rules were adopted extending equivalent military leave benefits to employees in m/c designated positions. While these benefits are intended to expire upon a date certain, the benefits described herein have been repeatedly renewed in the wake of the continuing war on terror, including homeland security activities, and the armed conflicts in Afghanistan and Iraq.

With respect to supplemental military leave, eligible State employees federally ordered, or ordered by the Governor, to active military duty (other than for training) in response to the war on terror receive a single, non-renewable grant of the greater of 22 working days or 30 calendar days of supplemental military leave with full pay.

With respect to military leave at reduced pay, upon exhaustion of the military leave benefit conferred by the Military Law, and the single grant of supplemental military leave with pay, and any available accruals (other than sick leave) which an employee elects to use, employees who continue to perform qualifying military duty are eligible to receive military leave at reduced pay. Compensation for such leave is based upon the employee's regular State salary as of his/her last day in full pay status (defined as base pay, plus location pay, plus geographic differential) reduced by military pay (defined as base pay, plus food and housing allowances) received from the United States or New York State for military service, if the former exceeded the latter. While in leave at reduced pay status, employees are eligible to receive leave days due upon his/her personal leave anniversary if such anniversary date falls during a period of military leave at reduced pay, and can accumulate biweekly vacation and sick leave credits for any

pay period in which they remain in full pay status for at least seven out of ten days (or a proportionate number of days for employees with work weeks of less than 10 days per bi-weekly pay period.) These leave benefits are available even for employees who do not receive supplemental pay because their military salaries (as defined) exceed their regular State pay.

With respect to training leave at reduced pay, many employees ordered to military duty in response to the war on terror also continue to perform other required military service unrelated to the war on terror. To support employees performing other military duty, including mandatory summer and weekend training and other activation, a new category of leave was established, entitled "training leave at reduced pay." Eligible employees receive the greater of 22 work days or 30 calendar days of training leave at reduced pay following qualifying military duty in response to the war on terror, and after depleting the annual Military Law grant of leave with pay and any leave credits (other than sick leave) that they elect to use. Training leave at reduced pay may then be used for any ordered military duty during the calendar year that is not related to the war on terror. Employees who have already utilized leave at reduced pay receive the same compensation for any periods of training leave at reduced pay. Employees who have not used leave at reduced pay prior to their initial use of training leave at reduced pay are paid according to the employee's regular State salary as of his or her last day in full pay status reduced by military pay received from the United States or New York State for military service, if the former exceeds the latter. Employees on training leave at reduced pay retain the same leave accrual benefits as apply to leave at reduced pay.

The proposed rule extends the availability of supplemental military leave with pay, leave at reduced pay and training leave at reduced pay through December 31, 2008. Employees must establish eligibility for supplemental military leave (provided they have not already depleted the single grant of such leave), leave at reduced pay and training leave at reduced pay during 2008 by performing qualifying military service.

Employees on leave at reduced pay or training leave at reduced pay on January 1, 2008, have their rate of pay calculated from their base State pay as of January 1, 2008, reduced by the military pay rate applied to their most recent period in either reduced pay category prior to 2008. For employees who have used leave at reduced pay or training leave at reduced pay prior to year 2008, their pay for either type of reduced pay leave at point between January 1, 2008 and December 31, 2008, will be calculated from their base State pay as of their last day in full pay status after January 1, 2008, prior to their initial use of leave of reduced pay or training leave at reduced pay, offset by the rate of military pay from their most recent period of reduced pay leave, prior to 2008. Employees whose initial use of either reduced pay leave category occurs during 2008 will have their pay rate determined by their base State pay on their last day of full pay status, minus military pay. For all employees receiving leave at reduced pay or training leave at reduced pay in 2008, the initial pay calculation will apply to all subsequent periods of reduced pay leave.

The proposed amendment provides that in no event shall supplemental military leave, leave at reduced pay or training leave at reduced pay be granted for military service performed after December 31, 2008, nor shall such leaves be available to employees who have voluntarily separated from State service or who are terminated for cause.

Text of proposed rule and any required statements and analyses may be obtained from: Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

Data, views or arguments may be submitted to: Judith I. Ratner, Counsel, Department of Civil Service, Albany, NY 12239, (518) 473-2624, e-mail: judith.ratner@cs.state.ny.us

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

Consensus Rule Making Determination

Section 6(1) of the Civil Service Law authorizes the State Civil Service Commission to prescribe and amend suitable rules and regulations concerning leaves of absence for employees in the Classified Service of the State.

Following September 11, 2001, certain State employees were federally ordered, or ordered by the Governor, to active military duty. The New York State Military Law provides for the greater of 22 working days or 30 calendar days of military leave at full (State) pay for ordered service during each calendar year or continuous period of absence. Employees ordered to prolonged active duty, or repeatedly ordered to intermittent periods of active duty, faced exhaustion of the Military Law leave with pay benefit. Further periods of military service would then subject these employees to economic hardship from the loss of their regular State salaries and deprive their dependents of needed benefits derived from State employment.

To support State employees called to military duty after September 11, 2001, the Governor's Office of Employee Relations (GOER) executed memoranda of understanding (MOUs) with the employee unions to provide for a supplemental grant of military leave with pay and leave at reduced pay. Subsequent MOUs established a new benefit entitled training leave at reduced pay. These military leave benefits have been repeatedly renewed in the wake of the ongoing war on terrorism, including homeland security activities and military actions in Afghanistan and Iraq.

Upon depletion of the Military Law paid leave benefit, employees federally ordered, or ordered by the Governor, to active military duty in response to the war on terror receive a single grant of the greater of 22 work days or 30 calendar days of military leave with pay. Employees who continue to perform active duty in response to the war on terror and have exhausted their paid Military Law leave and supplemental military leave with pay, and any available leave credits (other than sick leave), which they elect to use, become eligible for leave at reduced pay. Leave at reduced pay provides eligible employees with the difference between their regular State salaries (defined as base pay, plus location pay, plus geographic differential) and their pay for military service (defined as base pay plus food and housing allowances), if the former exceeds the latter. Individuals in leave at reduced pay status also retain certain other leave benefits, even if they do not receive additional salary.

Members of the Reserves and National Guard may also continue to perform duty unrelated to the war on terror, including mandatory weekend and summer training or other activation. Following any military service related to the war on terror, and exhaustion of the annual Military Law paid leave benefit, plus any available leave credits (other than sick leave) that an employee elects to use, eligible employees can use up to 22 work days or 30 calendar days of training leave at reduced pay for any ordered military service that is not in response to the war on terror. Salary computations for training leave at reduced pay are substantially derived from the calculations for leave at reduced pay.

The Governor's Office of Employee Relations has executed new MOUs with the Classified Service employee unions extending the availability of the single grant of supplemental military leave with pay and leave at reduced pay, and training leave at reduced pay through December 31, 2008. The State Civil Service Commission shall amend the Attendance Rules in accordance with the MOUs and extend equivalent benefits to employees serving in m/c designated positions.

No person or entity is likely to object to the rule as written, because it conforms the Attendance Rules to the current, approved MOUs negotiated with the employee unions and provides equivalent benefits to employees serving in m/c positions. Cost estimates are expected to remain consistent with the \$2-5 million per annum cost estimates prepared before prior adoptions of the military leave benefits described herein. These cost projections include both the anticipated full and partial State salary payments for employees on all categories of additional military leave and the cost of any replacement staffing for mission-critical State positions. Most eligible employees are expected to have already utilized the sole grant of supplemental military leave at full pay, so direct leave costs for calendar year 2008 may be slightly lower than projected. Estimates cannot anticipate sudden changes in global conditions or homeland security needs. No new compliance costs or implementation difficulties are associated with the extension of the subject benefits.

The Civil Service Commission received no public comments after publication of the amendments to the Attendance Rules establishing or re-authorizing the benefits now put forward for renewal. Previous re-adoptions of the proposed amendments have been proposed and adopted as consensus rules. As no person is likely to object to the rule as written, the proposed rule is advanced as a consensus rule pursuant to State Administrative Procedure Act (SAPA) § 202(1)(b)(i).

Job Impact Statement

By modifying Title 4 of the NYCRR to extend the availability of supplemental military leave, leave at reduced pay and training leave at reduced pay for eligible employees subject to the Attendance Rules for Employees in New York State Departments and Institutions, these rules will positively impact jobs or employment opportunities for eligible employees, as set forth in section 201-a(2)(a) of the State Administrative Procedure Act (SAPA). Therefore, a Job Impact Statement (JIS) is not required by section 201-a of such Act.

Department of Economic Development

EMERGENCY RULE MAKING

Empire Zones Reform

I.D. No. EDV-06-08-00005-E

Filing No. 38

Filing date: Jan. 16, 2008

Effective date: Jan. 16, 2008

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

Action taken: Amendment of Parts 10 through 14 of Title 5 NYCRR.

Statutory authority: General Municipal Law, article 18-B, section 959

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

Specific reasons underlying the finding of necessity: The Empire Zones Program reforms as enacted by Chapter 63 of the Laws of 2005 were designed to improve the cost-effectiveness and accountability of the program for all New Yorkers. However despite these reforms, the program continues to grow at a rate that is unsustainable and benefits some companies that do not meet their job commitments. In some cases, the tax benefits a company receives exceed the economic return to the State. Prudent financial management of this and all public programs is an imperative at all times but even more important when the State is experiencing fiscal difficulties. Additional regulatory action is needed immediately to protect the integrity of the program, enhance its strategic focus, improve its cost-effectiveness, increase accountability, and mitigate the impact on the General Fund.

One area of particular concern relates to regionally significant projects. Regionally significant projects should be limited to those businesses that would have the most significant economic impact for local communities and the State by restricting eligibility to projects that export a substantial amount of their goods or services to customers outside of New York State. These "export" type of projects ensure that net new economic activity will be created in the State versus simply redistributing economic activity between different communities of the State, or providing incentives for projects where such incentives are not necessary to create or retain jobs.

To increase accountability, job creation for regionally significant projects would have to occur in a timely manner. The timeframe for achieving job targets would be reduced from five to three years. This change would make firms more accountable for job creation by reducing the incentive for companies to inflate job numbers knowing they have five years of zone benefits in which to achieve their goals.

Participation would also be limited to companies that provide a greater economic return on the State's investment in order to improve the cost-effectiveness of the Program. A statewide standard would be adopted based on the cost-benefit factors defined in law. Specifically, there would need to be twenty dollars of economic development benefits in the form of wages and capital investments for every one dollar of tax credits a business would receive. For projects where the economic development benefits are justified based on non-quantitative factors, there would need to be at least five dollars of such benefits for every one dollar of tax credits. In addition, the non-quantifiable terms identified in the law for strategic industry cluster or its supply chain would be defined to ensure that only businesses that are truly part of a strategic industry cluster or its supply chain can qualify based on the non-quantifiable factors of the cost-benefit analysis.

In order to hold businesses more accountable for their commitments and realize annual savings in program costs, these regulatory changes need to be adopted immediately. With 82 empire zones statewide, 10-20 applications are being submitted to the State weekly. Once businesses are in the Program, the annual costs are borne by the State for a 10 year period. These changes are expected to immediately reduce the number of eligible applicants by about 30% in order to achieve the objectives of strategic focus, improved cost-effectiveness, greater accountability and ultimately help preserve the program during the immediate fiscal crisis and beyond.

Subject: Empire Zones reform.

Purpose: To continue implementing previous reforms and adopt changes that would enhance the strategic focus of the program, make it more cost effective and accountable.

Substance of emergency rule: The emergency rule is the result of changes to Article 18-B of the General Municipal Law pursuant to Chapter 63 of the Laws of 2005, as well as a comprehensive review of administrative procedures and existing regulations for the purpose of making the program more strategic, cost effective and accountable to taxpayers. The amended laws require the existing Empire Zones to identify revised zone boundaries—that is, placement of zone acreage into “distinct and separate contiguous areas”—which has not yet been completed. The existing regulations fail to address this requirement, and at the same time, contain several outdated references. The proposed regulations will correct these two items and improve the program’s administrative procedures. The Empire Zone regulations contained in 5 NYCRR Parts 10 through 14 are hereby amended as follows:

First, pursuant to Chapter 63 of the Laws of 2000 and Chapter 63 of the Laws of 2005, the emergency rule would reflect the name change of the program from Economic Development Zones to the Empire Zones and add reference to three new tax benefits: the Qualified Empire Zone Enterprise (“QEZE”) Real Property Tax Credit, QEZE Tax Reduction Credit, and the QEZE Sales and Use Tax Exemption. The emergency rule also reflects the eligibility of agricultural cooperatives for Empire Zone tax credits and the QEZE Real Property Tax Credit.

Second, the emergency rule would conform the regulations to existing statutory terminology, definitions and practices. For example, an incorrect reference to a local empire zone administrator is being corrected to read local empire zone certification officer or simply, the local empire zone, if applicable. Pursuant to statute, the chief executive officer must ensure that the information on a designation application is accurate and complete, not the local legislative body. The requirements for a shift resolution did not contain all the criteria as set forth in statute. Certain regulatory provisions regarding application for zone designation were not in accord with the statute, such as whether certain information must be contained in local law rather than the application itself. In addition, tracking the statutory changes from Chapter 63 of the Laws of 2005, census tract zones are renamed “investment zones”, county-created zones are renamed “development zones”, and the new term “cost-benefit analysis” is defined. The emergency regulation also tracks the amended statute’s deletion of the category of contributions to a qualified Empire Zone Capital Corporation from those businesses eligible for the Zone Capital Credit.

Third, the emergency rule would amend the Department’s discretionary provision that limits the designation of nearby lands in investment zones to 320 acres. Such regulatory limitations are arbitrary and unnecessarily exceed or are inconsistent with State statute, and at the same time place undue limits on the reconfiguration of zones; municipalities cannot effectively utilize zone acreage to create opportunities for business investment and job growth in economically distressed areas that are not necessarily located in eligible or contiguous census tracts. At the same time, the Department is required to provide guidance in regulation on placement of nearby zone lands, and cannot countenance abuse of the program’s requirements on acreage placement. Thus, placement of nearby lands can exceed 320 acres provided that the municipality demonstrates that (1) there is insufficient existing or planned infrastructure within eligible or contiguous tracts to accommodate business development in a highly distressed area, or to accommodate development of strategic businesses or (2) placing up to 960 acres in eligible or contiguous census tracts would be inconsistent with open space and wetland protection or (3) there are insufficient lands available for further business development within eligible or contiguous census tracts or (4) lands previously designated in the eligible or contiguous census tracts that were otherwise suitable for development and have not had any appreciable commercial activity or capital investment or (5) changes to eligible census tracts as a result of the 2000 Census, combined with the requirement in the amended statute that the distinct and separate contiguous areas accommodate already designated lands, alter the amount of nearby acreage used and available for development.

Fourth, the emergency rule clarifies the statutory requirement from Chapter 63, L. 2005 that development zones (formerly county zones) create up to three areas within their reconfigured zones as investment (formerly census tract) zones. The rule would require that 75% of the acreage used to define these investment zones be included within an eligible or contiguous census tract. Furthermore, the rule would not require a development zone to place investment zone acreage within a municipality in that county if that particular municipality already contained an investment zone, and the only eligible census tracts were contained within

that municipality. The purpose of this is to fulfill the intent of the new statutory amendments that the counties place a substantial portion of the zone acreage within eligible or contiguous census tracts, and this provision follows essentially the same method for concentrating acreage within distressed areas as the General Municipal Law employed for census tract zones.

Fifth, the emergency rule tracks the statutory requirements that zones reconfigure their existing acreage in up to three (for investment zones) or six (for development zones) distinct and separate contiguous areas, and that zones can allocate up to their total allotted acreage at the time of designation. These reconfigured zones must be presented to the Empire Zones Designation Board for unanimous approval. The emergency rule makes clear that zones may not necessarily designate all of their acreage into three or six areas or use all of their allotted acreage, however, any subsequent additions after their official redesignation by the Designation Board will still require unanimous approval by that Board.

Sixth, the emergency rule clarifies the new statutory requirement that certain defined “regionally significant” projects can be located outside of the new distinct and separate contiguous areas. There are four categories of projects identified in Chapter 63; only one category of applications, manufacturers projecting the creation of 50 or more jobs, are allowed to progress before the identification of the distinct and separate contiguous areas and/or the approval of certain regulations by the Empire Zones Designation Board. Such projects must be projects that are exporting a substantial amount of goods or services beyond the State. The emergency rule identifies a timetable for meeting the minimum job creation requirement: 100% of the minimum jobs required to meet the definition of regionally significant project within 3 years of the date of designation of the project as regionally significant. Failure to achieve the minimum job creation requirement would trigger a decertification process.

Seventh, the emergency rule elaborates on the “demonstration of need” requirement mentioned in Chapter 63 of the Laws of 2005 for the addition (for both investment and development zones) of an additional distinct and separate contiguous area. A zone can demonstrate the need for a fourth or, as the case may be, a seventh distinct and separate contiguous area if (1) there is insufficient existing or planned infrastructure within the three (or six) distinct and separate contiguous areas to (a) accommodate business development and there are other areas of the applicant municipality that can be characterized as economically distressed and/or (b) accommodate development of strategic businesses as defined in the local development plan, or (2) placing all acreage in the other three or six distinct and separate contiguous areas would be inconsistent with open space and wetland protection, or (3) there are insufficient lands available for further business development within the other distinct and separate contiguous areas.

Eighth, the emergency rule clarifies Chapter 63’s permission for zone-certified businesses which will be located outside of the distinct and separate contiguous areas to receive zone benefits until decertified. The area which will be “grandfathered” shall be limited to the expansion of the certified business within the parcel or portion thereof that was originally located in the zone before redesignation. Each zone must identify any such business by December 30, 2005.

Ninth, the emergency rule tracks Chapter 63’s requirement that new zone development plans, created in the conjunction with the new distinct and separate contiguous areas to be approved by the Empire Zones Designation Board, are to be approved by the Department within 90 days of submission. The emergency rule defines the date of submission for each zone as the date of approval of the distinct and separate contiguous areas by the Empire Zones Designation Board.

Tenth, the emergency rule fulfills the requirements of Chapter 63 to subject all businesses applying for zone benefits to meet a “cost-benefit analysis”. The cost-benefit analysis is to be included in the zone development plan by the applicant municipality. The definition included in the emergency rule establishes a minimum economic development benefit to cost ratio of 20:1 for a project to be eligible for certification. A project that does not meet the 20:1 ratio but can be justified based on non-quantifiable factors must meet a minimum ratio of 5:1. In addition, definitions for strategic industry cluster and supply chain are included in the rule.

Eleventh, the emergency rule clarifies the status of community development projects as a result of the reconfiguration of the zones pursuant to Chapter 63. The current regulations require the community development projects to be located in an Empire Zone in order for investments in those projects to qualify for tax benefits. Drawing distinct and separate contiguous areas around community development projects would severely limit the ability of Empire Zones to include as many eligible businesses as possible into the new distinct and separate contiguous areas. Community

development projects are not necessarily required to be certified. There is a strong public policy preference for these projects and there is an expectation by their sponsors that they continue to offer tax credits to contributors until fundraising for the projects are completed. To that end, all community development projects approved by the Department before April 1, 2005 would be considered to be located within its respective Empire Zone, and a community development project will be considered to be located in the Empire Zone if it can demonstrate that a zone has been working with the project before April 1, 2005 for the purpose of submitting a boundary revision for inclusion in to the Zone that would include job creation.

Twelfth, the emergency rule would revise the application process in order to ensure timely action and improve efficiency and accountability. For example, the proposed process would no longer require the applicant to submit an application to both the Department and the Department of Labor. In addition, the proposed process allows the applicant to cure incomplete or deficient applications within a set time period.

Lastly, the emergency rule would add certain programmatic information that is helpful to zone administrators, applicants, and practitioners such as the method for determining the effective dates for certifications and boundary revisions.

The full text of the rule is available at www.empire.state.ny.us

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 April 14, 2008.

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

Regulatory Impact Statement

STATUTORY AUTHORITY:

Section 959(a) of the General Municipal Law authorizes the Commissioner of Economic Development to adopt rules and regulations governing the criteria of eligibility for empire zone designation, the application process, and the joint certification of a business enterprise.

LEGISLATIVE OBJECTIVES:

The rulemaking accords with the public policy objectives the Legislature sought to advance because the majority of such revisions are in direct response to recent statutory amendments and the remaining revisions conform the regulations to existing statute or clarify administrative procedures of the program. It is the public policy of the State to offer special incentives and assistance that will promote the development of new businesses, the expansion of existing businesses and the development of human resources within areas designated as Empire Zones. The proposed amendments help to further such objectives by enabling the Department of Economic Development to administer the program in a more efficient manner. In addition, these amendments further the Legislative goals and objectives for the Empire Zones program, particularly as they relate to regionally significant projects and the cost-benefit analysis. With these changes, the Department strives to make the Program more strategic, cost-effective and accountable to the taxpayers of the New York state.

NEEDS AND BENEFITS:

The emergency rule is required in order to bring the regulations into accord with statute and to improve the overall administration and effectiveness of the program. There are several benefits that would be derived from this emergency rulemaking. First, the emergency regulations would conform to statutory provisions and thereby eliminate potential confusion to the practitioner. Second, the emergency rule would clarify the application process to ensure timely action and improve efficiency and accountability. Third, the rule seeks to reform the Empire Zones program to make it more cost-effective and accountable to the State's taxpayers, particularly in light of New York's current fiscal climate.

COSTS:

I. Costs to private regulated parties (the Business applicants): None. The emergency regulation will not impose any additional costs to the business applicants beyond the existing program. In fact, there may be a cost savings due to a clearer application and the ability to cure application deficiencies rather than being immediately denied.

II. Costs to the regulating agency for the implementation and continued administration of the rule: While there will be additional costs to the Department of Economic Development associated with the emergency rule making, this is a result of the statutory changes which the emergency regulation language tracks or interprets. All existing Empire Zones have to revise their boundaries as a result of the statutory changes, with certain exceptions tied to specific types of business or the timing of certain

applications. This has resulted in more paperwork and additional staff time and will continue even more so as regulatory changes add additional scrutiny to the review and evaluation of projects attempting to gain eligibility into the program.

III. Costs to the State government: None. There will be no additional costs to New York State as a result of the emergency rule making.

IV. Costs to local governments (the Local Zone administration): None. The emergency regulation will not impose any additional costs to the local zone administration beyond any additional costs associated with implementing the statutory requirements which reform the program. In the long term, there may be some cost savings in regards to staff time due to a clarification of program requirements.

LOCAL GOVERNMENT MANDATES:

None. Local governments are not mandated to participate in the Empire Zones Program. If a local government chooses to participate, there is a cost associated with local administration. However, this emergency rule does not impose any additional costs to the local governments beyond any additional costs associated with implementing the statutory requirements which reform the program.

PAPERWORK:

The emergency rule does create additional paperwork, insofar as the various Empire Zones have to refile applications to reconfigure their Zone acreage, identify regionally significant projects and "grandfathered" businesses where necessary, and process boundary revisions before deadlines enumerated in statute which are reproduced verbatim from the statute.

DUPLICATION:

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

ALTERNATIVES:

No alternatives were considered with regard to amending the regulations in response to statutory revisions. Certain alternatives to policies seeking to be adopted were considered in certain subject areas where the Legislature provided some room for interpretation; for example, acreage devoted to existing businesses outside of the reconfigured zone areas, creation of investment zones within development zones, the placement of "nearby" acreage, the location of "grandfathered" businesses and the continuation of community development projects. In each case, interpretation was geared to preserving, to the extent possible, the expectation of benefits for existing zone businesses, making zone reconfiguration as clear as possible for existing zones, and enabling zone acreage to be utilized in the most effective manner. Finally, with regard to the application process, an alternative was considered to include more time for review of the application at the State level. This alternative was rejected because it was determined that certification of a business, which has a complete and sufficient application, should not be delayed.

FEDERAL STANDARDS:

There are no federal standards in regard to the Empire Zones program; it is purely a state program that offers, among other things, state and local tax credits. Therefore, the emergency rule does not exceed any Federal standard.

COMPLIANCE SCHEDULE:

The affected State agencies (Economic Development and Labor), local zone administration and the business applicants will be able to achieve compliance with the emergency regulation as soon as it is implemented.

Regulatory Flexibility Analysis

Participation in the Empire Zones Program is entirely at the discretion of each eligible municipality and business enterprise. Neither General Municipal Law Article 18-B nor the emergency regulations impose an obligation on any local government or business entity to participate in the program. The emergency regulation does not impose any adverse economic impact, reporting, recordkeeping, or other compliance requirements on small businesses and/or local governments. In fact, the emergency regulations may have a positive economic impact on the small businesses and local governments that do participate due to clarifying changes, the added flexibility and a new application process. The administrative structure of the program was designed to offer a streamlined application and approval process by extracting only essential information from the applicants. In addition, the changes to the regulations that track changes in statute and result in a reconfiguration of zones will actually enhance the ability of businesses yet to apply which are located in distressed areas to receive program benefits. Local governments will have the additional short-term burden of taking the legal and administrative steps necessary to reconfigure their zones, but this is a statutorily imposed burden, not solely a regulatory one. Because it is evident from the nature of the emergency rule that it will have either no substantive impact, or a positive impact, on small

businesses and local governments, no further affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses and local government is not required and one has not been prepared.

Rural Area Flexibility Analysis

The program is a statewide program. There are eligible municipalities and businesses in rural areas of New York State. However, participation is entirely at the discretion of eligible applicant municipalities and eligible business enterprises. The program does impose some responsibility on those municipalities and businesses which participate in the program such as submitting applications and reports. The emergency rule will not impose any additional reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. Therefore, the emergency regulation will not have a substantial adverse economic impact on rural areas or reporting, record keeping or other compliance requirements on public or private entities in such rural areas. Accordingly, a rural area flexibility analysis is not required and one has not been prepared.

Job Impact Statement

The emergency regulation relates to the Empire Zones Program. The Empire Zones Program itself is a job creation incentive. The emergency regulation will not have a substantial adverse impact on jobs and employment opportunities. In fact, the emergency regulations, which result from statutory-based reforms, will enable the program to better fulfill its mission: job creation and investment for economically distressed areas. At the same time, businesses currently receiving benefits will not have their status jeopardized as a result of the emergency regulations. Because it is evident from the nature of the emergency regulations that it will have either no impact, or a positive impact, on job and employment opportunities, no further affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

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*.

At their September 10, 2007 meeting, and again at their October 23, 2007 meeting, the Board of Regents readopted the July emergency rule to ensure that the emergency rule remains in effect until the effective date of its adoption as a permanent rule. The October emergency rule will expire on January 21, 2008.

Further revisions to the proposed amendment are being considered, based on suggestions from members of the Board of Regents, the Department's experience with the implementation of the Contracts for Excellence and additional comments from school districts and other interested parties, which will require publication of a Notice of Revised Rule Making in the *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, 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 March 17-18, 2008 Regents meeting. However, the October emergency adoption will expire on January 21, 2008, 60 days after its filing with the Department of State on November 25, 2007. A lapse in the rule's effectiveness would disrupt implementation of the contract for excellence program under Education Law section 211-d. A sixth emergency adoption is therefore necessary for the preservation of the general welfare to ensure that the emergency rule that was adopted at the April Regents meeting, revised at the June and July Regents meetings, and readopted at the September and October Regents meetings, remains continuously in effect until the effective date of its adoption as a permanent rule.

Subject: Contracts for excellence.

Purpose: 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.

Substance of emergency rule: The Board of Regents has readopted, by emergency action effective January 22, 2008, the emergency rule adopted at the September 10, 2007 Regents meeting, and readopted at the October 23, 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

Education Department

EMERGENCY RULE MAKING

Contracts for Excellence

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

Filing No. 44

Filing date: Jan. 22, 2008

Effective date: Jan. 22, 2008

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), (2), 211-d(1-9); and L. 2007, ch. 57, part A, sec. 12

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

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 applica-

ble, 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 partner-

ship 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 March 21, 2008.

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-based intervention; and analyzing, gathering and compiling the necessary research to support their proposed Contract for Excellence programs and activities. To estimate the total yearly costs associated with these items, it is estimated that each district (55 plus 34 for NYC (see above) for a total of 89 districts) hires two new, appropriately certified teachers at an annual cost of \$53,000 per teacher (salary plus benefits). This yields a total estimated, annual cost of \$9,435,000.

c. Costs to private, regulated parties:

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

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

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

LOCAL GOVERNMENT MANDATES:

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

PAPERWORK:

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

DUPLICATION:

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

ALTERNATIVES:

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

FEDERAL STANDARDS:

The proposed rule is necessary to implement Chapter 57 of the Laws of 2006, and does not exceed any minimum federal standards. There are no

substantive federal standards that are applicable to this proposal insofar as there is no federal equivalent of the contract for excellence.

COMPLIANCE SCHEDULE:

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

Regulatory Flexibility Analysis

Small Businesses:

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

Local Governments:

EFFECT OF RULE:

The effects of the rule will be borne by local governments, specifically, school districts. The proposed rule applies to those (56) fifty-six school districts in the State that have been determined to meet the statutory requirements in Education Law section 211-d necessitating the submission of a contract for excellence.

COMPLIANCE REQUIREMENTS:

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

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

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

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

PROFESSIONAL SERVICES:

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

COMPLIANCE COSTS:

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

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

(i) Sustained Professional Development

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

(ii) Other Costs

Depending on a district's selection of allowable programs and activities, it is possible that there will be additional costs. Particular activities where the cost imposed could be large include the following: the requirement that additional instruction under any allowable program must be provided by appropriately certified or highly qualified teachers; that allowable programs must be coordinated with school district comprehensive plans; determining if a student responds to scientific, research-based intervention; and analyzing, gathering and compiling the necessary research to

support their proposed contract for excellence programs and activities. To approximate the total yearly costs associated with these items, it is estimated that each district (55 plus 34 for NYC (see above) for a total of 89 districts) hires two new, appropriately certified teachers at an annual cost of \$53,000 per teacher (salary plus benefits). This yields a total estimated, annual cost of \$9,435,000 for all contract districts.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

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

MINIMIZING ADVERSE IMPACT:

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

LOCAL GOVERNMENT PARTICIPATION:

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

Rural Area Flexibility Analysis

TYPES AND ESTIMATED NUMBERS OF RURAL AREAS:

The proposed rule applies to the school districts in the State, so identified pursuant to Education Law section 211-d as having to file a contract for excellence, including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less. Eight (8) of the school districts that will have to file contracts for excellence for the 2007-2008 school year are rural school districts.

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

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

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

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

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

COSTS:

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

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

(i) Sustained Professional Development

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

(ii) Other Costs

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

MINIMIZING ADVERSE IMPACT:

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

RURAL AREA PARTICIPATION:

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

Job Impact Statement

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

Assessment of Public Comment

The agency received no public comment since publication of the last assessment of public comment.

NOTICE OF ADOPTION

Continuing Education Requirements for Dentists Licensed in New York State**I.D. No.** EDU-44-07-00033-A**Filing No.** 41**Filing date:** Jan. 22, 2008**Effective date:** Feb. 6, 2008

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

Action taken: Amendment of section 61.15 and addition of section 61.19 to Title 8 NYCRR.**Statutory authority:** Education Law, sections 207 (not subdivided), 6506(1), 6507(2)(a), 6604-a(2), (6), 6611(10); and L. 2007, ch. 183, sec. 4**Subject:** Continuing education requirements for dentists licensed in New York State.**Purpose:** To increase the amount of continuing education required of licensed dentists during each triennial registration period and requiring certification in cardiopulmonary resuscitation and completion of coursework in New York State jurisprudence and ethics.**Text or summary was published** in the notice of proposed rule making, I.D. No. EDU-44-07-00033-P, Issue of October 31, 2007.**Final rule as compared with last published rule:** No changes.**Text of rule and any required statements and analyses may be obtained from:** Anne Marie Koschnick, Legal Assistant, Office of Counsel, Education Department, State Education Bldg., Rm. 148, Albany, NY 12234, (518) 473-8296, e-mail: legal@mail.nysed.gov**Assessment of Public Comment**

The agency received no public comment.

NOTICE OF ADOPTION

Admission to the Licensing Examination for Veterinary Technicians**I.D. No.** EDU-44-07-00034-A**Filing No.** 42**Filing date:** Jan. 22, 2008**Effective date:** Feb. 7, 2008

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

Action taken: Amendment of section 62.5 of Title 8 NYCRR.**Statutory authority:** Education Law, sections 207 (not subdivided), 6504 (not subdivided), 6506(1), 6507(2)(a), (3)(a) and 6711(5)**Subject:** Admission to the licensing examination for veterinary technicians.**Purpose:** To allow students completing registered or accredited programs of education for veterinary technology admission to the licensing examination for veterinary technicians within the final six months of professional study.**Text or summary was published** in the notice of proposed rule making, I.D. No. EDU-44-07-00034-P, Issue of October 31, 2007.**Final rule as compared with last published rule:** No changes.**Text of rule and any required statements and analyses may be obtained from:** Anne Marie Koschnick, Legal Assistant, Office of Counsel, Education Department, State Education Bldg., Rm. 148, Albany, NY 12234, (518) 473-8296, e-mail: legal@mail.nysed.gov**Assessment of Public Comment**

The agency received no public comment.

Department of Environmental Conservation

NOTICE OF ADOPTION

Water Quality Standards, Standard-Setting Procedures, and Related Regulations**I.D. No.** ENV-50-06-00001-A**Filing No.** 37**Filing date:** Jan. 17, 2008**Effective date:** 30 days after filing

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

Action taken: Amendment of Parts 700-704 of Title 6 NYCRR.**Statutory authority:** Environmental Conservation Law, sections 3-0301(2)(m), 15-0313 and 17-0301**Subject:** Water quality standards, standard-setting procedures, and related regulations.**Purpose:** To add, revise, and delete water quality standards, and add and/or revise standard-setting procedures and related regulations, based upon the most current scientific information.**Substance of final rule:** The Table summarizes the amendments being adopted for specific parameters in Part 703.

Substance or Parameter	Adopted Amendment
Flow	Adopts new narrative ambient standard of "No alteration that will impair the waters for their best usages" for all fresh surface water classes.
Turbidity	Adopts new narrative ambient standard of "No increase that will cause a substantial visible contrast to natural conditions" for Class A-S and AA-S waters.
Dissolved Oxygen (DO)	Revises ambient standard for Class SA, SB, and SC marine waters from never-less-than 5 mg/L to a chronic standard of 4.8 mg/L, with excursions between 4.8 and 3.0 mg/L allowed for a limited period of time. Revised standards also include an acute standard of 3.0 mg/L.
Ammonia	Adopts new aquatic life ambient standards for marine waters of 35 ug/L (chronic) and 230 ug/L (acute).
Acetaldehyde	Adopts new Health (Water Source) ambient standard of 8 ug/L for surface waters and groundwaters; adopts new groundwater effluent limitation of 8 ug/L.
Carbon Disulfide	Adopts new Health (Water Source) ambient standard of 60 ug/L for surface waters and groundwaters; adopts new groundwater effluent limitation of 120 ug/L.
Formaldehyde	Adopts new Health (Water Source) ambient standard of 8 ug/L for surface waters and groundwaters; adopts new groundwater effluent limitation of 8 ug/L.
Iron	Deletes existing ambient chronic and acute Aquatic Life standards.
Metolachlor	Adopts new Health (Water Source) ambient standard of 10 ug/L for surface waters and groundwaters; adopts new groundwater effluent limitation of 10 ug/L.
Copper	Revises groundwater effluent limitation from 1,000 ug/L to 400 ug/L.
Styrene	Revises groundwater effluent limitation from 930 ug/L to 5 ug/L.

The standard-setting procedures for human health are revised for both oncogenic (carcinogenic) effects, and for nononcogenic effects. These revisions update and improve the procedures, provide the Department greater flexibility to use recently developed risk assessment methodology.

gies, and enhance the Department's ability to derive the most accurate standards to protect human health.

Standard-setting procedures for aquatic life are revised to allow use of an alternative procedure if a standard cannot be derived according to the procedures in section 706.1.

A new procedure is adopted to allow the Department to derive a "specific organic mixture guidance value" of 100 ug/L. The wording of the adopted regulations makes clear that this is not a "default" value that applies or will be applied to all organic mixtures.

Language regarding the "general organic guidance value" provision is added to clarify that this is not a true "default" value.

Revisions are adopted regarding the Aesthetic Type standards and guidance values, in effect splitting this into two Types to better differentiate between those derived to protect aesthetic quality of the water for human uses, and those to protect the aesthetic quality of the water for prevention of tainting of aquatic food for human consumption.

A new Type of standard, Recreation (R) is created to facilitate derivation of standards and guidance values to protect the recreational uses of the waters. Procedures for deriving Aesthetic and Recreation Type standards and guidance values are amended.

Part 701 is amended to describe waters classified for trout and trout spawning. The rule also clarifies the applicability of existing standards for dissolved oxygen (DO) (section 703.3) and nitrite (section 703.5), and the thermal criteria (Part 704) to (T) and/or (TS) waters.

Section 702.16 is revised to more clearly indicate that intermittent streamflow and wet weather events are factors the Department considers in the establishment of surface water effluent limitations.

Section 703.4 is amended to clarify the applicability of the existing coliform standards.

Part 701 is amended to indicate that, where waters are to be suitable for the propagation and survival of fish, they must also be suitable for the propagation and survival of shellfish and wildlife.

Part 700 is amended to add and revise definitions commensurate with other changes in the regulations and to provide greater clarity and understanding.

Additional matter required by statute: These amendments were adopted by the Environmental Board pursuant to Articles 3 and 5 of the Environmental Conservation Law.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 702.4, 702.12(a), 703.5(f) Table 1 and 703.6(e) Table 3.

Text of rule and any required statements and analyses may be obtained from: Robert Simson, Department of Environmental Conservation, 625 Broadway, Division of Water, 4th Fl., Albany, NY 12233, (518) 402-8231, e-mail: rjsimson@gw.dec.state.ny.us

Regulatory Impact Statement

The changes to the rule that was proposed on December 13, 2006 are nonsubstantive and do not result in any change in the regulatory impact of the rule. The only provision of the proposed rule that was determined to have a regulatory impact is the new standard for ammonia for marine waters; no changes to that proposed standard were made. The proposed standard for metolachlor of 9 ug/L is revised in the final rule to 10 ug/L, a less stringent value. As there was no identified regulatory impact from the standard at 9 ug/L, the Department concludes that there is no regulatory impact from the less stringent standard of 10 ug/L. Thus, a revised RIS is not required.

Regulatory Flexibility Analysis

The changes to the rule that was proposed on December 13, 2006 are nonsubstantive and do not result in any change in the regulatory impact of the rule, including to small businesses and local governments. The only provision of the proposed rule that was determined to have a regulatory impact is the new standard for ammonia for marine waters; no changes to that proposed standard were made. The proposed standard for metolachlor of 9 ug/L is revised in the final rule to 10 ug/L, a less stringent value. As there was no identified regulatory impact from the standard at 9 ug/L, the Department concludes that there is no regulatory impact from the less stringent standard of 10 ug/L. Thus, a revised RFA is not required.

Rural Area Flexibility Analysis

In its proposal, the Department had determined that a RAFA was not required. The changes to the rule that was proposed on December 13, 2006 are nonsubstantive and do not result in any change in the regulatory impact of the rule. The only provision of the proposed rule that was determined to have a regulatory impact is the new standard for ammonia for marine waters, but none of the impacted facilities are in designated rural areas. Moreover, no changes to that proposed standard were made. The proposed

standard for metolachlor of 9 ug/L is revised in the final rule to 10 ug/L, a less stringent value. As there was no identified regulatory impact from the standard at 9 ug/L, the Department concludes that there is no regulatory impact from the less stringent standard of 10 ug/L. Thus, a revised RAFA is not required.

Job Impact Statement

In its proposal, the Department had determined that a JIS was not required, and that the effect upon jobs in the State was likely to be positive. The changes to the rule that was proposed on December 13, 2006 are nonsubstantive and do not result in any change in the impact of the rule on jobs in the State. Therefore, a revised JIS is not required.

Assessment of Public Comment

The comment period was open from December 13, 2006 until February 14, 2007. One public hearing was held on February 5, 2007 in Albany, NY. Written comments were received from approximately 23 parties, and five people spoke at the public hearing. Major areas of comment included the proposed narrative flow standards for turbidity and flow, the proposed numerical standards for dissolved oxygen, ammonia, and metolachlor, the proposed definitions for cooling water intake structures, and the revised groundwater effluent limitation for copper. A synopsis of these issues and Department's response is provided below.

Turbidity: Proposal to Extend Existing Narrative Standard to Class A-Special and AA-Special Waters

Several commentors objected to the use of the narrative turbidity standard for regulating stormwater. In addition, the proposal was argued as violating equal protection rights of the "regulated public" under the United States Constitution. The Department did not respond to comments regarding this standard that were outside the purview of this rule making (which did not change the standard or its application in any way).

Flow: Proposed New Narrative Standard for Fresh Surface Waters

The proposed narrative standard for flow received a large number of comments, both strongly for and strongly against. Commentors, including The Business Council and the ski industry, asserted that the proposed regulation was illegal under both SEQRA and SAPA and would have a devastating impact on the ski industry in New York. In its response, the Department affirms that the proposed standard is procedurally valid under both the State Administrative Procedure Act (SAPA) and the State Environmental Quality Review Act (SEQRA). DEC properly looked at and made determinations as to the need for a job impact analysis, regulatory impact analysis for small businesses and rural flexibility analysis, and determined that the flow standard would not have an adverse impact on jobs, small businesses or rural areas.

The Department already has the authority to regulate flow through statute. This rulemaking will simply publish such existing authority within the NYCRR. The Department is not proposing to regulate the commercial withdrawal of water via the narrative flow standard. This rulemaking is in no way *ultra vires*, as commentors suggest, but based upon sound statutory authority allowing the department to create water quality standards.

Enforceability was raised by commentors, seeking to clarify how the standard will be applied once in place. The Department has begun to develop Technical and Operational Guidance Series (TOGS) which will help everyone to better understand implementation of this rule. The Department will establish an outside advisory group to assist in the development of this guidance, which will then undergo public review.

Dissolved Oxygen (DO): Revised Standard for Marine Waters

The Interstate Environmental Commission raised several issues regarding this revision. In response, the Department explains that the interpretation of the standard will be addressed via new guidance (TOGS 1.1.6) that the Department is preparing; this draft TOGS will shortly be released for public review.

Ammonia: New Standard for Marine Waters

New York City DEP disagreed with the Department's assessment of the regulatory impact from this standard, and questioned the methods DEC used to develop effluent limits. In response, DEC addresses the concerns and stands by its original regulatory impact assessment.

Metolachlor: New Standard to Protect Human Health and Sources of Drinking Water

Syngenta submitted extensive comments regarding the proposed cancer-based standard for this pesticide, requesting that the standard be recalculated based upon the Department's proposed new standard-setting procedures. Commentor asserted that the additional information they provided on the mode of action and oncogenic potential of metolachlor support the use of a non linear at low doses (threshold) model to derive the standard.

The DEC, with the technical assistance of the NYS Department of Health, has revised the proposed standard using the proposed new proce-

dures; this resulted in a change in the standard from 9 ug/L (in the original proposal) to 10 ug/L. However, the information submitted by the commenter was insufficient to support the use of a non linear approach to deriving the standard.

Definitions Related to Cooling Water Intake Structures

Entergy asserted that the proposed rule clarifies that the water quality standards are intended to protect species or populations (and not individuals) of fish, shellfish and wildlife. The Department rejects this assertion, explaining in response that these definitions support protection of individual fish, shellfish or wildlife organisms. The Department also disagrees with Entergy's further recommendation that the term "adverse environmental impact" be defined, and that the definition be impacts to populations of fish, shellfish, and wildlife, as opposed to individual organisms. Such definition would be overly exclusive and therefore inappropriate as a regulatory matter, and would conflict with previous Department decisions.

Revision to Groundwater Effluent Limitation for Copper [703.6]

Commentors questioned the need for this revision, asserting that it is arbitrary and capricious and will have a burden on dischargers. In response, the Department explains that rather than being arbitrary and capricious, this revision makes copper consistent with other metals, and reiterates its determination of no regulatory impact from this revision.

NOTICE OF ADOPTION

Marine Recreational Fishing Regulations for Summer Flounder

I.D. No. ENV-40-07-00005-A

Filing No. 36

Filing date: Jan. 22, 2008

Effective date: Feb. 6, 2008

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

Action taken: Amendment of Part 40 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 3-0301, 13-0105 and 13-0340-b

Subject: Marine recreational fishing regulations for summer flounder.

Purpose: To control the recreational harvest and possession of summer flounder consistent with fishery management plans.

Text or summary was published in the notice of emergency/proposed rule making, I.D. No. ENV-40-07-00005-EP, Issue of October 3, 2007.

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

Text of rule and any required statements and analyses may be obtained from: Stephen W. Heins, Department of Environmental Conservation, 205 N. Belle Meade Rd., Suite 1, East Setauket, NY 11733-3400, (631) 444-0435, e-mail: swheins@gw.dec.state.ny.us

Additional matter required by statute: Pursuant to the requirements of article 8 of the Environmental Conservation Law, a negative declaration is on file with the department.

Assessment of Public Comment

This proposed rulemaking, which amends New York's regulations for recreational harvest of summer flounder, was published in the *New York State Register* on September 17, 2007.

The Department received thirteen written comments from a total of eleven individuals during the public comment period for this rulemaking. All of the comments expressed opposition to the proposed amendment. Those comments are summarized below, followed by the Department's response:

Comment: The rationale for closing the season early is flawed. The recreational quota for 2008 will not be affected by overages in 2007, nor will the regulations be any more restrictive in 2008 in spite of the overage.

Response: New York's allowable harvest limit of fluke for 2007 was 430,262 fish. The measures in place for 2007 failed to constrain the harvest of fluke to the allowable harvest limit. According to the Marine Recreational Fisheries Statistics Survey (MRFSS) estimate, New York anglers took 666,753 fluke, or 55% more fish than allowed. If the 2008 allowable harvest limit were the same as that in 2007, New York would have to adopt measures in 2008 that are more restrictive than 2007's in order to constrain harvest to the allowable limit. However, the 2008 allowable harvest limit is only 361,000 fish, which is lower than 2007. Therefore, the 2008 management measures will need to be even more restrictive.

Fluke is currently required by federal law to be rebuilt by 2013 and the current estimates show that the population is only slightly over half way to the target. One of the main causes for the lack of progress in the rebuilding is the fact that the fishing mortality rate (F) target has been exceeded each year throughout the rebuilding program. Clearly, a state exceeding its

recreational allocation contributes to a higher fishing mortality rate. Each year the F target is exceeded the biomass does not increase as expected or may even decrease. This lack of growth in the biomass will impact future year's quotas and in turn will negatively impact the future recreational regulations. As the 2013 deadline approaches, if there is not consistent and significant growth in the biomass each year, future quotas will have to be reduced accordingly.

Comment: The data used in the management of the fishery are not credible. It is not possible that nearly 400,000 fluke were taken in the recreational fishery before the 4th of July.

Response: A 2006 review of the Marine Recreational Fisheries Statistics Surveys (MRFSS) by a panel of independent scientists concluded that there are a number of serious flaws requiring immediate attention. This same panel has advised NOAA Fisheries to rethink the way they do recreational fishing surveys to improve their transparency, effectiveness, and applicability to today's fishery management practices, and changes are currently under development. However, despite these concerns, federal law requires the use of the best scientific information available in fishery management. MRFSS is currently the only annual survey of its type available.

In 2006, the MRFSS estimate for the number of anglers fishing saltwater in New York was 874,055. New York's allowable harvest of fluke for 2007 was 430,262 fish. Assuming the 2006 angler data does not change for 2007, this would mean each angler would be allowed no more than one-half of a fluke for the whole season (430,262 fish divided among 874,055 anglers). The MRFSS estimate of fluke taken by New York anglers for the time period from April 24th (when the season opened) to June 30th is 365,759 fish. Given the number of potential fluke anglers in the state, this estimate is plausible.

Comment: Recreational anglers have been limited to fish over 19.5 inches, while commercial fishermen can take 14-inch fish. Why are you closing the recreational fishery when the commercial fishermen are the ones who are over harvesting?

Response: The commercial fluke fishery quota is managed under a limited-entry system using trip limits and net mesh restrictions. There is a cap on the total number of participants in the commercial fishery, and this cap has been lowered each year since 2001. In 2007, there were less than 350 participants. These participants are allowed daily trip limits in pounds of fish. These landings are monitored weekly and the fishery is closed when the quota is reached. New York's commercial quota for 2007 was 619,123 pounds, which was taken by October 20 when the fishery was closed. As of the end of December, 2007, an over-harvest of about 3% had been recorded in the commercial landings.

In the recreational fishery in 2006, the average weight of a harvested fluke was over three pounds. The 2007 recreational fluke allowable harvest limit was 430,262 fish, or 1.29 million pounds using the 3-pound average from 2006. As of the end of October 2007, MRFSS estimated that 666,753 fluke had been harvested by New York anglers. Assuming that three-pound per-fish average weight (an underestimate because of the size-limit increase), the recreational fishery had accounted for well over 2 million pounds of fluke, or over 3 times the commercial catch and a 55% over-harvest.

Comment: The fluke population is higher than at any time in recent memory. The stock is healthy and does not need further rebuilding. Fishing does not pose a threat to this resource.

Response: The recent growth in the fluke stock in spite of the high fishing mortality rates suggests that the current environment can support a large fluke population. The current stock assessment indicates that sustainable catches at the biomass goal would be higher than catches at the current population size - perhaps much higher. It is the objective of the stock rebuilding program to continue to grow the stock until the biomass goal is achieved, with the result that fluke fishing will be even better than it is now. Over-harvest of our yearly allowable harvest limit delays achievement of this goal, and must therefore be controlled.

The Department participates in interstate coastal management of many stocks of fish, including fluke. The Department is obligated by law to participate and is committed to the goals of the management program. The program is only effective to the extent that the states participate and does not work if individual states abandon their responsibilities under the coastwise management process. New York, by closing its fishery, has demonstrated its commitment to the process.

Comment: The closure of the fluke season prematurely will have a devastating impact on the party and charter boat industry and the recreational industry in general.

Response: The Department is very much aware of and concerned about the affects that an early closure has on industry. However, the Department's responsibility to maintain healthy fishery resources often necessitates significant restrictions in order to allow a fishery to recover or rebuild. The Department's experience with rebuilding of coastal striped bass stocks has demonstrated that short-term social and economic losses are offset by long-term socio-economic gains.

Comment: Would the Department consider holding a public hearing on this issue?

Response: Emergency regulations by their nature do not allow sufficient time for public input. Quick action is required, so public consultation is not what it would be under the normal rulemaking process. However, this emergency rule is not permanent. The Department will be proposing a recreational fluke fishing season for 2008. When that proposal is issued, there will be an opportunity for public comment.

Comment: Would the Department consider increasing the size limit and decreasing the catch limit as an alternative to closing the fishery?

Response: No. Once it is discovered that New York's allowable harvest limit has been exceeded, the Department does not support allowing the season to remain open, even with new size and catch limits. Allowing the fishery to remain open would permit harvest and hooking mortality to continue and would therefore be irresponsible and contrary to management objectives.

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

Office of Mental Health

EMERGENCY RULE MAKING

Personalized Recovery-Oriented Services

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

Filing No. 45

Filing date: Jan. 22, 2008

Effective date: Jan. 22, 2008

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 a new Part 512 to Title 14 NYCRR.

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

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

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

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

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

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

OVERVIEW OF CURRENT STANDARDS

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

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

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 the proposed this emergency rule as a permanent rule, having previously published a notice of proposed rule making, I.D. No. OMH-29-07-00014-P, Issue of July 18, 2007. The emergency rule will expire March 21, 2008.

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 (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 clubhouses, intensive psychiatric rehabilitation treatment (IPRT) programs and other rehabilitation program categories, reducing fragmentation and increasing continuity of care and accountability for achieving recovery goals. Also, there is the option to incorporate Continuing Day Treatment (CDT) programs and clinical treatment into a PROS license. These two program categories are currently licensed separately under mental health regulations.

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

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

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

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

The design of PROS addresses many of the care delivery system problems. Access to the range of services needed to facilitate recovery will be increased due to the comprehensive nature of the license. The use of an IRP promotes consumer and provider collaboration toward recovery and fosters integration of rehabilitation, support and treatment, thereby reducing fragmentation. The flexibility of the license stimulates creative development of recovery-oriented services. Consumers are allowed to choose services from more than one PROS provider, so consumer choice is preserved. The design encourages a provider to work with a consumer

throughout the recovery process, enhancing accountability for outcomes. By collecting outcome data and using it to help improve individual outcomes and program effectiveness, a data-based continuous quality improvement process is introduced. The various aspects of the PROS license, when viewed as a whole, support and encourage a recovery-focused culture and service delivery system.

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

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

Under the revised methodology, providers will continue to bill on a monthly case payment basis. To determine the monthly base rate, the daily PROS units accumulated during the calendar month are aggregated and translated into one of the five payment levels. While the current rate codes and billing process will continue to be utilized, new PROS rates are effective for the 2006-07 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 received no public comment since publication of the last assessment of public comment.

NOTICE OF ADOPTION

Personalized Recovery-Oriented Services

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

Filing No. 40

Filing date: Jan. 22, 2008

Effective date: Feb. 6, 2008

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 a new Part 512 to Title 14 NYCRR.

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

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

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

Substance of final 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, assessment, engagement and individual recovery planning;
 - 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 2007-08 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.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 512.5(a), (m), (s), 512.7(b)(9)(v), (e)(5)(i), 512.8(a)(3)(ix), (b)(1)(xii)(d), (4), (c)(3) and (4), 512.9(c)(7)(ix), (d), 512.11(b)(7)(i), (iii), (iv), (c)(3)(ii), (e)(1), 512.12(e)(1)(i), (ii), (2)(i), (ii).
Text of rule and any required statements and analyses may be obtained from: Joyce Donohue, Office of Mental Health, 44 Holland Ave. 7th Fl., Albany, NY 12229, (518) 474-1331, e-mail: cocbjdd@omh.state.ny.us

Revised Regulatory Impact Statement

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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.

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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 clubhouses, 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.

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

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

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

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

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

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

Under the revised methodology, providers will continue to bill on a monthly case payment basis. To determine the monthly base rate, the daily PROS units accumulated during the calendar month are aggregated and translated into one of the five payment levels. While the current rate codes and billing process will continue to be utilized, new PROS rates are effective for the 2006-07 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, startup funding and/or deficit 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, Rural Area Flexibility Analysis and Job Impact Statement

Minor revisions to Part 512 were completed and included in the Notice of Adoption, which was filed 1/22/08. A revised regulatory impact statement was included in the filing, as well as an assessment of public comment. However, no changes were needed to any of the other statements (Job Impact Statement, Regulatory Flexibility Analysis for Small Business and Local Government, Rural Area Flexibility Analysis).

Assessment of Public Comment

1. Issue: The case of an individual who chooses to register in a PROS program for ongoing rehabilitation and support (ORS) services in PROS and is receiving fee-for-service clinic services from the same provider raised an issue. Current regulations would require that the individual also enroll in the clinical component of the PROS program. Therefore a concern was registered that the individual may choose to forego the ORS service in order to maintain a relationship with his/her fee-for-service clinic treatment team.

Response: OMH can accommodate the sharing of staff allocated between an agency's clinic program and PROS program as long as the staff

allocation is regular, substantial, and identifiable per program. The re-allocated staffing plan of both programs would need to be reviewed and approved. Guidance will be provided to assist any PROS program that may have questions regarding this response.

2. Issue: Concern was registered over the requirement of inclusion of collateral support for Intensive Rehabilitation-Family Psychoeducation services. It is understood that assisting a person to prepare for the involvement of his/her family is critical to the success of Family Psychoeducation services as well as to successful engagement of PROS. It was suggested that the regulations allow Family Psychoeducation services be provided without the presence of a collateral.

Response: Engagement services may be provided in the community rehabilitation and support component of PROS until the individual is ready to have family actively participate in his/her recovery. When ready, the individual can choose this intensive rehabilitation service. OMH will offer ongoing technical assistance to providers to increase understanding of how each component of PROS can support the individual and the family in the recovery process.

3. Issue: Concern was expressed that the regulations appear to prohibit VESID-sponsored individuals in supported employment to be co-enrolled in intensive rehabilitation (IR) services and that IR services are unavailable to individuals working more than 15 hours per week.

Response: The regulations refer only to the intensive goal acquisition service within the IR component and only when that IR service is linked to an employment life role goal. All other IR component services remain available to a VESID participant. If an individual is employed more than 15 hours per week, they are eligible for the ongoing rehabilitation and support services component of PROS. OMH will offer ongoing technical assistance to providers to increase the understanding of how each component of PROS can support the individuals and his/her vocational goals.

4. Issue: Concern was expressed that ongoing rehabilitation and support visits are not reimbursable if they occur during an individual's work hours.

Response: OMH regulations do not prohibit ORS services to be provided during an individual's work hours. OMH will adjust its current guidance to clarify the circumstances in which ongoing rehabilitation and support visits can be provided during the individual's work hours.

5. Issue: A comment stated that the current regulations prohibit billing for both ongoing rehabilitation and support (ORS) and intensive rehabilitation (IR) add-ons in a given month. Yet, an individual receiving ORS services can benefit from IR services.

Response: Current regulations do not limit the provision of IR and ORS components of service in a given month. They do prohibit payment by Medicaid for both components in the same month as per the State Plan Amendment.

6. Issue: A request was received to increase the USpra credential from 20 percent of the total number of required professional staff to 50 percent.

Response: USpra credentialed staff have the opportunity to be represented in the PROS program staffing plan, and OMH encourages all staff to pursue the USpra credential.

7. Issue: No Job Impact Statement was included in the PROS emergency regulations yet the program requires 40% professional staff within 18 months of beginning operation. The concern was expressed that many existing clubhouse staff are not professional staff and therefore job tenure could be potentially negatively impacted.

Response: The PROS program is reimbursed by health care insurance programs including Medicaid and Medicare. The program integrates treatment, rehabilitation and support services and, as a result, requires a level of professional staffing for a number of its eligible services. All staff do not need to have a professional status and the 18-month transition period should minimize any impact on job tenure.

8. Issue: A concern was raised concerning the lack of definition for PROS program participation time and the exposure it creates for New York State and providers.

Response: Both onsite and offsite program participation are defined in the PROS regulations 512.4(w) and (x). In addition, OMH will continue to provide guidance regarding program participation time.

9. Issue: Will the lack of opportunity to select from individual service-driven billing codes prohibit the opportunity to be compensated fairly for extensive services?

Response: The State Plan Amendment for PROS stipulates that PROS providers be reimbursed via a monthly case payment. This payment method allows programs to project revenue and, on average, should fairly reimburse them for all services. This approach was developed with input from stakeholders who identified this as the preferred billing method.

10. Issue: Frequently, older participants do not want to achieve vocational and educational goals. Some individuals indicate that they are "retired" but still express a desire for increased socialization. Others may be limited by health problems. A concern was raised that it may be unrealistic to expect that such individuals will demonstrate a "change in status" as required by Medicaid.

Response: Individuals at any age may participate in the PROS program to overcome the barriers due to their mental illness that prevent them from achieving their goals. An individual's goal does not need to be one of employment or education. However, as this program is reimbursement by Medicaid as a healthcare service, the expectation is that PROS participants will benefit from the program as demonstrated by an achievement of goals.

11. Issue: A concern was raised over the lack of clarity regarding health assessment service and emphasized the importance of health assessment within the psychiatric assessment.

Response: Additional written guidance and technical assistance will be provided regarding the health assessment service.

12. Issue: An issue was raised regarding the intensive rehabilitation (IR) add-on, which allows billing once per month. Since PROS participants often engage in multiple IR services in any given month, a question was raised regarding proportionate reimbursement.

Response: The PROS IR add-on rate is designed to reimburse the program for an average number of services rendered per month per individual and is intended to provide sufficient reimbursement for efficiently and economically operated providers.

13. Issue: Concern was raised regarding the documentation requirement of having a staff member sign off on a daily basis for the recorded individual services and program participation.

Response: The PROS regulations specify that services rendered must be documented, with a signature, by the staff person providing those services (e.g., group attendance sheet, individual contact note). However, the monthly summary of services needs only be signed once per month. The regulations have been revised to clarify this.

14. Issue: A question was raised regarding the requirement that the Individualized Recovery Plan (IRP) be revised with each change in an individual's goal or service needs.

Response: The regulations have been revised to incorporate a process for the use of an IRP service addition form to allow PROS-eligible services be counted toward a PROS unit until they can be added to the IRP.

15. Issue: An issue was raised regarding the minimum time frame for Individualized Recovery Plan (IRP) updates, i.e., every three months for intensive rehabilitation (IR) and ongoing rehabilitation and support (ORS); every six months for community rehabilitation and support (CRS) and clinic. Comments were received indicating these time frames are too frequent and will ultimately be burdensome to staff.

Response: As a document that supports the ongoing process of the person-centered service provision, the IRP should be updated according to the established minimum time frames. The continuation of reimbursement for the IR and ORS component services is justified by an assessment of continued need for those services, on a quarterly basis. OMH has revised its regulations to provide additional clarity regarding this policy.

16. Issue: Questions were raised regarding signatures on the Recommendation for Admission form. Specifically, per guidance document, the necessity of the psychiatrist's signature on the form if clinical component services are to be included in the participant's treatment, and the necessity of the PROS participant's signature on the Recommendation for Admission form.

Response: OMH will adjust its guidance to be consistent with the regulatory requirements regarding the licensed practitioner of the health arts (LPHA) in regard to the Recommendation for Admission form. The LPHA and the individual are required to sign this form, regardless of whether clinical component services are included in treatment.

17. Issue: A suggestion was made to have PROS programs create a summary progress of each service – or one comprehensive progress note each calendar month.

Response: OMH will continue to require a minimum of two progress notes per month. In the regulations, OMH will provide clarification as to the content of the progress notes and the circumstances in which more than two progress notes per month would be required.

18. Issue: Concern was raised regarding the PROS registration process that batches registration requests on the 15th of each month.

Response: The batching process eliminates the need for post-payment edits; therefore, no regulation change is necessary.

19. Issue: A suggestion was made that the PROS regulations should only state that a service provider shall not use restraint and/or seclusion.

Response: The PROS regulations have been modified as follows: Restraint and seclusion shall not be utilized in programs governed by this Part. Each PROS program must have ongoing education and training and must demonstrate competence in techniques and alternative methods of safely handling crisis situations. In situations in which alternative procedures and methods not involving the use of physical force cannot reasonably be employed, nothing in this Section shall be construed to prohibit the use of reasonable physical force when necessary to protect the life and limb of any person.

20. Issue: A more extensive definition of "Staff Code of Conduct" was requested.

Response: Guidance will be provided by OMH relating to what may be included in an agency's Staff Code of Conduct.

21. Issue: Concern was raised regarding the fact that the Assessment Service within the community rehabilitation and support component includes a traditionally clinical component service.

Response: The regulations have been amended to include a Psychiatric Assessment service. Assessment of the data shall be done by a psychiatrist or psychiatric nurse practitioner. The psychiatric assessment is a service within the clinical component and is eligible for the clinical component add-on reimbursement fee.

22. Issue: Clarification of the Pre-admission/Pre-registration policies was requested.

Response: The regulations have been amended to include, for the purpose of Medicaid billing, "pre-admission services" as those services which are provided to an individual during the engagement process, regardless of whether or not that individual is ultimately admitted to the program, assuming that the person is Medicaid eligible.

New York State 911 Board

INFORMATION NOTICE NOTICE OF PROPOSED AMENDMENT

The New York State 911 Board, established pursuant to County Law § 326, is charged with assisting local governments, service suppliers, wireless telephone service suppliers and appropriate state agencies by facilitating the most efficient and effective routing of wireless 911 emergency calls; developing minimum standards for public safety answering points; promoting the exchange of information, including emerging technologies; and encouraging the use of best practice standards among the public safety answering point community. The Board is exempt from the requirements of the New York State Administrative Procedure Act, but is required to publish its proposed and final standards pursuant to the provisions of County Law § 327. This Notice is published pursuant to those provisions.

Summary of Proposed Amendments to Minimum Standards Relating to Call-Taker/Dispatcher Training: At its meeting on December 11, 2007, the Board proposed amendments to the minimum standards regarding basic training for call-takers/dispatchers. Currently, the standards restrict call-takers/dispatchers who have failed to satisfy the annual in-service training standards from being assigned to duty in the subsequent calendar year. This amendment will replace that provision with a new requirement that restricts call takers/dispatchers who fail to satisfy the annual in-service training standard from being eligible for or assigned to duty until such training has been successfully completed. A minimum 45-day comment period follows this Notice, during which all interested persons and organizations are invited to comment.

For further information, contact Thomas J. Wutz, Chief, Fire Services Bureau, New York State Department of State, Office of Fire Prevention and Control, 41 State Street, Albany NY 12231, phone: 518-474-6746.

Text of proposed rule: Title 21 of the Official Compilation of Codes, Rules and Regulations of the State of New York, Sections 5201.4(b) is amended to read as follows:

Section § 5201.4(b) Annual In-Service Training Standards.

(b) [No] A call-taker/dispatcher who [shall have] *has* failed to satisfy the annual in-service training standards set forth herein for any calendar year shall *not* be eligible for, or be assigned to, duty [in any subsequent calendar year] *until such time as the training is successfully completed.*

Public Service Commission

NOTICE OF ADOPTION

Filing Requirement Waivers by New York State Electric & Gas Corporation

I.D. No. PSC-46-06-00024-A

Filing date: Jan. 17, 2008

Effective date: Jan. 17, 2008

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

Action taken: The commission, on Jan. 16, 2008, adopted an order approving New York State Electric & Gas Corporation's request for waivers in connection with its application for a certificate of environment compatibility and public need for the Ithaca Transmission Project.

Statutory authority: Public Service Law, sections 4(1) and 122(1)

Subject: Filing requirements in article VII proceeding concerning the submission of maps, drawings and aerial photographs.

Purpose: To approve the appropriate filing requirements without imposing any undue burdens.

Substance of final rule: The Commission adopted an order approving New York State Electric & Gas Corporation's request for waivers in connection with its application for a Certificate of Environmental Compatibility and Public Need for the Ithaca Transmission Project, subject to the terms and conditions set forth in the order.

Final rule compared with proposed rule: No changes.

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

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (06-T-1298SA1)

NOTICE OF ADOPTION

Lightened Regulation by Sheldon Energy, LLC

I.D. No. PSC-13-07-00009-A

Filing date: Jan. 17, 2008

Effective date: Jan. 17, 2008

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

Action taken: The commission, on Jan. 16, 2008, adopted an order approving Sheldon Energy LLC's (Sheldon) request for lightened regulation in connection with the construction and operation of the High Sheldon Wind Farm Project in Wyoming County.

Statutory authority: Public Service Law, sections 4(1), 66(1), 69, 70 and 110

Subject: Sheldon's request for lightened regulation.

Purpose: To approve Sheldon's request for lightened regulation.

Substance of final rule: The Public Service Commission adopted an order approving Sheldon Energy LLC's request for lightened regulation in connection with the construction and operation of the High Sheldon Wind Farm Project in Wyoming County, subject to the terms and conditions set forth in the order.

Final rule compared with proposed rule: No changes.

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

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(07-E-0213SA1)

NOTICE OF ADOPTION

Mini Rate Filing by the Village of Spencerport

I.D. No. PSC-34-07-00022-A
Filing date: Jan. 16, 2008
Effective date: Jan. 16, 2008

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

Action taken: The commission, on Jan. 16, 2008, adopted an order in Case 07-E-0892 approving the Village of Spencerport's request to make various changes in the rates, charges, rules and regulations contained in its schedule for electric service—P.S.C. No. 1.

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

Subject: Mini rate increase.

Purpose: To approve the Village of Spencerport's request to increase annual revenues of \$218,306 or 7.9 percent.

Substance of final rule: The Commission adopted an order approving the request of the Village of Spencerport (Spencerport) to increase annual revenues by \$218,306 or 7.9%, effective February 1, 2008, provided Spencerport files further revisions, subject to the terms and conditions set forth in the order.

Final rule compared with proposed rule: No changes.

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

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(07-E-0892SA1)

NOTICE OF ADOPTION

Dutch Hill Project by Canandaigua Power Partners II, LLC

I.D. No. PSC-37-07-00009-A
Filing date: Jan. 17, 2008
Effective date: Jan. 17, 2008

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

Action taken: The commission, on Jan. 16, 2008, adopted an order approving Canandaigua Power Partners, II, LLC's (CPP II) request for financing and providing for lightened regulation.

Statutory authority: Public Service Law, sections 4(1), 66(1), 69 and 110

Subject: CPP II's request for lightened regulation as an electric corporation and for financing approval of up to \$80 million.

Purpose: To approve CPP II's request for lightened regulation and financing.

Substance of final rule: The Public Service Commission adopted an order approving Canandaigua Power Partners, II, LLC's (CPP II) request for project financing up to \$80 million to construct and operate the Dutch Hill Wind Energy Generation Project in Steuben County, and providing for lightened regulation as an electric corporation, subject to the terms and conditions set forth in the order.

Final rule compared with proposed rule: No changes.

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

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(07-E-1003SA1)

NOTICE OF ADOPTION

Audit Report Concerning Consolidated Edison Company of New York, Inc.

I.D. No. PSC-42-07-00016-A
Filing date: Jan. 17, 2008
Effective date: Jan. 17, 2008

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

Action taken: The commission, on Jan. 16, 2008, adopted an order directing Consolidated Edison Company of New York, Inc. (Con Edison) to submit an implementation plan addressing the audit report of its Electric Emergency Outage Response Program.

Statutory authority: Public Service Law, sections 5, 65(1) and 66(1)

Subject: Audit report and implementation plan of Con Edison.

Purpose: To direct Con Edison to implement the recommendations developed from the audit report.

Substance of final rule: The Commission adopted an order directing Consolidated Edison Company of New York, Inc. to submit an Implementation Plan addressing the audit report of its Electric Emergency Outage Response Program, subject to the terms and conditions set forth in the order.

Final rule compared with proposed rule: No changes.

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

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(06-M-1078SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Petition for the Submetering of Electricity by Herbert E. Hirschfeld, P.E.

I.D. No. PSC-06-08-00007-P

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

Proposed action: The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by Herbert E. Hirschfeld, P.E., on behalf of BLDG Management Company, Inc., to submeter electricity at 210 E. 68th 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 consider the request Herbert E. Hirschfeld, P.E., on behalf of BLDG Management Company, Inc., to submeter electricity at 210 E. 68th St., New York, 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 Herbert E. Hirschfeld, P.E., on behalf of BLDG Management Company, Inc., to submeter electricity at 210 East 68th Street, New York, 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.
(08-E-0026SA1)

Department of State

EMERGENCY RULE MAKING

Continuing Education Requirements for Licensed Home Inspectors

I.D. No. DOS-06-08-00006-E

Filing No. 39

Filing date: Jan. 17, 2008

Effective date: Jan. 17, 2008

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

Action taken: Addition of Subpart 197-3 to Title 19 NYCRR.

Statutory authority: Real Property Law, section 444-f

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

Specific reasons underlying the finding of necessity: This rule was adopted on an emergency basis to preserve and enhance the public welfare. Article 12-B of the Real Property Law (Home Inspection Professional Licensing Act, which became effective December 31, 2005), requires that no person shall conduct a home inspection for compensation unless that person is licensed as a home inspector in accordance with requirements set forth in the statute, including meeting specific standards for education and experience. Further, section 444-f(1) of article 12-B, requires that applicants for renewal of a license as a home inspector must complete a course of continuing education approved by the Secretary of State. Accordingly, to ensure that prospective applicants continue to meet the educational standards required for their profession, this rule has been adopted on an emergency basis. As such, it is similar to those required by other regulatory statutes, and provides a greater measure of assurance to the general public that home inspectors are qualified for licensure. As part of fulfilling its ongoing obligation to provide appropriate guidelines and standards for the profession, the state home inspection council has only recently adopted the number of course hours required for meeting the continuing education requirement, thus necessitating the adoption of this rule on an emergency basis. This rule is being adopted on an emergency basis so that it can remain in effect until it is adopted on a permanent basis.

Subject: Continuing education requirements for licensed home inspectors.

Purpose: To establish standards for continuing education courses for licensed home inspectors.

Text of emergency rule: 19 NYCRR Subpart 197-3 is adopted to read as follows:

SUBPART 197-3. HOME INSPECTION CONTINUING EDUCATION COURSES

Section 197-3.1 General requirements.

(a) *Renewals.* For all home inspection licenses that expire prior to December 31, 2008, no renewal license shall be issued unless said licensee has completed 6 hours of approved continuing education within the two-year period immediately preceding such renewal. For all home inspection licenses that expire on or after December 31, 2008, no renewal license shall be issued unless said licensee has completed 24 hours of approved continuing education within the two-year period immediately preceding such renewal.

(b) *Course approval.* No offering of a course of study in the home inspection field for the purpose of compliance with the continuing education requirements of subdivision (a) of this section shall be acceptable for

credit unless such course of study has been approved by the Department of State under the provisions of this Part.

Section 197-3.2 Approved entities.

Continuing education home inspection courses may be given by any college or university accredited by the Commissioner of Education of the State of New York or by a regional accrediting agency approved by the Commissioner of Education; public or private schools; and home inspection related professional societies and organizations. Types of instruction which shall not be acceptable as meeting continuing education requirements include, but are not limited to:

(a) offerings in basic computer skills training, instructional navigation of the Internet, instructional use of generic computer software or industry specific report writing software, instruction in personal motivation, business marketing, salesmanship, radon and pests.

Section 197-3.3 Request for approval of course of study.

The following applies to courses to be presented in a class-room setting where the instructor is present with the class. Requests for approval of courses of study in the home inspection field to be given to satisfy the requirements for continuing education under the provisions of this Part shall be made 60 days before the proposed course is to be given. The request shall include the following:

(a) name, address and telephone number of the applicant;
(b) if applicant is a partnership, the names of the partners in the entity; if a corporation, the names of any persons who own five percent or more of the stock of the entity;

(c) title of each course to be offered;

(d) location of each course offered;

(e) duration and time of each course offered;

(f) procedure for taking attendance;

(g) a detailed outline of the subject matter of each course or seminar containing at least one hour of instruction up to 24 hours of instruction, together with the time sequence of each segment thereof and teaching techniques used in each segment; and

(h) description of materials to be distributed to the participants.

Section 197-3.4 Program Approval.

Sponsors delivering a course may file an application for approval within 30 days of the completion of that course. The sponsor must advise registrants that approval is not guaranteed.

Section 197-3.5 Successful completion of course.

(a) Any course for continuing education shall be accepted for credit on the basis of attendance only. The course administrator must submit to the Department of State within 15 days of completion of the class, the names of all individuals who successfully complete the approved course together with the unique identification number assigned by the Department of State to all such individuals.

(b) Evidence of successful completion of the course must be furnished to students in certificate form. The certificates must indicate the following: the name of the approved entity, the name of the course, the code number of the course, and that the student who shall be named has satisfactorily completed a continuing education course approved by the Department of State and the number of hours earned. The certificate must be signed and dated by the person authorized to sign certificates.

Section 197-3.6 Equivalency Credit.

(a) A licensee who teaches an approved home inspection course pursuant to Subpart 197-2 of this Part or an approved course offered for continuing education shall be credited with two hours for each hour of actual teaching performed. Records of such teaching shall be maintained by the person or organization presenting the course and certified on forms prescribed by the Department of State. The records of such teaching shall be deemed records of attendance for all purposes of these rules. Credit shall not be awarded for teaching the same course more than once in a license cycle. Instructors must submit evidence of such teaching experience with an equivalency application as prescribed by the Department of State.

(b) Individuals who complete a course of study offered outside of the State of New York, which course has not been approved by the Department of State, may file a request to the Department of State for review and evaluation. All applications for such consideration must be submitted with official documentation of satisfactory completion and the official descriptions of the course of study as prescribed by the Department of State.

(c) All applications for and evidence of equivalency credit must be submitted to the Department of State for consideration at least 30 days prior to the expiration of the license.

Section 197-3.7 Extension of time to complete courses.

The Department of State may grant a waiver to any licensee who evidences bona fide hardship precluding completion of the continuing education requirements prior to the time the renewal application is to be filed. A licensee seeking such a waiver shall submit a written request, together with the evidence demonstrating such hardship. The licensee will be notified if their extension has been granted.

Section 197-3.8 Computation of instruction time.

To meet the minimum statutory requirement, attendance shall be computed on the basis of an hour equaling 60 minutes.

Section 197-3.9 Attendance and Record Retention.

(a) No licensed person shall receive credit for any course presented in a class-room setting if he or she is absent from the class room, during any instructional period, for a period or periods totaling more than 10 percent of the time prescribed for the course pursuant to section 197-3.3(g) of this Part, and no licensed person shall be absent from the class room except for a reasonable and unavoidable cause.

(b) The person or organization conducting the course shall certify to the Department of State the name of each licensed person who successfully completed the course of study and his or her unique identification number as assigned by the Department of State, and shall maintain its attendance records and a copy of such report for three years and, in addition, shall maintain the following records concerning the course:

(1) the approval number issued by the Department of State for the course;

(2) title and description of the course;

(3) the dates and hours the course was given; and

(4) the names and Unique Identification numbers of the persons who took the course and whether they completed it successfully.

Section 197-3.10 Policies concerning course cancellation and tuition refund.

Any educational institution or other organization requesting from the Department of State approval for home inspection courses must have a policy relating to course cancellation and tuition refunds. Such policy must be provided in writing to prospective students prior to the acceptance of any fees.

Section 197-3.11 Auditing.

A duly authorized designee of the Department of State may audit any course offered and may verify attendance and inspect the records of attendance of the course at any time during its presentation or thereafter.

Section 197-3.12 Change in approved course of study.

There shall be no change or alteration in any approved course of study without prior written notice to, and approval by, the Department of State.

Section 197-3.13 Suspensions and denials of school approval.

The Department of State may deny, suspend or revoke the approval of a home inspection school, if it is determined that they are not in compliance with the law and rules. If disciplinary action is taken, a written order of suspension, revocation, or denial of approval will be issued. Anyone who objects to such denial, suspension or revocation shall have the opportunity to be heard by the Secretary of State or his or her designee.

Section 197-3.14 Open to public.

All courses approved pursuant to this Part shall be open to all members of the public regardless of the membership of the prospective student in any home inspection professional society or organization.

Section 197-3.15 Facilities.

Each course shall be presented in such premises and in such facilities as shall be necessary to properly present the course.

Section 197-3.16 Faculty.

(a) Each instructor for an approved home inspection course of study must be approved by the Department of State. To be approved, an instructor must submit an application along with a resume reflecting three years of experience as a home inspector during which time the applicant has completed at least 250 home inspections.

(b) An instructor who does not qualify under subdivision (a) of this section may be approved as a technical expert if the instructor submits an application and resume establishing, to the satisfaction of the Department of State, that the applicant is an expert in and has at least three years' experience in a specific technical subject related to home inspection. Approval by the Department of State shall specify the subject(s) within the home inspection course or course module for which approval is given.

Section 197-3.17 Continuing education credit.

No continuing education course will be considered for continuing education credit more than once within the two year cycle of renewal.

Section 197-3.18 Registration period.

Each registration or renewal period for approved programs or courses shall be for 12 months or a part thereof, said period to commence on January 1 or date thereafter and to continue until December 31.

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 April 15, 2008.

Text of emergency rule and any required statements and analyses may be obtained from: Whitney A. Clark, Department of State, Division of Licensing Services, P.O. Box 22001, Albany, NY 12231-0001, (518) 473-2728, e-mail: whitney.clark@dos.state.ny.us

Regulatory Impact Statement

1. Statutory authority:

Article 12-B (Home Inspection Professional Licensing Act) of the Real Property Law, enacted as Chapter 461 of the Laws of 2004, and amended by the Laws of 2005, ch. 225, provides that no person shall perform a home inspection for compensation unless that person is licensed as a home inspector. The statute sets forth minimum standards of education and experience required to obtain a license as a home inspector. These include the successful completion of an extensive course of study of not less than one hundred forty hours, including at least forty hours of field-based inspections in the presence of a licensed home inspector, professional engineer or architect; performance of not less than one hundred home inspections under the direct supervision of a home inspector, professional engineer or architect; and passing a standardized written examination.

Real Property Law, § 444-f (1) provides that licenses for home inspectors shall be valid for two years, and are subject to renewal only after successful completion of a course of continuing education approved by the Secretary of State in consultation with the home inspection council. This rule fulfills that obligation by outlining the continuing education requirements for home inspectors, and setting appropriate standards for approval of home inspection courses. Accordingly, the Secretary of State has express authority to adopt this rule.

2. Legislative objectives:

In enacting Article 12-B of the Real Property Law, the legislature emphasized the significant role played by home inspectors, and the reliance consumers place upon their reports in purchasing homes, especially when encouraged to do so by mortgage lenders. Recognizing that not all persons providing this service may be reliable, this legislation was enacted to provide additional assurance to consumers that those individuals performing such inspections are qualified to do so. The statute sets minimum standards for the home inspection profession, which include an extensive course of study of not less than one hundred forty hours, including at least forty hours of field based inspections in the presence of a licensed home inspector, professional engineer or architect; the performance of not less than one hundred home inspections under the direct supervision of a home inspector, professional engineer or architect; and passing a standardized written examination. In addition, all applicants for renewal of a license must have successfully completed a course of continuing education approved by the Secretary of State.

Thus, Article 12-B was designed to "protect the public," especially from those who present themselves as qualified professionals, but without the necessary education and experience.¹ This rule re-enforces the stated objectives of the Legislature when it enacted Article 12-B, by providing appropriate standards for maintaining the skills required by professional home inspectors.

3. Needs and benefits:

Real Property Law § 444-f(1) requires all home inspectors seeking renewal of their licenses to have successfully completed a course of continuing education approved by the Secretary of State, in consultation with the home inspection council. Created by statute, the home inspection council is an advisory board that advises the Secretary of State on the need for certain regulatory action, including continuing education. The home inspection council has advised the Secretary of State that this rule making is necessary to ensure that all home inspectors who apply for renewal of their licenses will have had the opportunity to meet the statutory continuing education requirement.

The rule making will pro rate the continuing education requirement for certain licensees. Licensees whose licenses expire prior to December 31, 2008 will have to complete six hours of approved continuing education. Those whose licenses expire on or after December 31, 2008 will be required to complete the full 24 hours of continuing education.

In addition, consumers benefit from the assurance that persons hired to inspect the homes they purchase continue to meet the qualifications and experience needed to render professional service.

4. Costs:

a. Costs to regulated parties:

Licensees seeking renewal will be required to pay the cost of attending and completing an approved course of study for the required number of hours. The Department has conferred with several education providers throughout the State and estimates that course providers will charge an average of \$480 for 24 hours of continuing education courses. Based on a review of continuing education fees currently being charged by course providers, the Department of State determined that each continuing education unit costs a student approximately \$20.00 per credit; or \$480 for 24 hours of continuing education.

b. Costs to the Department of State:

The Department of State anticipates that the cost and implementation will be minimal, and administration of this rule will be accomplished using existing resources.

c. Costs to State and local governments:

The rule does not otherwise impose any implementation or compliance costs on State or local governments.

5. Local government mandates:

The rule does not impose any program, service, duty or other responsibility on local governments.

6. Paperwork:

The rule requires that each applicant seeking renewal of a home inspector's license obtain and retain certificates as evidence of the successful completion of the required number of hours of continuing education.

7. Duplication:

This rule does not duplicate, overlap or conflict with any other state or federal requirement.

8. Alternatives:

During regular meetings, the state home inspection council reviewed and considered various proposals for compliance with the statutory mandate for continuing education standards, ultimately recommending approval of the number of hours, courses of study, and methods of ensuring compliance adopted by this rule. The home inspection council considered waiving the continuing education requirement completely, or reducing the requirement to a de minimus amount. The Department, in consultation with the council determined that six hours of continuing education was appropriate insofar as it provides an accommodation to licensees whose licenses expire prior to December 31, 2008, while providing protections to consumers by guaranteeing that all licensed home inspectors complete an appropriate amount of continuing education.

9. Federal standards:

There are currently no federal standards requiring continuing education courses for licensed home inspectors.

10. Compliance schedule:

Applicants for renewal of a home inspector's license have two years in which to comply with the continuing education requirement, with a pro-rated reduction for renewal of licenses expiring less than two years from the effective date of this rule. The Department of State maintains a list on its website of approved continuing education providers, with their relevant contact information to assist licensees to locate approved continuing education courses. Therefore, regulated parties will be on notice of, and have adequate time to comply with the requirements imposed by the proposed rule making.

¹ McKinney's Session Laws of New York, 2005, p. 1951

Regulatory Flexibility Analysis

1. Effect of rule:

The rule affects all licensed home inspectors (individuals, firms, companies, partnerships, limited liability companies, or corporations) who seek renewal of a home inspector's license. Each such applicant will be required to expend the time and incur the costs of attending the required number of hours needed for successful completion of an approved course of continuing education, and obtain a certificate as evidence of successful completion of that requirement. However, it is not anticipated that this requirement will place an undue financial burden, or impose a hardship for those applicants seeking to maintain their qualifications for providing professional services to consumers.

The rule does not apply to local governments.

2. Compliance requirements:

Applicants seeking renewal of their licenses will be required to attend and complete an approved course of study of continuing education, and obtain certificates as proof of the successful completion of these courses.

3. Professional services:

Small businesses will not need professional services in order to comply with this rule.

4. Compliance costs:

It is anticipated that small businesses will incur only the costs of any fees required for attending and completing an approved course of continuing education. It is estimated that the cost of completing 24 hours of continuing education will be \$500 per licensee.

5. Economic and technical feasibility:

With the exception of the cost associated with taking the required continuing education courses as set forth under the compliance costs section of this statement, it is not anticipated that small businesses will incur any additional costs or require technical expertise as a result of implementation of this rule.

6. Minimizing adverse economic impact:

With the exception of the cost associated with taking the required continuing education courses as set forth under the compliance costs section of this statement, it is not anticipated that small businesses will incur any additional costs as a result of implementation of this rule.

7. Small business and local government participation:

The home inspection council, in consultation with the Secretary of State, recommended approval of the minimum requirements for continuing education adopted by this rule. Members of the home inspection council are diverse and include owners of small businesses. The subject matter of the proposed rule was further discussed at meetings of the home inspection council which were open to public comment.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

This rule applies equally to all licensed home inspectors in all areas of the state—urban, suburban and rural. The rule does not apply to public entities located in rural areas.

2. Reporting, recordkeeping and other compliance requirements:

Reporting and recordkeeping requirements include the obligation of all applicants seeking renewal of their licenses to maintain course completion certificates as proof of completing the required continuing education. Applicants for renewal of a home inspector's license in rural areas will not need to employ any additional professional services in order to comply with this rule.

3. Costs:

Other than the estimated cost of \$500 per licensee to complete 24 hours of continuing education, it is not anticipated that small businesses, whether located in urban, suburban or rural areas, will incur any costs of compliance as a result of this rule.

4. Minimizing adverse impact:

Other than the estimated cost of \$500 per licensee to complete 24 hours of continuing education, it is not anticipated that small businesses, whether located in urban, suburban or rural areas, will incur any additional costs of compliance.

5. Rural area participation:

The home inspection council, in consultation with the Secretary of State, recommended approval of the minimum requirements for continuing education adopted by this rule. Members of the home inspection council represent geographically diverse areas including rural areas of New York State. In addition, the subject matter of the proposed rule was discussed during open meetings of the home inspection council and which were open to public comment.

Job Impact Statement

This rule will not have any substantial adverse impact on jobs and employment opportunities. As a result of enactment of Article 12-B of the Real Property Law, which became effective December 31, 2005, any person performing a home inspection for compensation in this state must obtain a license. Licenses are valid for two years, and may be renewed only upon successful completion of an approved course of continuing education. Inasmuch as this rule affects only those licensed home inspectors who seek renewal of license, it promotes employment opportunities by ensuring that only those qualified to provide this service, will be licensed.

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

Technical Corrections to Coastal Regulations

I.D. No. DOS-06-08-00003-P

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

Proposed action: This is a consensus rule making to amend sections 600.1, 600.2 and Parts 601, 602 and 603 of Title 19 NYCRR.

Statutory authority: Executive Law, art. 42

Subject: Technical corrections to coastal regulations.

Purpose: To make technical corrections to existing regulations.

Substance of proposed rule (Full text is posted at the following State website: <http://www.dos.state.ny.us>): The proposed changes and additions to the regulations correct technical errors and outdated text as follows:

Section 600.1, Authority, Intent, and Purpose:

Minor changes to this section include the addition of the term "inland waterways" to the text to reflect statutory changes.

Section 600.2, Definitions:

The amendments add a regulatory definition of Local Waterfront Revitalization Program (LWRP) that reflects statutory changes to Executive Law Section 915. Coastal and inland waterway municipalities are encouraged to beneficially use, revitalize and protect their waterfronts by preparing LWRPs for the Secretary of State's approval after extensive public input. In addition, coastal LWRPs must be approved by the Office of Ocean and Coastal Resource Management within the National Ocean and Atmospheric Administration of the U.S. Commerce Department as routine program changes to New York's Coastal Management Program (NYCMP).

Through the LWRP a municipality refines the State's coastal policies to reflect local conditions and circumstances. Local, State and federal agencies and applicants for federal permits use the coastal LWRP to determine whether or not a proposed action or project is consistent with the local coastal policies. Local and State agencies use the inland waterway LWRP to determine whether or not their actions are consistent with the municipality's inland waterway policies.

The definition clarifies that two or more municipalities may act jointly or a municipality may adopt a partial LWRP to address a discrete portion of its waterfront or address one or more coastal or inland waterway policies. The definition provides maximum flexibility to municipalities to manage coastal and inland waterway resources.

Parts 601-603

Technical amendments with no change in meaning are made to these parts. Extraneous text is deleted. The Department's guidance documents and the New York CMP refer to Local Waterfront Revitalization Programs as LWRPs. The public is familiar with this term. Existing regulations, however, refer to the LWRP as a Local Government Waterfront Revitalization Program. Similarly a Harbor Management Plan has been commonly referred to as an HMP. The regulations, however, refer to a Local Government Harbor Management Plan. The terms "local" and "government" are deleted from the existing regulatory provisions to reflect use of the simpler acronyms. Other statutory references are corrected and text is deleted if a controlling statute has been repealed or amended and grammar is corrected.

Text of proposed rule and any required statements and analyses may be obtained from: Kathleen Martens, Department of State, 41 State St., Albany, NY 12231, (518) 408-3746, e-mail: Kathleen.Martens@dos.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 proposed rule making includes clarifications, technical amendments to delete extraneous text with no change in meaning, and adding or amending text to reflect statutory changes. The proposed rule will have no impact on the public and, therefore, no person is likely to object to the rule as written.

Job Impact Statement

The proposed regulation will not have an adverse impact on jobs and employment opportunities because it clarifies the definition of Local Waterfront Revitalization Program, updates statutory references and makes technical corrections to existing regulations.

Thruway Authority

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Toll Rate Adjustments

I.D. No. THR-06-08-00004-P

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

Proposed action: Repeal of sections 101.2 and 101.4 and addition of new sections 101.2 and 101.4 to Title 21 NYCRR.

Statutory authority: Public Authorities Law, sections 354(5), (8) and (15) and 361(1); and Vehicle and Traffic Law, section 1630

Subject: Toll rate adjustments on the New York State Thruway system.

Purpose: To finance the authority's capital plan and comply with the relevant requirements of the general revenue bond resolution and the authority's fiscal management guidelines.

Public hearing(s) will be held at: 6 - 8 p.m., March 24, 2008 at Colonie Town Library (Stedman Room), 629 Albany-Shaker Rd., Loudonville, NY; 6 - 8 p.m., March 25, 2008 at Buffalo & Erie County Public Library, Auditorium (Main Level), One Lafayette Square, Buffalo, NY; 6 - 8 p.m., March 27, 2008 at State Fair Grounds, Martha Eddy Rm. in the McNeil Art & Home Center, 581 State Fair Blvd., Syracuse, NY; 6 - 8 p.m., April 1, 2008 at Monroe County Community College, Monroe A Meeting Rm., Brighton Campus, 1000 E. Henrietta Rd., Rochester, NY; and 6 - 8 p.m., April 3, 2008 at Palisades Center, 1000 Palisades Center Dr., West Nyack, NY.

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

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

Substance of proposed rule (Full text is posted at the following State website: <http://www.nysthruway.gov>): The Proposed Rule provides for toll rate adjustments on the controlled system and at fixed barriers along the New York State Thruway to provide the funds necessary to finance the New York State Thruway Authority's (Authority) multi-year capital plan, to perform necessary maintenance and operation and to comply with the relevant portions of the Authority's General Revenue Bond Resolution and Fiscal Management Guidelines. These toll rate adjustments will be phased in beginning in the summer of 2008 and will be fully implemented in early January, 2010.

Text of proposed rule and any required statements and analyses may be obtained from: Sharon P. O'Connor, General Counsel, Thruway Authority, 200 Southern Blvd., Albany, NY 12209, (518) 436-2840, e-mail: sharon_oconor@thruway.state.ny.us

Data, views or arguments may be submitted to: Tracie M. Sandell, Assistant Counsel, Thruway Authority, 200 Southern Blvd., Albany, NY 12209, (518) 436-3188, e-mail: tracia_sandell@thruway.state.ny.us

Public comment will be received until: Five days after the last scheduled public hearing required by statute.

Additional matter required by statute: Public Authorities Law section 2804 requires that a detailed financial report be submitted to the Governor, Comptroller and the Chairs and Ranking Members of the Legislative Fiscal Committees.

Regulatory Impact Statement

1. Statutory authority:

Public Authorities Law (PAL) section 354 subdivision 5 authorizes the New York State Thruway Authority (Authority) to make rules and regulations for the use of the Thruway and any other facilities under the jurisdiction of the Authority. PAL section 354 subdivision 8, in pertinent part, authorizes the Authority "to fix fees for the use of the Thruway System or any part thereof necessary . . . to produce sufficient revenue to meet the expense of maintenance and operation and to fulfill the terms of any agreements made with the holders of its notes or bonds . . ." PAL section 354 subdivision 15 authorizes the Authority to do all things necessary or convenient to carry out its purposes or exercise the powers given in Title 9. Section 1630 of the Vehicle and Traffic Law authorizes the Authority to

make rules and regulations to regulate traffic on any highway under its jurisdiction with respect to charging tolls, taxes, fees, licenses or permits for the use of the highway or any property under the Authority's jurisdiction. In addition to the Vehicle and Traffic Law authorization, the Authority is authorized pursuant to section 361 of the PAL to "promulgate such rules and regulations . . . for the collection of tolls . . .".

2. Legislative objectives:

In enacting PAL section 353 the legislature found that certain public benefits would accrue from the creation of the Thruway Authority. The Legislature found and declared that the development, operation and maintenance of the Thruway System was a benefit to the people of the State of New York with respect to their health, welfare, safety, recreation, commerce and common defense. That statutory provision declared that the Authority was created for the purpose of and given the power to finance, develop, construct, reconstruct, improve, maintain and operate the Thruway System. As a self sustaining entity, the proposed toll adjustment will enable the Authority to continue to maintain and operate the Thruway System in furtherance of the health, safety and welfare of the people of the State of New York. The proposed toll adjustment will produce revenues that meet the needs of the multi-year capital program and will allow the Authority to perform necessary operation and maintenance and comply with the relevant portions of the Authority's General Revenue Bond Resolution and Fiscal Management Guidelines.

3. Needs and benefits:

The Authority last adjusted tolls in 2005. Section 365 of the PAL authorizes the Authority to issue negotiable notes and bonds necessary to provide sufficient moneys for achieving the corporate purposes of the Authority. The Authority has and will continue to issue negotiable notes and bonds pursuant to its General Revenue Bond Resolution, adopted August 3, 1992 (the, Bond Resolution), as amended, which is the contract between the Authority and its bondholders. Pursuant to Section 608 of the Bond Resolution (the Maintenance covenant) the Authority has covenanted to operate and maintain its Facilities (as defined in the Bond Resolution) "in a sound and economical manner and shall maintain, reconstruct and keep the same . . . and every part and parcel thereof, in good repair, working order and condition, and shall from time to time, make or cause to be made, all necessary and proper repairs, replacements and renewals so that at all times the operation of the Facilities may be properly and advantageously conducted . . .". The continuation of the present toll schedule would result in revenues insufficient to allow the Authority to meet its needs for the required Maintenance covenant under the Bond Resolution.

Section 609 (the Rate covenant) of the Bond Resolution requires that that Authority fix, charge and collect tolls sufficient to equal the Authority's Net Revenue Requirement, as that term is defined in the Bond Resolution. In accordance with the Bond Resolution, the Authority requested a study by an independent consultant to recommend a schedule of tolls, fees and charges to provide sufficient net revenues to comply with the Rate covenant and the Maintenance covenant. The report developed by Stantec Consulting Services Inc. examined the financial requirements of the Authority to meet the future maintenance, reconstruction and operational needs of the system over the next several years. That report, "New York State Thruway Financial Requirements and Proposed Toll Adjustments", (Stantec Report), found that current toll levels on the Thruway were insufficient to meet the Thruway's future needs. In order to maintain a serviceable system and a safe facility the Stantec Report found that a toll adjustment is required to fully implement the Authority's multi-year capital program providing for the needed reconstruction, maintenance and congestion relief improvements. The Stantec Report concluded that continuation of the present toll schedule will result in operational deficits and very low pay-as-you-go financing. The Stantec Report further concluded that the continuation of the present toll schedule would result in debt service coverage ratios in the later years of the forecast period declining below the limits established in the Authority's Bond Resolution and Fiscal Management Guidelines. Please see table V-6 "Baseline Revenues and Operating Expenses", contained in the Stantec Report, indicating that the Net Balance Available for Working Capital for the period 2009-2012 is projected to be -\$212,800,000 without the proposed toll adjustment. Table VII-6 "Revenue and Operating Expenses", contained in the Stantec Report, indicates that the Net Balance Available for Working Capital for the period 2009-2012 is projected to be \$0.0 with the proposed toll adjustment.

The Authority's Audit and Finance Committee established several goals for the Authority to follow in developing a proposed toll adjustment, including, preserving the Authority's \$2.7 billion multi-year capital program; preserving a commuter discount program and the commercial vol-

ume discount program; eliminate any anticipated operational gaps; maintain debt service coverage ratios of at least 1.7x in 2011; and increase the pay-as-you-go financing ratio to at least 30 percent by 2011. The proposed toll adjustments achieve the goals of the Authority's Audit and Finance Committee.

4. Costs:

Costs to regulated parties will vary as the Authority employs a multi-classification system for tolls that takes into consideration vehicle class, based upon axles and height, and distance traveled on the Thruway System. In general, the cash toll for a passenger vehicle (class 2L), under the proposed plan will increase by 0.43 cents per mile and the E-ZPass rate will increase less than 1 cent per mile. In general, the cash toll for a tractor trailer (class 5H), the most common commercial vehicle, under the proposed plan will increase by 2.2 cents per mile and the E-ZPass rate will increase by 3.99 cents per mile.

The Authority is mindful of all people who use the Thruway, including those who use the Thruway to commute to work in rural areas and for small businesses and local governments. However, all customers who participate in E-ZPass and in the Annual Permit Plan, and businesses who take advantage of the commercial E-ZPass and volume discounts, have reduced impacts by this toll adjustment. The Authority encourages all customers to sign up for E-ZPass to receive a discount. Currently, E-ZPass discounts are based on the 2007 cash rates and are 10 percent off the 2007 rates for passenger vehicles and 5 percent off the 2007 rates for commercial vehicles. Under the proposed toll adjustment, E-ZPass discounts will be 5 percent off the cash rates for all vehicles effective June 29, 2008. Customers who operate passenger vehicles may also enroll in the Annual Permit Plan, whereupon payment of the Annual Permit Plan fee allows free travel on the controlled portion of the Thruway System for the first 30 miles of every trip. The Annual Permit fee is only increasing \$4 per year in 2009 and 2010. The 2009 increase will be the first increase to the Annual Permit Plan since 1988. This toll adjustment further maintains the commercial E-ZPass and volume discounts, which are available to all Authority commercial customers, including small businesses, that enroll and qualify. Further, the Thruway is a vital transportation corridor for both intrastate and interstate commerce. Failure to properly maintain the highway could negatively impact all of New York State including rural areas.

5. Local government mandates:

Not applicable.

6. Paperwork:

Not applicable.

7. Duplication:

Not applicable.

8. Alternatives:

The Authority review and the Stantec Report both looked at the alternative of not implementing toll adjustments. The Stantec Report indicated that a toll adjustment was required. The Authority is statutorily required to finance, construct, reconstruct, improve, develop, maintain and operate the Thruway System pursuant to PAL section 353. Leaving the current toll structure in place would result in:

- Revenues insufficient to fund the multi-year capital program;
- Insufficient funds for capital improvements to the infrastructure and routine operations and maintenance, resulting in deterioration of pavement and bridge conditions that would impact safety and service to Thruway customers;
- Insufficient funds for the operation and maintenance of Other Authority Projects (as defined in the Bond Resolution), such as the Canal, resulting in deterioration of canal infrastructure;
- Operational deficits;
- Very low pay-as-you-go financing;
- Debt service coverage ratios in the later years of the forecast period declining below the limits established in the Authority's Bond Resolution and Fiscal Management Guidelines;
- Revenues insufficient to allow the Authority to comply with the relevant portions of the Bond Resolution;
- The Authority's financial condition deteriorating to the extent that the bond rating would probably be negatively effected leading to greater costs of future debt issuances.

The Authority intends to conduct an extensive public outreach during the public comment period, including holding three statewide public hearings. To date, Authority staff have reached out to several interested parties including, AAA, the Motor Truck Association, Associated General Contractors of America, the Business Council and many elected officials. The Authority expects additional dialogue with the above referenced parties, as

well as other interested parties and will consider all comments during the public comment period.

9. Federal standards:

Not applicable.

10. Compliance schedule:

It is anticipated that all regulatory requirements will be scheduled and completed by June 29, 2008 and that such schedule will comply with all of the state statutory and regulatory requirements. Following implementation of the rule, there will be no additional time required for regulated persons to achieve compliance with the rule.

Regulatory Flexibility Analysis

1. Effect of rule:

An estimate as to the number of small businesses or local governments that will be affected by the toll adjustment cannot be provided. However, the Authority is mindful of all people who use the Thruway, including those who use the Thruway to commute to work for small businesses and local governments. However, all customers who participate in E-ZPass and in the Annual Permit Plan, and businesses who take advantage of the commercial E-ZPass and volume discounts, have reduced impacts by this toll adjustment. The Authority encourages all customers to sign up for E-ZPass to receive a discount. Currently, E-ZPass discounts are based on the 2007 cash rates and are 10 percent off the 2007 rates for passenger vehicles and 5 percent off the 2007 rates for commercial vehicles. Under the proposed toll adjustment, E-ZPass discounts will be 5 percent off the cash rates for all vehicles effective June 29, 2008. Customers who operate passenger vehicles may also enroll in the Annual Permit Plan, whereupon payment of the Annual Permit Plan fee allows free travel on the controlled portion of the Thruway System for the first 30 miles of every trip. The Annual Permit fee is only increasing \$4 per year in 2009 and 2010. The 2009 increase will be the first increase to the Annual Permit Plan since 1988. This toll adjustment further maintains the commercial E-ZPass and volume discounts, which are available to all Authority commercial customers, including small businesses, that enroll and qualify. Further, the Thruway is a vital transportation corridor for both intrastate and interstate commerce. Failure to properly maintain the highway could negatively impact all of New York State, including small businesses and local governments. The Thruway System is a user fee supported system. Therefore, only those who use the Thruway System are affected by the toll adjustment.

2. Compliance requirements:

There are no reporting or recordkeeping requirements necessary to comply with this rule.

3. Professional services:

There are no professional services that a small business or local government is likely to need to comply with this rule.

4. Compliance costs:

Costs to regulated parties will vary as the Authority employs a multi-classification system for tolls that takes into consideration vehicle class, based upon axles and height, and distance traveled on the Thruway System. In general, the cash toll for a passenger vehicle (class 2L), under the proposed plan will increase by 0.43 cents per mile and the E-ZPass rate will increase less than 1 cent per mile. In general, the cash toll for a tractor trailer (class 5H), the most common commercial vehicle, under the proposed plan will increase by 2.2 cents per mile and the E-ZPass rate will increase by 3.99 cents per mile.

For example, a passenger vehicle paying cash traveling between Exit 24 (Albany) and Exit 25 (Schenectady) currently pays .30 cents, and will pay .30 cents in 2009 and .30 cents in 2010. Please note, tolls are calculated by multiplying the distance traveled by the per mile cost and rounded to the nearest nickel for cash tolls. The same trip with E-ZPass currently costs .23 cents and will cost .29 cents in July, 2008, .29 cents in 2009 and .29 cents in 2010. For participants in the Annual Permit Plan, this trip is within thirty miles and therefore has no additional charge. A commercial vehicle (Tractor Trailer-Class 5H) paying cash for the same trip currently pays \$1.30 and will pay \$1.40 in 2009 and \$1.45 in 2010. With E-ZPass, the same commercial vehicle currently pays \$1.14 and will pay \$1.24 in July, 2008, \$1.33 in 2009 and \$1.38 in 2010. A passenger vehicle paying cash traveling between Exit 24 (Albany) and Exit 50 (Williamsville) currently pays \$11.65 and will pay \$12.25 in 2009 and \$12.85 in 2010. The same trip with E-ZPass currently costs \$9.54 and will cost \$11.07 in July, 2008, \$11.64 in 2009 and \$12.21 in 2010. A commercial vehicle (Tractor Trailer-Class 5H) paying cash for the same trip currently pays \$59.10 and will pay \$62.05 in 2009 and \$65.15 in 2010. With E-ZPass, the same commercial vehicle currently pays \$51.07 and will pay \$56.15 in July, 2008 and \$58.95 in 2009 and \$61.89 in 2010.

5. Economic and technological feasibility:

Technological feasibility is not applicable to the proposed rule. Economic feasibility cannot be assessed as outlined in responses 1 and 4 above.

6. Minimizing adverse impact:

The Authority is mindful of all people who use the Thruway, including those who use the Thruway to commute to work for small businesses and local governments. However, all customers who participate in E-ZPass and in the Annual Permit Plan, and businesses who take advantage of the commercial E-ZPass and volume discounts, are minimally impacted by this toll adjustment. The Authority encourages all customers to sign up for E-ZPass to receive a discount. Customers who operate passenger vehicles may also enroll in the Annual Permit Plan, whereupon payment of the Annual Permit Plan fee allows free travel on the controlled portion of the Thruway System for the first 30 miles of every trip. The Annual Permit fee is only increasing \$4 per year in 2009 and 2010. The 2009 increase will be the first increase to the Annual Permit Plan since 1988. This toll adjustment further maintains the commercial E-ZPass and volume discounts, which are available to all Authority commercial customers, including small businesses, that enroll and qualify. Further, the Thruway is a vital transportation corridor for both intrastate and interstate commerce. Failure to properly maintain the highway could negatively impact all of New York State, including small businesses and local governments.

7. Small business and local government participation:

The Authority will be conducting an extensive public outreach process as part of this toll adjustment, including publication in the State Register pursuant to SAPA and publication in two newspapers of daily circulation in each of the areas where public hearings are to be held pursuant to Public Authorities Law Section 2804. Although the Authority is only statutorily required to conduct three statewide public hearings for this toll adjustment, it has decided to conduct five statewide public hearings. This will permit any interested party, including small businesses and local governments, to participate in the rule making process.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

An estimate as to the number of rural areas that will be affected by the toll adjustment cannot be provided. However, the Authority is mindful of all people who use the Thruway, including those who use the Thruway to commute to work in rural areas. However, all customers who participate in E-ZPass and in the Annual Permit Plan, and businesses who take advantage of the commercial E-ZPass and volume discounts, have reduced impacts by this toll adjustment. The Authority encourages all customers to sign up for E-ZPass to receive a discount. Currently, E-ZPass discounts are based on the 2007 cash rates and are 10 percent off the 2007 rates for passenger vehicles and 5 percent off the 2007 rates for commercial vehicles. Under the proposed toll adjustment, E-ZPass discounts will be 5 percent off the cash rates for all vehicles effective June 29, 2008. Customers who operate passenger vehicles may also enroll in the Annual Permit Plan, whereupon payment of the Annual Permit Plan fee allows free travel on the controlled portion of the Thruway System for the first 30 miles of every trip. The Annual Permit fee is only increasing \$4 per year in 2009 and 2010. The 2009 increase will be the first increase to the Annual Permit Plan since 1988. This toll adjustment further maintains the commercial E-ZPass and volume discounts, which are available to all Authority commercial customers, including small businesses, that enroll and qualify. Further, the Thruway is a vital transportation corridor for both intrastate and interstate commerce. Failure to properly maintain the highway could negatively impact all of New York State including rural areas. The Thruway System is a user fee supported system. Therefore, only those who use the Thruway System are affected by the toll adjustment.

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

There are no reporting, recordkeeping or professional service requirements necessary to comply with this rule.

3. Costs:

Costs to regulated parties will vary as the Authority employs a multi-classification system for tolls that takes into consideration vehicle class, based upon axles and height, and distance traveled on the Thruway System. In general, the cash toll for a passenger vehicle (class 2L), under the proposed plan will increase by 0.43 cents per mile and the E-ZPass rate will increase less than 1 cent per mile. In general, the cash toll for a tractor trailer (class 5H), the most common commercial vehicle, under the proposed plan will increase by 2.2 cents per mile and the E-ZPass rate will increase by 3.99 cents per mile.

For example, a passenger vehicle paying cash traveling between Exit 24 (Albany) and Exit 25 (Schenectady) currently pays .30 cents, and will pay .30 cents in 2009 and .30 cents in 2010. Please note, tolls are calculated by multiplying the distance traveled by the per mile cost and rounded to the nearest nickel for cash tolls. The same trip with E-ZPass currently costs .23 cents and will cost .29 cents in July, 2008, .29 cents in 2009 and .29 cents in 2010. For participants in the Annual Permit Plan, this trip is within thirty miles and therefore has no additional charge. A commercial vehicle (Tractor Trailer-Class 5H) paying cash for the same trip currently pays \$1.30 and will pay \$1.40 in 2009 and \$1.45 in 2010. With E-ZPass, the same commercial vehicle currently pays \$1.14 and will pay \$1.24 in July, 2008, \$1.33 in 2009 and \$1.38 in 2010. A passenger vehicle paying cash traveling between Exit 24 (Albany) and Exit 50 (Williamsville) currently pays \$11.65 and will pay \$12.25 in 2009 and \$12.85 in 2010. The same trip with E-ZPass currently costs \$9.54 and will cost \$11.07 in July, 2008, \$11.64 in 2009 and \$12.21 in 2010. A commercial vehicle (Tractor Trailer-Class 5H) paying cash for the same trip currently pays \$59.10 and will pay \$62.05 in 2009 and \$65.15 in 2010. With E-ZPass, the same commercial vehicle currently pays \$51.07 and will pay \$56.15 in July, 2008 and \$58.95 in 2009 and \$61.89 in 2010.

4. Minimizing adverse impact:

The Authority is mindful of all people who use the Thruway, including those who use the Thruway to commute to work in rural areas. However, all customers who participate in E-ZPass and in the Annual Permit Plan, and businesses who take advantage of the commercial E-ZPass and volume discounts, are minimally impacted by this toll adjustment. The Authority encourages all customers to sign up for E-ZPass to receive a discount. Customers who operate passenger vehicles may also enroll in the Annual Permit Plan, whereupon payment of the Annual Permit Plan fee allows free travel on the controlled portion of the Thruway System for the first 30 miles of every trip. The Annual Permit fee is only increasing \$4 per year in 2009 and 2010. The 2009 increase will be the first increase to the Annual Permit Plan since 1988. This toll adjustment further maintains the commercial E-ZPass and volume discounts, which are available to all Authority commercial customers, including small businesses, that enroll and qualify. Further, the Thruway is a vital transportation corridor for both intrastate and interstate commerce. Failure to properly maintain the highway could negatively impact all of New York State including rural areas.

5. Rural area participation:

The Authority will be conducting an extensive public outreach process as part of this toll adjustment, including publication in the State Register pursuant to SAPA and publication in two newspapers of daily circulation in each of the areas where public hearings are to be held pursuant to Public Authorities Law Section 2804. Although the Authority is only statutorily required to conduct three statewide public hearings for this toll adjustment, it has decided to conduct five statewide public hearings. This will permit any interested party, including those in rural areas, to participate in the rule making process.

Job Impact Statement

1. Nature of impact:

The toll adjustment is designed, among other things, to support the Authority's multi-year \$2+ billion capital program. According to data from the Federal Highway Administration (FHWA), each \$1 billion of highway investment supports approximately 42,000 full-time jobs. Applying the FHWA statistics, it is estimated that the multi-year capital plan will support approximately 85,000 full-time jobs over the course of the multi-year capital plan.

2. Categories and numbers affected:

According to data from the FHWA, for every \$1 billion of highway investment approximately 7,900 Direct jobs, 19,700 Indirect jobs and 14,500 Induced jobs are supported. Direct jobs are those held by workers employed at the highway construction site, including laborers, specialists, engineers and managers. Indirect jobs are those held by workers in industries that supply highway construction manufacturers with materials, including those involved in lumber, steel, concrete and cement products, and by offsite construction industry workers, including administrative, clerical and managerial workers. Induced jobs are those jobs supported throughout the economy when highway construction industry employees spend their earnings.

3. Regions of adverse impact:

Not applicable.

4. Minimizing adverse impact:

Not applicable.

5. Self-employment opportunities:

Not applicable.